

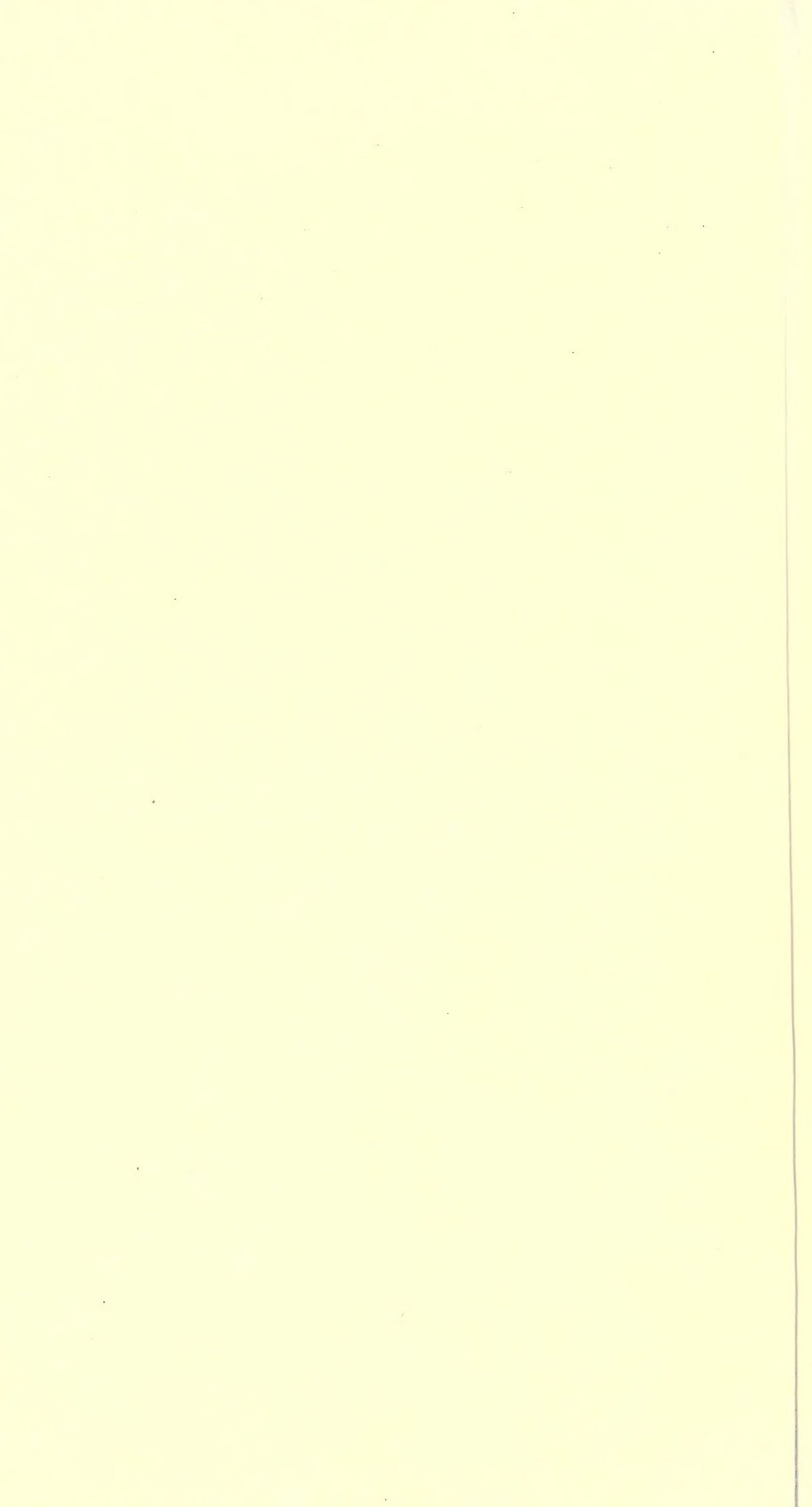








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# NOTES

ON THE

REVISED STATUTES OF THE UNITED STATES.

NOTES

OF THE

REVISED STATUTES OF THE UNITED STATES



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# NOTES

ON THE

## REVISED STATUTES OF THE UNITED STATES

AND THE

SUBSEQUENT LEGISLATION OF CONGRESS

BY

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NOTES



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## PREFACE.

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THE annotation and collection of authorities for these notes was first begun about the year 1878, and was continued at intervals until 1884, since which year the work has been almost continuously prosecuted. The labor thus begun by Mr. Gould assumed such proportions, with the collection of the authorities, that assistance became necessary, and was supplied by Mr. Tucker and others, whose names, with the sections assigned to each, appear below. The aim has been to show all changes made by the Revision of 1874 in the previous laws, and all statutory changes and additions since made, down to and including the legislation of the Fiftieth Congress, together with the result of all material decisions of the Federal and State courts relating to the constitutionality, repeal, modification, and construction of these, the supreme laws of the land. Great care has been taken in the collection and classification of the later statutes, which have been repeatedly verified, and all the more important of which are given in full with the original punctuation preserved; and as their provisions are scattered through many volumes of the Statutes at Large, and are often included in appropriation acts, this collection of statutes alone, referred to, as they are, by abundant cross-references, in addition to the 28,000 or more decisions cited, will be of great service to those wishing to know the present law upon any topic. The dates of the more important acts only are given, for the sake of conciseness, and throughout the work the aim has been to compress as much information as possible in a single volume, while many of the topics, such as the Navy, Territories, Indians, Immigration, Internal Revenue, Pensions, &c., are not, it is believed, discussed in any other work.

By the acts of 1866 (14 St. 74), and of 1877 (19 St. 268) [see Rev. Stats. pp. 1089-1092], all pertinent decisions were to be cited in the margin. While appreciating the difficult labors of the Commissioners, whose duties were outlined in the acts just referred to, we may safely state that this volume contains many decisions prior to 1878 not to be found in the marginal references of the Revision or of the later edition. All decisions for the last eleven years have also been added, and all laws of the last Congress included. Where there has been occasion to doubt whether a law was general or special in its application, it has been quoted for safety. Statutes passed before 1873 were often separated in the Revision, and, as old cases



were decided upon them as entireties, the distribution of such cases and quotations from them have not in all cases been satisfactory. In this connection see Rev. Stats. § 5600. It was deemed best to confine the work to the statutes themselves; and hence decisions upon Inspectors', Admiralty, and Supreme Court rules, and upon regulations, like those of the Treasury, will be found only when these rules and regulations involve the construction of a statute. As the Treasury Decisions are comparatively unimportant, only a few of them have been cited; these will be found chiefly under "Duties upon Imports," "Collection of Duties," and "Commerce and Navigation." After a decision of the United States Supreme Court, the decision of the same case in an inferior tribunal has sometimes been given, generally, however, without stating whether the decision of the inferior court was reversed or sustained, the adjudications of the highest court of appeal being conclusive and binding. In many cases the names of the reporters and of the reports have been given in full.

The following is a list of the more important abbreviations:—

Commissioners' Draft . . . . .	Com. D.	Attorney-General's Opinions . . . . .	A. G. Op.
Law Reporter . . . . .	Law Rep.	Court of Claims . . . . .	Ct. Cl.
Law Reporter, new series . . . . .	Law Rep.(N. S.)	New York Legal Observer . . . . .	N. Y. Leg. Obs.
Reporter . . . . .	Rep'r.	Pittsburg Law Journal . . . . .	Pittsb. L. J.
Blatchford . . . . .	Blatch.	Supreme Court Reporter . . . . .	Sup. Ct. Rep.
Benedict . . . . .	Ben.	Synopsis Treasury Decisions . . . . .	S. T. D.
Federal Reporter . . . . .	F. R.		

At the outset the work was found to be so vast and likely to be so protracted that able assistants were employed. Mr. Gould, assisted by Mr. Tucker, has exercised a constant supervision of the work, all of which has been revised and verified by them. The following is a statement of the parts prepared by each in the original draft:—

Mr. Gould, §§ 1-628, 658-686, 751-857, 1043-1048, 1094-2038, 2158-2206, 3495-3583, 3591-4130, 4613-4691, 5244-5255, 5263-5291, 5297-5322; also the statutes throughout the work, except those relating to Titles 28, 32, 48-53, 57, 70. Mr. Tucker, §§ 1049-1093, 2491-3129, 3466-3494, 3584-3590, 4131-4196, 4233-4251, 4290-4612, 5256-5262, 5292-5296, 5551-5601. Charles N. Harris, Esq., §§ 1014-1042, 3140-3465, 4197-4232, 4252-4289, 5133-5243, 5323-5550. Alphonso A. Wyman, Esq., §§ 629-657, 687-750, 858-1013, 4883-4971. S. H. Emery, Jr., Esq., §§ 2207-2490. Edward W. McClure, Esq., §§ 2039-2157. Thomas T. Woodruff, Esq., §§ 4692-4882.

It should be noted that the pages are larger than those of the Rev. Stats., in that they embrace the space devoted in the former to marginal references. The labor of collecting the statutes of fifteen years, and more particularly the decisions, believed to be nearly 30,000 in number, has been quite as tedious and exacting as that of arrangement and disposition. The authors and their assistants feel confident that the profession will appreciate the vexations incident to the prosecution of the undertaking, and they trust that the volume

will prove of value and service to the practitioner. As the Index to the Revised Statutes is full and complete, the Index to this companion volume has been made brief and synoptical, while a table of the cases cited has been omitted as unnecessary in a work of this character, and as likely to unduly increase the size of the book. Certain of the latest statutes and decisions are added in the Appendix.

A similar work having been entered upon, and notes therefor prepared, by Messrs. John R. Berryman and A. L. Sanborn, of Wisconsin, which were placed in the hands of the undersigned, the latter desire to acknowledge their obligation for the assistance derived therefrom upon comparison with their own annotations and researches, and especially for notes of cases upon the original acts prior to the Revision, and from the earlier Court of Claims decisions, and Attorney-General's Opinions. They are also indebted to Francis W. Vaughan, Esq., Librarian of the Social Law Library, Boston, for valuable suggestions, and for that uniform courtesy and readiness to supply information which have so long made his services valuable to the Boston bar.

JOHN M. GOULD.

GEORGE F. TUCKER.

Boston, August 1, 1889.





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# NOTES

ON THE

## REVISED STATUTES OF THE UNITED STATES

AND THE

### SUBSEQUENT LEGISLATION OF CONGRESS.

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#### TITLE I.

##### GENERAL PROVISIONS.

UPON the Revised Statutes and their effect, see notes, Title LXXIV. The act which provided "for the Revision and Consolidation of the Statute Laws of the United States" defined the duties of the Commissioners, and was approved June 27, 1866. 14 St. 74; Rev. Stats. (2d ed.), p. 1089.

#### CHAPTER I.

##### DEFINITIONS.

SECT. 1.—"*Words importing the singular number*," &c. *Hannum v. Day*, 105 Mass. 33; *Barre National Bank v. Hingham Manuf. Co.*, 127 Id. 563, 565; *Blanding v. Mansfield*, 72 Maine, 427.

"*Words importing the plural number*," &c. *Re Rand*, 18 F. R. 99, 102.

"*Words importing the masculine gender*," &c. Thus the words "pensioner" and "person entitled to a pension" in Rev. Stats., § 4718, include a widow pensioner. 15 A. G. Op. 591.

"*Insane person*." *Prima facie*, a deaf mute is *non compos*. *Oliver v. Berry*, 53 Maine, 206.

"*Person*." This usually means, in statutes, a natural person. *Blair v. Worley*, 1 Scam. (Ill.) 178. But it is often applied to corporations. *United States v. Amedy*, 11 Wheat. 392; *Commonwealth v. Boston & Maine R. R.*, 3 Cush. (Mass.) 25, 45; *Lewis v. Denney*, 4 Id. 588; *Trustees v. Boston*, 12 Id. 54, 59; *Dickie v. Boston & Albany R. R.*, 131 Mass. 516; *Brookhouse v. Union Railway Co.*, 132 Id. 178; 15 A. G. Op. 230; Rev. Stats. §§ 3140, 5013; *United States v. McGinnis*, 1 Abb. U. S. 122. The word "individual" may also apply to a corporation. *Otis Co. v. Ware*, 8 Gray (Mass.) 509.

The provision of the similar act, St. Feb. 25, 1871, ch. 71, § 2 (16 St. 431; cf. 14 St. 163, § 44), that "person" may extend and be applied to "bodies politic and corporate," appears to be somewhat broader, including, perhaps, in some cases, States, Territories, foreign governments, &c. 1 Com. D. 19. The clause of the Fourteenth Amendment of the United States Constitution, that no State shall "deny to any person within its jurisdiction

the equal protection of the laws," is held to apply to natural persons only. *Central Pacific R. R. Co. v. State Board*, 60 Cal. 35; *Insurance Co. v. New Orleans*, 1 Woods, 85.

SECT. 2. — Generalized from St. July 13, 1866, ch. 184, § 9 (14 St. 110), where this definition is applied to internal revenue laws only.

SECT. 3. — Generalized from the Acts of 1866 and 1870. The context or nature of an Act may of course show that the word is used in a different sense; as, *e. g.*, the provision of Rev. Stats. § 3266, that "no person shall use any still, boiler, or other vessel," &c. A steam-dredge, being an artificial contrivance used, or capable of being used, as a means of transportation on water, has the legal status of a vessel. *The Pioneer*, 30 F. R. 206. See *Swan v. United States*, 19 Ct. Cl. 51; Rev. Stats. § 4612.

SECT. 5. — Generalized from St. July 25, 1866, ch. 242, § 9 (14 St. 241), where this provision is applied to a single company.

SECT. 6. — The ancient common law seal was wax, with an impression thereon; but it has long been held that a wafer, gummed paper, or other tenacious substance, affixed to the document, is a sufficient seal, although no impression is made upon it. *In re Sandilands*, L. R. 6 C. P. 411; *Tasker v. Bartlett*, 5 Cush. (Mass.) 359; 1 Am. Law Rev. 638. And that a corporate seal may be impressed directly upon and into the paper. *Hendee v. Pinkerton*, 14 Allen (Mass.) 387. At common law, a scroll or scrawl, made with a pen or with type, is not a seal. *McLaughlin v. Randall*, 66 Maine, 226. And it has been held that, under this rule, a printed *fac-simile* of a corporate seal is in effect a scroll. *Bates v. Boston & New York Central R. Co.*, 10 Allen, 251. *Contra*, *Woodman v. York & C. R. Co.*, 50 Maine, 549. See *Liverpool Royal Bank v. Grand Junction R. Co.*, 100 Mass. 444; *State v. McNally*, 34 Maine, 210, 222. In the District of Columbia a printed seal is operative as a seal. *Green v. Lake*, 2 Mackey (D. C.) 162.

Other words and phrases specially defined in the Revised Statutes and other statutes of the United States are:—

*Alien*. § 2169, Rev. Stats.  
*Bank and banker*. §§ 3407, 5157.  
*Butter*. 24 St. 209.  
*Circuit justice*. § 605.  
*Circular*. 20 St. 355, ch. 180, § 18.  
*Citizen*. §§ 1993, 2172, 2174.  
*Consul, Commercial agent, &c.* §§ 1674, 4130.  
*Contiguous territory*. § 4252.  
*Department*. § 159.  
*Diplomatic officer*. § 1674.  
*Distiller*. § 3247.  
*During the session*. 24 St. 599; 23 St. 164.  
*Exhausted*. 22 St. 452.  
*Gallon*. See note, § 3339.  
*Gunpowder*. 23 St. 159, § 4.  
*Intended to be conveyed by mail*. § 5468.  
*Judge and justice*. § 605.  
*Lawful money*. § 5186.  
*Master*. §§ 2768, 4612.  
*Merchandise*. § 2766.  
*Mineral*. 14 St. 241, § 10.  
*Minister*. § 4130.  
*National Trade Union*. 22 St. 86.  
*Naval cadets*. 22 St. 285.  
*Obligation or other security of the United States*.  
 § 5413.  
*Oleomargarine*. 22 St. 209.  
*Ordinance*. 23 St. 159, § 4.  
*Owner*. §§ 4286, 4612.  
*Person*. See note, § 3140.

*Polygamy*. § 5352; 22 St. 30.  
*Port*. § 2767; 23 St. 58; 25 F. R. 677.  
*Predecessor*. 13 St. 288, § 127.  
*Printed matter*. 20 St. 355, ch. 180, § 19.  
*Railroad*. 24 St. 379.  
*Real estate*. 13 St. 287, § 126.  
*Revised Statutes*. § 5595; 20 St. 327, ch. 125, § 23.  
*Sailing-ship*. 23 St. 438.  
*Sail-vessel*. § 4233.  
*Seamen*. § 4612; 18 St. 485, ch. 156, § 3; see note,  
 § 4801.  
*Smuggling*. 18 St. 186, ch. 391, § 4; see note,  
 § 3091.  
*State*. § 3140; 15 St. 166, § 104.  
*Steamship*. 23 St. 438.  
*Steam-vessel*. §§ 4233, 4399, 4400.  
*Succession*. 13 St. 287, 288, §§ 128, 130.  
*Successor*. 13 St. 288, § 127.  
*Surgeon of the Fleet*. § 1373.  
*Sworn*. 16 St. 431, § 2.  
*Tea*. 22 St. 452.  
*Time*. 23 St. 4.  
*Ton*. § 2951.  
*Transportation*. 24 St. 379.  
*United States bonds*. § 5158.  
*Value*. § 2952.  
*Vessels of the Navy*. § 4614.  
*Vessels of the United States*. § 4311.  
*Year*. 22 St. 284.



## CHAPTER II.

## FORM OF STATUTES AND EFFECT OF REPEALS.

THE rules given in this chapter are taken from the cited act of 1871. 16 St. 431.

SECT. 12.—This merely prescribes a rule of construction. *Jacksonville R. Co. v. United States*, 21 Ct. Cl. 173. Prior to the enactment of this provision, in 1871, the simple repeal of a repealing act, without more, restored the law as it previously was. *United States v. Philbrick*, 120 U. S. 52.

SECT. 13.—Under this provision the repeal of an act defining a crime and its punishment does not prevent the prosecution and conviction of a party for its prior violation. *United States v. Barr*, 4 Sawyer, 254. It covers a prosecution under a statute which authorizes imprisonment as well as fine (*United States v. Mathews*, 23 F. R. 74; *United States v. Ulrici*, 3 Dillon, 532), and forms a part of every repealing statute passed since its enactment in 1871, and not manifesting a different intent. *Commonwealth v. Desmond*, 123 Mass. 407; *United States v. Four Cases of Lastings*, 10 Ben. 371. See *United States v. Van Vliet*, 22 F. R. 641. At common law the repeal of a statute terminates all suits, civil or criminal, pending under it (*United States v. Van Vliet*, *supra*; *Files v. Fuller*, 44 Ark. 273; *Breitung v. Lindauer*, 37 Mich. 217); except that rights of contract which have vested under the statute, and do not relate to the remedy, are not disturbed (*Gillmore v. Shooter*, 2 Mod. 310; *Couch v. Jeffries*, 4 Burr. 2460; *Fletcher v. Peck*, 6 Cranch, 87, 135; *Buckner v. Street*, 1 Dillon, 248), and also except that new enactments are not construed retroactively, so as to take away or impair vested rights of action or defence. *Ogden v. Blackledge*, 2 Cranch, 272; *Maryland v. Todd*, 1 Biss. 69; *Dash v. Van Kleeck*, 7 Johns. 477; *New York R. Co. v. Van Horn*, 57 N. Y. 473; *People v. Supervisors*, 65 Id. 305; *Luhrs v. Eimer*, 80 Id. 171; *Hade v. McVay*, 31 Ohio St. 231, 241; *Bedford v. Shilling*, 4 Serg. & R. (Penn.), 401; *Berry v. Clary*, 77 Maine, 482. In *Campbell v. Holt*, 115 U. S. 620, it was held, Bradley and Harlan, JJ., dissenting, that while time may vest a right of property, it does not pay a debt, and that the defence of limitation against a debt already barred is not "property" within the Fourteenth Amendment of the Constitution, of which the debtor is deprived by a repeal of the Statute of Limitations. See also, on this section, *United States v. Williams*, 19 Pac. Repr. 288.

The words "penalty," "liability," and "forfeiture," as used in this section, are synonymous with "punishment," in connection with crimes of the highest grade, and apply to offences against St. June 20, 1878, ch. 367 (20 St. 243), relating to claim agents and attorneys in pension cases. *United States v. Reisinger*, 128 U. S. 398.



## TITLE II.

## THE CONGRESS.

## CHAPTER I.

## ELECTION OF SENATORS.

SECT. 14. — This act is in pursuance of Art. 1, § 4, of the Constitution. The choice of a senator for a full term belongs to the latest legislature that can perform the duty. Opinion of the Court, 60 N. H. 585.

## CHAPTER II.

## APPORTIONMENT AND ELECTION OF REPRESENTATIVES.

SECT. 20. — By St. 1882, ch. 20 (22 St. 5, 6), the House, since March 3, 1883, is composed of 325 members, apportioned as follows: Alabama, 8; Arkansas, 5; California, 6; Colorado, 1; Connecticut, 4; Delaware, 1; Florida, 2; Georgia, 10; Illinois, 20; Indiana, 13; Iowa, 11; Kansas, 7; Kentucky, 11; Louisiana, 6; Maine, 4; Maryland, 6; Massachusetts, 12; Michigan, 11; Minnesota, 5; Mississippi, 7; Missouri, 14; Nebraska, 3; Nevada, 1; New Hampshire, 2; New Jersey, 7; New York, 34; North Carolina, 9; Ohio, 21; Oregon, 1; Pennsylvania, 28; Rhode Island, 2; South Carolina, 7; Tennessee, 10; Texas, 11; Vermont, 2; Virginia, 10; West Virginia, 4; Wisconsin, 9. See also 22 St. 58, ch. 118, as to West Virginia.

SECT. 21. — By § 2 of the same act, the words "two hundred and ninety-two" in this section are changed to "three hundred and twenty-five." The cited provision of 1850 was not repealed by the act of 1870, although it is not clear that Congress intended to continue the act of 1850, which is thereby materially affected. 1 Com. D. 33.

A representative, elected before his State is admitted into the Union, is entitled to salary only from the date of such admission. *Conway v. United States*, 1 Ct. Cl. 68. Sect. 3 of St. 1882, ch. 20, provides: —

"That in each State entitled under this apportionment the number to which such State may be entitled in the Forty-eighth and each subsequent Congress shall be elected by Districts composed of contiguous territory, and containing as nearly as practicable an equal number of inhabitants, and equal in number to the Representatives to which such State may be entitled in Congress, no one District electing more than one Representative: *Provided*, That unless the Legislature of such State shall otherwise provide before the election of such Representatives shall take place as provided by law, where no change shall be hereby made in the representation of a State, the Representatives thereof to the Forty-eighth Congress shall be elected therein as now provided by law. If the number as hereby provided for shall be larger than it was before this change, then the additional Representative or Representatives allowed to said State under this apportionment may be elected by the State at large, and the other Representatives to which the State is entitled by the Districts as now prescribed by law in said State; and if the number hereby provided for shall in any State be less than it was before the change hereby made, then the whole number to such State hereby provided for shall be elected at large, unless the Legislatures of said States have provided or shall otherwise provide before the time fixed by law for the next election of Representatives therein."

SECT. 22. — The manner of holding the elections is left to be prescribed by the State legislatures. *Stone v. Charlestown*, 114 Mass. 227. But not qualifications. 3 Am. L. Rev. 410.

SECT. 23. — By § 3 of 22 St. 5, ch. 20, "Forty-third," in the third line of this section, is changed to "Forty-eighth," and provision is made for the election of representatives at large where the above apportionment changes the previous apportionment.

SECT. 24. — This provision was repealed by 18 St. 48, ch. 187.

SECT. 25. — Substituted for St. Aug. 30, 1856, ch. 30 (11 St. 150), which was left unrepealed. 1 Com. D. 36. By 20 St. 112, ch. 184, provision is made as to representatives to Congress from Colorado. By § 6 of 18 St. 400, this section is so modified as not

"to apply to any State that has not yet changed its day of election, and whose constitution must be amended in order to effect a change in the day of the election of State officers in said State."

SECT. 26. — Substituted for § 4 of the cited act of 1872. 1 Com. D. 36. Where the General Assembly of Rhode Island, by its count, found a failure to elect at a regular biennial election for a member of the United States House of Representatives, it was held to be its duty to order a new election, either before or after the ensuing fourth day of March. *Re Congressional Election*, 15 R. I. 624.

SECT. 27. — In 58 N. H. 621, the opinion of the court was that the governor and council are not judges of the elections of representatives in Congress, and cannot reject votes which the town-clerks' returns show were declared by the moderators at such elections. Election returns, designated "For Congress," sufficiently show that the office of representative in Congress was intended. *State v. Berg*, 76 Mo. 136.

### CHAPTER III.

#### ORGANIZATION OF MEETINGS OF CONGRESS.

SECT. 28. — 19 St. 34, ch. 66, provides —

"That the Presiding Officer, for the time being, of the Senate of the United States, shall have power to administer all oaths and affirmations that are or may be required by the Constitution, or by law, to be taken by any Senator, officer of the Senate, witness, or other person, in respect of any matter within the jurisdiction of the Senate. SEC. 2. That the Secretary of the Senate, and the chief clerk thereof, shall, respectively, have power to administer any oath or affirmation required by law, or by the rules or orders of the Senate, to be taken by any officer of the Senate, and to any witness produced before it."

SECT. 30. — The words "and delegates" are here added. 1 Com. D. 39.

SECT. 31. — The cited provision superseded, though not in terms repealing, St. March 3, 1863, ch. 108 (12 St. 804). 1 Com. D. 39.

SECT. 34. — "*Members*" may here apply either to those who have or have not taken the oath. 16 A. G. Op. 274. By 22 St. 632, ch. 143, senators elected whose credentials are presented in the Senate, but who have had no opportunity to be qualified, may receive their compensation monthly, from the beginning of their term, until there shall be a session of the Senate.

### CHAPTER IV.

#### COMPENSATION OF MEMBERS.

SECT. 35. — In margin of second edition change "1863" to "1873." By 18 St. 4, ch. 11, the salary of senators, representatives, and delegates was reinstated at \$5000 each, and the compensation of the Speaker of the House at \$8000, &c. The Appendix to



Rev. Stats. (2d. ed.), p. 1093, contains tables showing changes in salaries made by this act, which did not itself establish permanent salaries, but restored officers and employees to their former status of compensation. *Bradshaw v. United States*, 14 Ct. Cl. 78.

SECT. 36.—See note, § 154.

SECT. 37.—See note, § 35.

SECT. 38.—In margin of second edition change "126" to "226." By 18 St. 389, ch. 130, § 1, the last clause of this section, beginning with the words "but, in case the clerk," was repealed.

SECT. 39.—The words "and delegate" are here added. 1 Com. D. 41.

SECT. 42.—The act of March 3, 1853, ch. 96 (10 St. 188), providing that "hereafter no books shall be distributed to members of Congress except such as are ordered to be printed, as public documents, by the Congress of which they are members," although not expressly repealed, was deemed superseded by the act of 1856. 1 Com. D. 41.

SECT. 43.—The words "or delegate" are here added. The cited provision also excluded "stationery or commutation therefor exceeding \$125 for any one session of Congress." 1 Com. D. 42.

SECT. 44.—By the act of March 3, 1879, ch. 180, § 1, par. 4, members of Congress, the secretary of the Senate, and clerk of the House may send and receive free through the mails all public documents printed by order of Congress, the name and office of each such person being written thereon; and this provision applies to each until the first Monday of December following the expiration of his term of office. See also acts of June 23, 1874, ch. 456, § 13; of March 3, 1875, ch. 128, § 5 (Sup. 154); of March 3, 1877, ch. 103, § 7 (Sup. 288); of Dec. 15, 1877, ch. 3 (Sup. 304). Members of Congress appear to be entitled, under the act of 1879, as was held with respect to the act of 1877 (Franking Privilege of Members of Congress, 16 A. G. Op. 271), to exercise this privilege as soon as the term for which they were elected begins, although no session of Congress has convened, and they have not qualified.

SECT. 45.—See note, § 35. As to mileage, see 18 St. 4; 23 St. 396; 22 St. 603, 632, ch. 143.

SECT. 46.—22 St. 108, ch. 236, provides —

"That whenever any appropriation made for the payment of the salaries of Senators, Members, and Delegates in Congress, or the officers and employees of both or either of the houses thereof, or for the expenses of the same, or any committees thereof, cannot be lawfully disbursed by or through the officers specially charged with such disbursements, such disbursements may be made for the purposes named in said appropriations by the Treasurer of the United States, who shall take proper vouchers therefor and charge such disbursements against such appropriations; and the accounts therefor shall be audited and passed or rejected, as the law may require, in the same manner that similar accounts are or may be required by law to be audited and passed or rejected."

SECT. 47.—The certificate of the presiding officer of the Senate or House is conclusive evidence in support of the salary and accounts of senators and members. 5 A. G. Op. 191.

SECT. 49.—See note, § 35.

SECT. 51.—This refers only to a vacancy occurring after the commencement of a particular Congress, and in the membership of that Congress, compensation not being provided for both sitting and contesting members; and the term "predecessor" applies only to a predecessor in that Congress, and in the matter of the salary provided for the office. *Page v. United States*, 127 U. S. 69; *Shelley v. United States*, 19 Ct. Cl. 653.



## CHAPTER V.

## OFFICERS AND PERSONS IN THE EMPLOY OF THE SENATE AND HOUSE OF REPRESENTATIVES.

SECTS. 52, 53. — See notes, §§ 28, 35. The act of 1874, ch. 11 (18 St. 4), reduced such salaries, here named, as were increased by St. 1873, ch. 226 (17 St. 486), to the amounts previously allowed. See second edition Rev. Stats. p. 1093; St. 1874, ch. 328, § 1 (18 St. 85); St. 1875, ch. 129 (18 St. 344); St. 1876, ch. 66 (Sup. 204); 22 St. 378. As to cloak-room men, and laborers for cleaning the House, see Res. 24 of May 31, 1878 (Sup. 389). There is little in the statute-books to explain by what authority or for what services many officers in the service of the two Houses of Congress are employed, except such deductions as may be drawn from the recurrence of a provision as to each in the annual legislative appropriation bills. See 1 Com. D. 46. The Capitol police, though borne on the pay-rolls of Congress, are not "employees of the Senate and House." *Al-labach v. United States*, 19 Ct. Cl. 556. By 22 St. 372 one month's extra pay is allowed to officers and employees of the House, including the Capitol police. And see 22 St. 265, 635. Provision is made by 22 St. 337 for uniforms for the Capitol policemen and watchmen. 22 St. 270 contains the proviso —

"That hereafter no officer or employee of the Senate shall receive pay for any services performed by him at any rate higher than that provided for the office or employment to which he has been regularly appointed."

23 St. 516 provides —

"That the employees of the Navy Yard, Government Printing Office, Bureau of Printing and Engraving, and all other per diem employees of the Government on duty at Washington, or elsewhere in the United States, shall be allowed the following holidays, to wit: The 1st day of January, the 22d day of February, the 4th day of July, the 25th day of December, and such days as may be designated by the President as days for national thanksgiving, and shall receive the same pay as on other days."

Res. No. 26 of July 10, 1888, provides —

"That so much of the act making appropriations for legislative, executive, and judicial expenses of the Government for the fiscal year ending June 30, 1889, as requires that the pages of the House of Representatives shall not be under twelve years of age, shall not apply to pages in the employment of the House on July 1, 1888."

SECT. 54. — By 18 St. 145, ch. 388 (superseding the proviso to § 3 of 18 St. 5, ch. 16), the pay of the official reporters is established at \$50,000 for each Congress, and those of committees of the House at \$5000 each per annum.

SECT. 55. — Substituted for the cited provisions.

SECT. 56. — St. March 3, 1879, ch. 183 (20 St. 419), provides —

"That when any duty is imposed upon a committee of the Senate involving expenses which are ordered to be paid out of the contingent fund of the Senate, upon vouchers to be approved by the chairman of the committee charged with such duty, the receipt of the chairman of such committee for any sum paid to him or his order out of said contingent fund by the Secretary of the Senate shall be taken and passed by the accounting officers of the Treasury as a full and sufficient voucher; but it shall be the duty of such chairman, as soon as practicable, to furnish vouchers in detail for the disbursement of such moneys to the Secretary of the Senate, who shall file them with the accounting officers aforesaid; and this provision shall apply to all cases in which orders of the Senate have already been made."

SECTS. 57-59. — The word "First" before "comptroller" is here added in each of these sections. 1 Com. D. 49. St. 1789, ch. 1, § 5 (1 St. 24), which prescribed a particular form of oath of office to be taken by the secretary of the Senate and the clerk of the

House, was not restated in the Revision, as this provision is fully comprehended in the more stringent and specific oath prescribed by later statutes for all national officers. St. 1815, ch. 51, § 2 (3 St. 213), directing public moneys received by the secretary of the Senate and the clerk of the House to be kept in bank in the District of Columbia, was repealed as to the former by St. 1854 (10 St. 267), and new directions were given. 1 Com. D. 50.

SECT. 60. — 18 St. 96, ch. 328, provides — the same provision being repeated in later appropriation acts, St. 1875, ch. 129 (18 St. 355); St. 1876, ch. 287 (19 St. 156); St. 1877, ch. 102 (19 St. 306) — that —

“Hereafter a detailed statement of the expenditure for the preceding fiscal year of all sums appropriated for contingent expenses in any department or bureau of the Government shall be presented to Congress at the beginning of each regular session.”

SECT. 63. — “Regular” is here added before “session.” 1 Com. D. 52. 23 St. 512 provides —

“That in all contracts hereafter made for service for the House of Representatives involving the employment of horses, the expense of keeping such horses shall be covered by the contract; and no money hereafter appropriated for contingent or other expenses of the House of Representatives shall be expended for stables or forage.”

24 St. 596 provides —

“And hereafter all purchases of coal and wood for the Senate and House of Representatives of the United States shall be made by advertising once a week for at least four weeks, in three of the principal papers published in the District of Columbia, for sealed proposals for supplying the same; and the contract shall be given to the lowest bidder, provided he shall give satisfactory security to perform the same, under a forfeiture not exceeding double the contract-price in case of failure. When immediate delivery is required by the public exigency, such supplies may be procured by purchase in open market, at the places and in the manner in which such supplies are usually bought and sold. Purchases of stationery and materials for folding shall be made in accordance with Rev. Stats. §§ 65, 66, 67, 68, 69: *Provided further*, That all contracts and bonds for purchases made under the authority of this act shall be filed with the Committee to Audit and Control the Contingent Expenses of the Senate or the Committee on Accounts of the House of Representatives respectively. No payments shall be made from the contingent fund of the Senate unless sanctioned by the Committee to Audit and Control the Contingent Expenses of the Senate or from the contingent fund of the House of Representatives, unless sanctioned by the Committee on Accounts of the House of Representatives; and payments made upon vouchers approved by the respective committees shall be deemed, held, and taken, and are hereby declared to be conclusive upon all the departments and officers of the government.”

SECT. 65. — See note, § 3826. Amended by 18 St. 316, ch. 80, to read as follows:

“The Secretary of the Senate and Clerk of the House of Representatives shall annually advertise, once a week for at least four weeks, in one or more of the principal papers published in the District of Columbia, for sealed proposals for supplying the Senate and House of Representatives, respectively, during the next session of Congress with the necessary stationery.”

SECT. 66. — The requirement, as one of the terms of the advertisement, that the proposals shall be accompanied with sufficient security, is here first made, the previous law being clearly to the effect only that the bidder must give security. 1 Com. D. 5.

SECT. 67. — See note, § 3826. Amended by 18 St. 316, ch. 80, to read as follows:

“All such proposals shall be kept sealed until the day specified in such advertisement for opening the same, when the same shall be opened in the presence of at least two persons, and the contract shall be given to the lowest bidder, provided he shall give satisfactory security to perform the same, under a forfeiture not exceeding double the contract price in case of failure; and in case the lowest bidder shall fail to enter into such contract and give such security, within a time to be fixed in such advertisement, then the contract shall be given to the next lowest bidder, who shall enter into such contract, and give such security. And in case of failure by the person entering into such contract to perform the same, he and his sureties shall be liable for the forfeiture specified in such contract, as liquidated damages, to be sued for in the name of the United States.”



SECT. 69.—The phraseology here used modifies the act cited in the margin for the sake of greater clearness. 1 Com. D. 53.

SECT. 70.—By 22 St. 337, 338, all waste-paper, useless documents, and condemned furniture accumulating at the Capitol are to be sold, and the proceeds accounted for; and money may be advanced to meet extraordinary expenses arising during the recess of the Senate.

SECT. 72.—The note on § 69 applies also to this section.

SECT. 74.—Repealed by 18 St. 317, ch. 80. The appropriation act of June 16, 1874, ch. 285 (18 St. 72; see also 18 St. 452, ch. 133), contains the proviso:—

“That only actual traveling expenses shall be allowed to any person holding employment or appointment under the United States, and all allowances for mileages and transportation in excess of the amount actually paid are hereby declared illegal; and no credit shall be allowed to any of the disbursing officers of the United States for payment or allowances in violation of this provision.”

St. June 30, 1876, ch. 159 (19 St. 65) repeals this provision as applied to “officers of the navy.” *United States v. Mouat*, 124 U. S. 303; *Temple v. United States*, 14 Ct. Cl. 377. The act of 1874 applied to United States marshals, and superseded the allowance of mileage to them in Rev. Stats. § 829. 14 A. G. Op. 681. But St. March 3, 1875, ch. 133, which is otherwise similar in terms to the above provision of 1874, excepts marshals, district attorneys, and clerks of the United States courts and their deputies.

SECT. 76.—See note, § 56. Exclusive and final jurisdiction to audit and settle accounts chargeable upon the contingent fund of the House is vested in the Committee on Accounts; the Auditor and Comptroller of the Treasury having no right to inquire into such accounts. 9 A. G. Op. 167. The appropriation act of October 2, 1888, provides—

“Hereafter no payment shall be made from the contingent fund of the Senate unless sanctioned by the Committee to Audit and Control the Contingent Expenses of the Senate, or from the contingent fund of the House of Representatives unless sanctioned by the Committee on Accounts of the House of Representatives. And hereafter payments made upon vouchers approved by the aforesaid respective committees, shall be deemed, held, and taken, and are hereby declared to be conclusive upon all the departments and officers of the Government: *Provided*, That no payment shall be made from said contingent funds as additional salary or compensation to any officer or employee of the Senate or House of Representatives.”

SECT. 77.—22 St. 642, Res. 24, authorizes the sale at cost, but not on credit, of the then current Congressional Directory and Congressional Record.

SECT. 78.—After “Senate,” 18 St. 5, ch. 14, adds “and of the House of Representatives.” By 21 St. 516, No. 9, the index to the Congressional Record is to be printed semi-monthly.

SECT. 79.—Substituted for the cited provision of 1872. 1 Com. D. 55. Amended by 18 St. 317 by striking out the words “no money shall be paid from the Treasury for,” and adding “shall cease” after “newspapers.” All the amendments, like this, made under 18 St. 317, ch. 80, are construed as if originally adopted in the Revised Statutes. *Ludington v. United States*, 15 Ct. Cl. 453; *United States v. Auffmordt*, 122 U. S. 209. 18 St. 85, ch. 328, § 1, provides that after March 4, 1875, the publication of the laws in newspapers shall cease. 18 St. 231, ch. 456, § 4, provides—

“That the United States Revised Statutes shall not be published by the United States in any newspaper, anything in existing laws to the contrary notwithstanding.”



## CHAPTER VI.

## THE LIBRARY OF CONGRESS.

SECT. 80. — This enumeration does not include the act transferring the library of the Smithsonian Institution, which is here treated as a separate collection deposited for the time being in the Library rooms. 1 Com. D. 58.

SECT. 81. — The phrase, "the Library of Congress," appears to be uniformly used in the Revised Statutes as meaning the entire collection, while in earlier acts it is used ambiguously, sometimes meaning the whole collection, while at other times the law books are excluded. 1 Com. D. 59. 24 St. 12, 348, provides for a fire-proof building for the library.

SECT. 85. — The Statutes first passed reposed the general superintendence of the Library in the President of the Senate and Speaker of the House, and it does not appear that all the powers thus specifically conferred were ever formally transferred to the Joint Committee prior to the Revision. 1 Com. D. 60.

SECT. 86. — Section 9 of St. 1859, ch. 22 (11 St. 381), was treated as including and superseding 5 St. 409 (1840), Res. 5, § 1. 1 Com. D. 60. St. June 19, 1878, ch. 317 (20 St. 171), provides: —

"That any person who shall steal, wrongfully deface, injure, mutilate, tear, or destroy any book, pamphlet, or manuscript, or any portion thereof, belonging to the Library of Congress, or to any public library in the District of Columbia, whether the property of the United States or of any individual or corporation in said District, or who shall steal, wrongfully deface, injure, mutilate, tear, or destroy any book, pamphlet, document, manuscript, print, engraving, medal, newspaper, or work of art, the property of the United States, shall be held guilty of a misdemeanor, and, on conviction thereof, shall, when the offense is not otherwise punishable by some Statute of the United States, be punished by a fine of not less than \$10 nor more than \$1000, and by imprisonment for not less than one nor more than twelve months, or both, for every such offense."

SECT. 88. — 24 St. 13 makes the Librarian one of the three Commissioners for the construction of the new Congressional Library. 24 St. 542 (see also 23 St. 394) provides —

"That the Secretary of State, the Librarian of Congress, and the Secretary of the Smithsonian Institution, and their successors in office, are hereby constituted a commission whose duty it shall be to report to Congress the character and value of the historical and other manuscripts belonging to the Government of the United States, and what method and policy should be pursued in regard to editing and publishing the same, or any of them."

SECT. 91. — The salaries here stated, as affected by the reduction to the former rates, made by the St. of 1874, ch. 11, appear in the 2d ed. of Rev. Stats., p. 1097; 23 St. 394. By 21 St. 4, ch. 7, the Librarian was authorized to employ three additional assistants at a yearly compensation of \$1200 each.

SECT. 93. — "*Or otherwise authorized by law*," is here first added in order to cover cases in which the privilege of taking out books has been or may be accorded by temporary acts or resolutions not necessary to be embraced in the Revision. 1 Com. D. 61.

SECT. 94. — This section is based upon the series of differing statutes cited in the margin, the principal change being that the privilege is not here conferred directly, but, as to all classes of persons, the Joint Committee is simply authorized to grant it. 1 Com. D. 62. By 18 St. 512, ch. 179, the Joint Committee of both Houses on the Library is authorized to extend the use of the books in the Library to the regents of the Smithsonian

Institution resident in Washington, on the same conditions and restrictions as members of Congress are allowed to use the Library.

SECT. 95. — The appropriation act of July 11, 1888, ch. 615 (25 St. 262), provides —

“That hereafter the law library shall be kept open every day so long as either House of Congress is in session.”

SECT. 96. — Substituted for the act cited.

## CHAPTER VII.

### CONGRESSIONAL INVESTIGATIONS.

SECT. 101. — The provision in the original acts for punishing perjury are here omitted, as merged in the general provision covering all perjuries, under Title “Crimes.” 1 Com. D. 66. St. 1884, ch. 123 (23 St. 60), provides —

“That any member of either House of Congress may administer oaths to witnesses in any matter depending in either House of Congress of which he is a member, or any committee thereof.”

SECT. 102. — *People v. Keeler*, 99 N. Y. 479. As to the power of either house of Congress to punish for contempt, see *Kilbourn v. Thompson*, 103 U. S. 168; *Anderson v. Dunn*, 6 Wheat. 204; *Stewart v. Blaine*, 1 McArthur, 453; *Lilley v. United States*, 14 Ct. Cl. 539; *United States v. New Bedford Bridge*, 1 Wood. & M. 440.

SECT. 103. — Substituted for the acts cited in the margin.

## CHAPTER VIII.

### CONTESTED ELECTIONS.

SECT. 107. — By 18 St. 338, ch. 119, § 2, this section

“Shall be construed as requiring all testimony in cases of contested election to be taken within ninety days from the day on which the answer of the returned member is served upon the contestant.”

SECT. 127. — 18 St. 338, ch. 119, § 1, repeals so much of this section as requires the Clerk of the House, upon the written request of either party, to open the deposition, after receipt thereof and prior to the meeting of Congress. St. March 2, 1887, ch. 318 (24 St. 445), inserts “or by express” after “mail” in the fourth line; changes “D. C.” in the sixth line to “District of Columbia;” and striking out all after “taken” in the seventh line, substitutes therefor the following: —

“Together with the name of the party in whose behalf it is taken, and shall subscribe such endorsement. The Clerk of the House of Representatives, upon the receipt of such deposition or testimony, shall notify the contestant and the contestee, by registered letter through the mails, to appear before him at the Capitol, in person or by attorney, at a reasonable time to be named, not exceeding twenty days from the mailing of such letter, for the purpose of being present at the opening of the sealed packages of testimony and of agreeing upon the parts thereof to be printed. Upon the day appointed for such meeting the said clerk shall proceed to open all the packages of testimony in the case, in the presence of the parties or their attorneys, and such portions of the testimony as the parties may agree to have printed shall be printed by the Public Printer, under the direction of the said clerk; and in case of disagreement between the parties as to the printing of any portion of the testimony, the said clerk shall determine whether such portion of the testimony shall be printed; and the said clerk shall prepare a suitable index to be printed with the record. And the notice of contest and the answer of the sitting member shall also be printed with the record. If either party, after having been duly notified, should fail to attend, by



himself or by an attorney, the clerk shall proceed to open the packages, and shall cause such portions of the testimony to be printed, as he shall determine. He shall carefully seal up and preserve the portions of the testimony not printed, as well as the other portions when returned from the Public Printer, and lay the same before the Committee on Elections at the earliest opportunity. As soon as the testimony in any case is printed the clerk shall forward by mail, if desired, two copies thereof to the contestant and the same number to the contestee; and shall notify the contestant to file with the clerk, within thirty days, a brief of the facts and the authorities relied on to establish his case. The clerk shall forward by mail two copies of the contestants' brief to the contestee, with like notice. Upon receipt of the contestee's brief the clerk shall forward two copies thereof to the contestant, who may, if he desires, reply to new matter in the contestee's brief within like time. All briefs shall be printed at the expense of the parties respectively, and shall be of like folio as the printed record; and sixty copies thereof shall be filed with the clerk for the use of the Committee on Elections."

SECTS. 128, 130. — 20 St. 400, ch. 182, provides —

"That hereafter no contestee or contestant for a seat in the House of Representatives shall be paid exceeding \$2000 for expenses in election contests; and before any sum whatever shall be paid to a contestant or contestee for expenses of election contests, he shall file with the clerk of the Committee on Elections a full and detailed account of his expenses, accompanied by the vouchers and receipts for each item, which account and vouchers shall be sworn to by the party presenting the same, and no charges for witness fees shall be allowed in said accounts unless made in strict conformity to Rev. Stats. § 128."



## TITLE III.

## THE PRESIDENT.

## CHAPTER I.

## PRESIDENTIAL ELECTIONS.

St. Jan. 29, 1877, ch. 37 (19 St. 227), provided for and regulated the counting of votes for President and Vice-President, and the decision of questions arising thereon, for the term commencing March 4, 1877.

SECT. 132. — If a person is disqualified as elector by holding "an office of trust or profit under the United States" (Constitution, Art. 2, § 1), he cannot remove the disqualification by resigning the office after his appointment as elector, or, in Rhode Island, his election to the position of elector; and the result is a failure to elect, and not the election of the candidate receiving the next highest number of votes. *Re* Corliss, 11 R. I. 638.

SECTS. 135, 136. — St. Feb. 3, 1887, ch. 90 (24 St. 373), provides —

"That the electors of each State shall meet and give their votes on the second Monday in January next following their appointment, at such place in each State as the legislature of such State shall direct.

"SEC. 2. That if any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to the said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.

"SEC. 3. That it shall be the duty of the executive of each State, as soon as practicable after the conclusion of the appointment of electors in such State, by the final ascertainment under and in pursuance of the laws of such State providing for such ascertainment, to communicate, under the seal of the State, to the Secretary of State of the United States, a certificate of such ascertainment of the electors appointed, setting forth the names of such electors and the canvass or other ascertainment under the laws of such State of the number of votes given or cast for each person for whose appointment any and all votes have been given or cast; and it shall also thereupon be the duty of the executive of each State to deliver to the electors of such State, on or before the day on which they are required by the preceding section to meet, the same certificate, in triplicate, under the seal of the State; and such certificate shall be inclosed and transmitted by the electors at the same time and in the same manner as is provided by law for transmitting by such electors to the seat of Government the lists of all persons voted for as President and of all persons voted for as Vice-President; and Rev. Stats. § 136 is hereby repealed; and if there shall have been any final determination in a State of a controversy or contest as provided for in section two of this act, it shall be the duty of the executive of such State, as soon as practicable after such determination, to communicate, under the seal of the State, to the Secretary of State of the United States, a certificate of such determination, in form and manner as the same shall have been made; and the Secretary of State of the United States, as soon as practicable after the receipt at the State Department of each of the certificates hereinbefore directed to be transmitted to the Secretary of State, shall publish, in such public newspaper as he shall designate, such certificates in full; and at the first meeting of Congress thereafter he shall transmit to the two Houses of Congress copies in full of each and every such certificate so received theretofore at the State Department.

"SEC. 4. That Congress shall be in session on the second Wednesday in February succeeding every meeting of the electors. The Senate and House of Representatives shall meet in the Hall of the House



of Representatives at the hour of one o'clock in the afternoon on that day, and the President of the Senate shall be their presiding officer. Two tellers shall be previously appointed on the part of the Senate and two on the part of the House of Representatives, to whom shall be handed, as they are opened by the President of the Senate, all the certificates and papers purporting to be certificates of the electoral votes, which certificates and papers shall be opened, presented, and acted upon in the alphabetical order of the States, beginning with the letter A; and said tellers, having then read the same in the presence and hearing of the two Houses, shall make a list of the votes as they shall appear from the said certificates; and the votes having been ascertained and counted in the manner and according to the rules in this act provided, the result of the same shall be delivered to the President of the Senate, who shall thereupon announce the state of the vote, which announcement shall be deemed a sufficient declaration of the persons, if any, elected President and Vice-President of the United States, and, together with a list of the votes, be entered on the Journals of the two Houses. Upon such reading of any such certificate or paper, the President of the Senate shall call for objections, if any. Every objection shall be made in writing, and shall state clearly and concisely, and without argument, the ground thereof, and shall be signed by at least one Senator and one Member of the House of Representatives before the same shall be received. When all objections so made to any vote or paper from a State shall have been received and read, the Senate shall thereupon withdraw, and such objections shall be submitted to the Senate for its decision; and the Speaker of the House of Representatives shall, in like manner, submit such objections to the House of Representatives for its decision; and no electoral vote or votes from any State which shall have been regularly given by electors whose appointment has been lawfully certified to according to section three of this act from which but one return has been received shall be rejected, but the two Houses concurrently may reject the vote or votes when they agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified. If more than one return or paper purporting to be a return from a State shall have been received by the President of the Senate, those votes, and those only, shall be counted which shall have been regularly given by the electors who are shown by the determination mentioned in section two of this act to have been appointed, if the determination in said section provided for shall have been made, or by such successors or substitutes, in case of a vacancy in the board of electors so ascertained, as have been appointed to fill such vacancy in the mode provided by the laws of the State; but in case there shall arise the question which of two or more of such State authorities determining what electors have been appointed, as mentioned in section two of this act, is the lawful tribunal of such State, the votes regularly given of those electors, and those only, of such State shall be counted whose title as electors the two Houses, acting separately, shall concurrently decide is supported by the decision of such State so authorized by its laws; and in such case of more than one return or paper purporting to be a return from a State, if there shall have been no such determination of the question in the State aforesaid, then those votes, and those only, shall be counted which the two Houses shall concurrently decide were cast by lawful electors appointed in accordance with the laws of the State, unless the two Houses, acting separately, shall concurrently decide such votes not to be the lawful votes of the legally appointed electors of such State. But if the two Houses shall disagree in respect of the counting of such votes, then, and in that case, the votes of the electors whose appointment shall have been certified by the Executive of the State, under the seal thereof, shall be counted. When the two Houses have voted, they shall immediately again meet, and the presiding officer shall then announce the decision of the questions submitted. No votes or papers from any other State shall be acted upon until the objections previously made to the votes or papers from any State shall have been finally disposed of.

"SEC. 5. That while the two Houses shall be in meeting as provided in this act the President of the Senate shall have power to preserve order; and no debate shall be allowed and no question shall be put by the presiding officer except to either House on a motion to withdraw.

"SEC. 6. That when the two Houses separate to decide upon an objection that may have been made to the counting of any electoral vote or votes from any State, or other question arising in the matter, each Senator and Representative may speak to such objection or question five minutes, and not more than once; but after such debate shall have lasted two hours it shall be the duty of the presiding officer of each House to put the main question without further debate.

"SEC. 7. That at such joint meeting of the two Houses seats shall be provided as follows: For the President of the Senate, the Speaker's chair; for the Speaker, immediately upon his left; the Senators, in the body of the Hall upon the right of the presiding officer; for the Representatives, in the body of the Hall not provided for the Senators; for the tellers, Secretary of the Senate, and Clerk of the House of Representatives, at the Clerk's desk; for the other officers of the two Houses, in front of the Clerk's desk and upon each side of the Speaker's platform. Such joint meeting shall not be dissolved until the count of electoral votes shall be completed and the result declared; and no recess shall be taken unless a question shall have arisen in regard to counting any such votes, or otherwise under this act, in which



case it shall be competent for either House, acting separately, in the manner hereinbefore provided, to direct a recess of such House not beyond the next calendar day, Sunday excepted, at the hour of ten o'clock in the forenoon. But if the counting of the electoral votes and the declaration of the result shall not have been completed before the fifth calendar day next after such first meeting of the two Houses, no further or other recess shall be taken by either House."

The act of Oct. 19, 1888, supplementary to the above, provides —

"That the certificates and lists of votes for President and Vice-President of the United States, mentioned in Rev. Stats. Title 3, ch. 1, and in the act to which this is a supplement, shall be forwarded, in the manner therein provided, to the President of the Senate forthwith after the second Monday in January, on which the electors shall give their votes.

"SEC. 2. That Rev. Stats. § 141, is hereby so amended as to read as follows :

"SEC. 141. Whenever a certificate of votes from any State has not been received at the seat of Government on the fourth Monday of the month of January in which their meeting shall have been held, the Secretary of State shall send a special messenger to the district judge in whose custody one certificate of the votes from that State has been lodged, and such judge shall forthwith transmit that list to the seat of Government."

SECTS. 138, 139. — The cited provisions are divided into these two sections, which secure their substantial object. When the Act of 1792, § 3, was passed, the electors were required to furnish with each certificate one list of votes for both President and Vice-President. The Act of 1804, passed to carry into effect the Twelfth Amendment, by requiring them to give in each certificate "two distinct lists," one of votes for President, the other of votes for Vice-President, renders § 3 inoperative, as it requires literally the electors to receive six lists of their names, as they are to make six lists of votes. 1 Com. D. 84.

SECT. 140. — See note, § 135. The appropriation act of July 7, 1884, ch. 332 (23 St. 222), allows the electoral messengers of the respective States for conveying to the seat of Government the votes of the electors,

"at the rate of 25 cents for every mile of the estimated distance, by the most usual road traveled, from the place of meeting of the electors to the seat of Government, computed for the one distance only."

SECT. 141. — "Certificate" is substituted for "list," here and in §§ 143, 144, 145, and the words "one certificate of the votes from that State has been" are here substituted for "such list shall have been" in the cited act. 1 Com. D. 85. Pursuant to this section, provision was made by St. Jan. 17, 1885 (23 St. 283), for sending special messengers to Iowa and Oregon for certificates of the electoral vote of 1884. This section was amended by St. Oct. 19, 1888, as stated in note to § 135.

SECT. 142. — See note, § 135.

SECT. 144. — The final words, "of the United States," are here added ; and this section was substituted for the cited provision in order to make the right to mileage more distinctly several. St. Aug. 12, 1848, ch. 166, § 1 (9 St. 284, 295), which reduced the mileage of the messengers to 12½ cents, was repealed by Res. No. 2 of Jan. 6, 1849 (9 St. 417), the language of which, taken in connection with the repeal, was treated as showing the intent of Congress to restore the rate prescribed by St. 1792 as the rate to be allowed at future elections. 1 Com. D. 86. See note, § 141.

SECT. 145. — This was so framed as to apply distinctly either to the person appointed by the electors or the special messenger sent by the Secretary of State, the ordinary messengers between the business offices being excluded. 1 Com. D. 87. See note, § 141.

SECTS. 146-149. — Sect. 146 was here modified for greater conciseness, and the words "and Vice-President" in the 2d line of § 148 were added by the Revision. 1 Com. D. 88. Sects. 146-150 were repealed by St. Jan. 19, 1886, ch. 4 (24 St. 1), which provides for Presidential succession, in case of vacancy in both these offices, for the causes specified in § 146, in the following order: the Secretary of State, the Secretary of the



Treasury, the Secretary of War, the Attorney-General, the Postmaster-General, the Secretary of the Navy, the Secretary of the Interior; provided that Congress, if not in session, or to convene within 20 days, shall be convened in extraordinary session upon 20 days' notice; by § 2, this applies only to such of the above officers as are appointed by the advice and consent of the Senate, are eligible to the Presidency under the Constitution, and are not at the time under impeachment.

SECT. 150. — This section, substituted for part of the act cited, was repealed by 24 St. 2.

## CHAPTER II.

### OFFICE AND COMPENSATION OF THE PRESIDENT.

SECT. 154. — St. 1874, ch. 11 (18 St. 4; see 23 St. 166, 395; see 24 St. 178, 600) reduced the Vice-President's salary to \$8000.

SECT. 155. — Respecting these officers and their salaries, see the appropriation acts, 23 St. 166, 395; Sup. 378. St. July 20, 1868, ch. 176, § 1 (15 St. 92, 96), which reduced the number of clerks of the fourth class assigned to the President to two, repealed so much of § 4 of St. July 23, 1866 (14 St. 206), as authorized the President to appoint a clerk of pardons, &c. 1 Com. D. 91. See the appropriations in 16 St. 475, 480, ch. 113, § 1; 22 St. 224, 537, &c., as to salaries of persons employed in the office of the President; also 20 St. 178, ch. 329, § 1, which provides:—

“The Secretary of War is authorized to furnish two horses for the use of two of said messengers on public business; and the force above enumerated for the use of the Executive Office and Mansion shall be in full for the same; and all details from other departments for such service are hereby excluded.”

## TITLE IV.

## PROVISIONS APPLICABLE TO ALL THE EXECUTIVE DEPARTMENTS.

THE Department of State dates from July 27, 1789, being then denominated the Department of Foreign Affairs (1 St. 28); the Department of War from Aug. 7, 1789 (1 St. 49); that of the Treasury from Sept. 2, 1789 (1 St. 65); the Navy Department from April 30, 1798 (1 St. 553), and the Interior Department from March 3, 1849 (9 St. 395); the Post-Office Department from May 8, 1794 (1 St. 354), although St. Sept. 22, 1789 (1 St. 70), provided for the temporary establishment of the Post-Office and appointment of a Postmaster-General. See also St. Feb. 20, 1792 (1 St. 232). St. Sept. 23, 1789 (1 St. 72), allowed \$1500 salary to the Attorney-General, and § 35 of the Judiciary Act (1 St. 92) provided for the appointment of that officer with defined and limited duties; business of a departmental character was devolved upon him by later statutes, and by St. June 22, 1870 (16 St. 162), his duty was extended to a general superintendence of the administration of justice, "The Department of Justice" being then organized.

22 St. 563, § 2, provides —

"SEC. 2. That the Secretaries, respectively, of the Departments of State, of the Treasury, War, Navy, and of the Interior, and the Attorney-General, are authorized to make requisitions upon the Postmaster-General for the necessary amount of official postage-stamps for the use of their departments, not exceeding the amount stated in the estimates submitted to Congress; and upon presentation of proper vouchers therefor at the Treasury, the amount thereof shall be credited to the appropriation for the service of the Post-Office Department for the same fiscal year. And it shall be the duty of the respective departments to inclose to Senators, Representatives and Delegates in Congress, in all official communications requiring answers, or to be forwarded to others, penalty envelopes addressed as far as practicable, for forwarding or answering such official correspondence."

SECT. 158. — The President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties; a reservation of lands made at the request of the Secretary of War, for purposes in his department, was considered as made by the President within the terms of St. 1830, which provided that all lands reserved from sale by his order are exempted from pre-emption. *Wilcox v. Jackson*, 13 Pet. 498; *United States v. Cutter*, 2 Curtis, 617; 7 A. G. Op. 453. The action of the heads of executive departments in matters which the President is authorized to direct is presumed to have been directed by him. *United States v. Bayard*, 4 Mackey, 320. Where, however, political duties are imposed upon executive officers by acts of Congress, their duty and responsibility arise from and are subject to the law rather than the direction of the President. *Kendall v. United States*, 12 Pet. 524; 5 Cranch C. C. 163. This especially applies to those ministerial duties which require executive discretion and judgment, and are examinable politically and not judicially. *Decatur v. Paulding*, 14 Pet. 497; *Marbury v. Madison*, 1 Cranch, 137.

The act of Jan. 16, 1883 (22 St. 403), ch. 27, entitled "An act to regulate and improve the civil service of the United States," is printed in full in note to § 1753, *post*.

SECT. 160. — The present salary of each head of a Department is \$8000. 23 St. 396; 18 St. 374, ch. 130, § 2.

SECT. 161. — See note, § 1754. "*Records, papers, and property.*" Recommendations for executive offices and objections to appointments are not required to be kept by the



departments, but may be withdrawn by those who present them. Such papers should not be exhibited to representatives of newspapers in order that they may show from them that a certain senator and representative have recommended improper persons for office. 15 A. G. Op. 342. This section is generalized from the cited act of 1870, relating to the Department of Justice, the same power being apparently conferred by the earlier acts organizing the other departments. 1 Com. D. 102. Rules and regulations of a department, established in accordance with this section, have the force of law, and the courts take judicial notice of them. *Low v. Hanson*, 72 Maine, 104; *Gratiot v. United States*, 4 How. 80; *Ex parte Reed*, 100 U. S. 13; *United States v. Barrows*, 1 Abb. U. S. 351. The archives of all the departments, including vouchers or documents filed to justify the settlement of a public account, are always in the possession of the United States, and cannot be replevied from its officers under a claim of private property. *Brent v. Hagner*, 5 Cranch C. C. 71; 6 A. G. Op. 7. And if the papers are of a confidential character, their production cannot be compelled by the courts. 15 A. G. Op. 378, 415, 562; 16 Id. 24. Even the right to inspect the records and papers belonging to the courts exists only as allowed by statute or by rule of court. *Re McLean*, 2 Flippin, 512.

Authority is given to the heads of departments as follows: By St. June 10, 1874, ch. 328, par. 30 (Sup. 47), to regulate the hours of labor by clerks; by St. Aug. 15, 1876, ch. 287, § 3, to change the grades of clerks. See § 245, note.

SECTS. 162, 163. — See notes, §§ 161, 1753, 1754. These sections are more general in terms than the cited acts. The appropriation act of March 30, 1888, directs the Public Printer to rigidly enforce the provisions of the eight-hour law in the department under his charge. 22 St. 563, ch. 128, provides:—

“SEC. 4. That hereafter it shall be the duty of the heads of the several Executive Departments, in the interest of the public service, to require of all clerks and other employees, of whatever grade or class, in their respective departments not less than seven hours of labor each day, except Sundays and days declared public holidays by law, or executive order: *Provided*, That the heads of the departments may by special order, stating the reason, further extend or limit the hours of service of any clerk or employee in their departments respectively, but in case of an extension it shall be without additional compensation, and all absence from the departments on the part of said clerks or other employees, in excess of such leave of absence as may be granted by the heads thereof, which shall not exceed thirty days in any one year, except in case of sickness, shall be without pay.”

By St. Jan. 16, 1883, ch. 27, § 6 (22 St. 405), the Secretary of the Treasury is to classify clerks and persons employed by the collector, naval officer, surveyor, and appraisers, and make reports to the President. This section also provides for the classification of officers not previously classified.

SECT. 164. — Substituted for the act cited, being intended to confer a discretionary authority only. 1 Com. D. 103.

SECT. 165. — Substituted for appropriation acts.

SECT. 166. — See note, § 170.

SECT. 167. — See 22 St. 563, § 3. By 18 St. 343, ch. 129, § 1, no payment is thereafter to be made as salaries to clerks of Class 1, 2, 3, 4 in the Post-Office Department out of appropriations for other purposes.

SECT. 168. — See note, § 1753. By comparison with subdivision 5 of the preceding section, a difference exists, as respects temporary clerks, in the compensation of the two sexes. 1 Com. D. 82.

SECT. 169. — See the provision cited; *e. g.*, 23 St. 166, 168, 396; Sup. 156, 164. The tenure and principles of ancient common law offices do not apply to the tenure of offices created by the United States Constitution and laws. *Ex parte Hennen*, 13 Pet. 230. When Congress has the power to create an office, it may prescribe the term of holding, and when this is done, there is no power of removal during such term. *United States v. Avery*, Deady, 204. Sect. 169 did not authorize the Secretary of the Treasury to appoint



the "deputy comptroller," "deputy auditor," &c., mentioned in 18 St. 374, ch. 130, § 2. Under § 2, art. 2, of the Constitution, the power of appointing to a new office established by Congress is vested in the President, unless the law or the Constitution provide otherwise. 15 A. G. Op. 3. It was not the intention of the Constitution that those offices which are denominated inferior offices should be held during life; and in the absence of constitutional or statutory provisions providing for the removal of such officers, the power of removal may properly be considered as incident to the power of appointment. *Ex parte Hennen, supra*. The law giving the District Courts the power of appointing their own clerks does not prescribe any form therefor. This power vested in the court is a continuing one, and the mere appointment of a successor is, *per se*, a removal of the prior incumbent, with respect, at least, to his rights. *Id.* The Supreme Court has no control over the appointment or removal of a clerk of the District Court; nor can it entertain any inquiry into the grounds of the removal, even when the district judge is chargeable with an abuse of his power. *Id.*

SECT. 170.—This section is founded on clauses in the cited acts, the phraseology being modified and the exception of cases in which extra compensation may be expressly authorized, being introduced. 1 Com. D. 105. St. Aug. 5, 1882, ch. 389 (22 St. 255), provides —

"SEC. 4. That no civil officer, clerk, draughtsman, copyist, messenger, assistant messenger, mechanic, watchman, laborer, or other employee shall after the first day of October next be employed in any of the executive departments, or subordinate bureaus or offices thereof at the seat of government, except only at such rates and in such numbers, respectively, as may be specifically appropriated for by Congress for such clerical and other personal services for each fiscal year; and no civil officer, clerk, draughtsman, copyist, messenger, assistant messenger, mechanic, watchman, laborer, or other employee shall hereafter be employed at the seat of government in any executive department or subordinate bureau or office thereof or be paid from any appropriation made for contingent expenses, or for any specific or general purpose, unless such employment is authorized and payment therefor specifically provided in the law granting the appropriation, and then only for services actually rendered in connection with and for the purposes of the appropriation from which payment is made, and at the rate of compensation usual and proper for such services, and after the first day of October next § 172 of the Revised Statutes, and all other laws and parts of laws inconsistent with the provisions of this act, and all laws and parts of laws authorizing the employment of officers, clerks, draughtsmen, copyists, messengers, assistant messengers, mechanics, watchmen, laborers, or other employees at a different rate of pay or in excess of the numbers authorized by appropriations made by Congress, be, and they are hereby, repealed; and thereafter all details of civil officers, clerks, or other subordinate employees from places outside of the District of Columbia for duty within the District of Columbia, except temporary details for duty connected with their respective offices, be, and are hereby, prohibited: and thereafter all moneys accruing from lapsed salaries, or from unused appropriations for salaries, shall be covered into the Treasury: *Provided*, That the sums herein specifically appropriated for clerical or other force heretofore paid for out of general or specific appropriations may be used by the several heads of departments to pay such force until the said several heads of departments shall have adjusted the said force in accordance with the provisions of this act; and such adjustment shall be effected before October 1, 1882. And in making such adjustment the employees herein provided for shall, as far as may be consistent with the interests of the service, be apportioned among the several States and Territories according to population: *Provided, further*, That any person performing duty in any capacity as officer, clerk, or otherwise in any department at the date of the passage of this act who has heretofore been paid from any appropriation made for contingent expenses or for any contingent or general purpose, and whose office or place is specifically provided for herein, under the direction of the head of that department may be continued in such office, clerkship, or employment without a new appointment thereto, but shall be charged to the quotas of the several States and Territories from which they are respectively appointed and nothing herein shall be construed to repeal or modify Rev. Stats. § 166."

SECT. 171.—See note, § 1781. St. Aug. 15, 1876, ch. 287, § 5 (19 St. 169), provides —

"That the executive officers of the Government are hereby prohibited from employing any clerk, agent, engineer, draughtsman, messenger, watchman, laborer, or other employee, in any of the executive departments in the city of Washington, or elsewhere beyond provision made by law."



SECT. 172. — Repealed. See note, § 170. The words "other subordinate assistant" were here substituted for "other person" in the cited act, because of inconsistency between §§ 14, 15 of the cited act.

SECTS. 173, 174. — By St. March 3, 1875, ch. 130, § 2 (18 St. 371), the duties of the chief clerks in the several bureaus named are thereafter

to "devolve upon, and be performed by, the several deputy comptrollers, deputy auditors, deputy register, and deputy commissioner herein named: *Provided*, that on and after Jan. 1, 1876, the appointments of this Department shall be so arranged as to be equally distributed between the several States of the United States, Territories, and the District of Columbia, according to population."

This provision tacitly abolished the office of chief clerk in the bureaus therein named. 15 A. G. Op. 3.

In general, the head of a department cannot supervise or reverse the decisions and acts of his predecessors. *United States v. Bank of the Metropolis*, 15 Pet. 377; *United States v. Cobb*, 11 F. R. 76; *Lavalette v. United States*, 1 Ct. Cl. 147; 5 A. G. Op. 28, 87, 122, 664; 2 Id. 110, 463; 3 Id. 684; 8 Id. 214; 11 Id. 189; 12 Id. 169, 355; 13 Id. 389; 9 Id. 32. And when it has rightfully assumed jurisdiction, another co-ordinate department should not interfere with its control of the particular case (11 Id. 117); nor should it delay action therein at the request of a committee of a house of Congress. 13 Id. 113. It cannot certify by delegation when not authorized thereto by Congress. 7 Id. 594.

SECT. 176. — The acts of 1853 and of 1855, cited in the margin, did not include the Department of Justice, which did not then exist; but in drafting this section the rule was assumed to apply to the disbursing clerk of that department, an additional appropriation of \$200 having been made in 1871 for his salary. 16 St. 494; 1 Com. D. 107. Sect. 176 does not authorize the Secretary of the Treasury to diminish or abolish the salary of the chief clerk of the National Board of Health, who by 21 St. 46, which is mandatory, is to act as disbursing agent for the Board, and give bond conformably to § 176. *Dunwoody v. United States*, 22 Ct. Cl. 269.

SECT. 177. — *Chadwick v. United States*, 3 F. R. 756. See notes, §§ 215, 277. 18 St. 19, ch. 44, provides —

"That when, from illness or other cause, the Secretary of War is temporarily absent from the War Department, he may authorize the chief clerk of the Department to sign requisitions upon the Treasury Department, and other papers requiring the signature of said Secretary; the same, when signed by the chief clerk during such temporary absence, to be of the same force and effect as if signed by the Secretary of War himself."

SECT. 178. — *Smith v. Whitney*, 116 U. S. 180. See note, § 1132. The cited provision of 1868, excepting the case of absence, &c., of the Commissioner of Patents, and devolving his duties upon the senior examiner, was apparently repealed by St. July 8, 1870, ch. 230, § 111 (16 St. 216), and by § 11 of that act authorizing the Assistant Commissioner to act in his place. 1 Com. D. 107.

SECT. 179. — See note, § 177. The eleven words following "sections" are here added. 1 Com. D. 108. By St. Aug. 5, 1882, ch. 389 (22 St. 238), the President may empower the commanding general of the army or the chief of any military bureau of the War Department to perform the duties of the Secretary of War under this section, and Rev. Stats. § 1222, is not to apply to the officer so designated by reason of his temporarily performing such duties.

SECT. 180. — Substituted for the cited provision. The ten days are computed from the date of the President's action. 15 A. G. Op. 457. But when a vacancy is once temporarily filled for that period under §§ 177-179, the power of appointment is exhausted, and it is not competent for the President to appoint the same or another officer for an additional period of ten days. 16 A. G. Op. 596.



SECT. 181. — Substituted for the last clause of § 2 of the act of 1868 (15 St. 168).

SECT. 182. — As the cited act of 1868 may not abrogate the implied permission deducible from St. March 3, 1849, ch. 100 (9 St. 370), in favor of the substitute, to draw the salary of the vacant office, this section is framed upon the theory that the officer called in to fill another office temporarily is to claim no addition to the salary of his own office. 1 Com. D. 108. St. 1868, ch. 227, § 3, was held to be general, and applicable as well to those vacancies which are filled by operation of the statute as to those which are filled by appointment. 13 A. G. Op. 7.

SECT. 183. — *United States v. Graff*, 14 Blatch. 387.

SECT. 184. — See note, § 4744. It was assumed by the cited provision of 1871 that heads of departments and bureaus were authorized to require oaths in support of claims against the government. 14 A. G. Op. 419. See *United States v. Bailey*, 9 Pet. 238, 253.

SECT. 189. — Under this provision neither the Secretary of War nor the Secretary of the Navy can retain a civilian lawyer to act as judge-advocate of a court-martial, their only recourse being to call upon the Department of Justice for an officer for the service. 13 A. G. Op. 514; 14 Id. 13; 7 Id. 141; 10 Id. 40.

The head of a department may, however, employ agents whenever, in his judgment and discretion, services necessary to be performed demand such employment. *Gratiot v. United States*, 15 Pet. 336; *United States v. Macdaniel*, 7 Id. 1; *United States v. Ripley*, Id. 18; *United States v. Fillebrown*, Id. 28; *United States v. Potter*, 7 Rep. 675; 10 A. G. Op. 40; *United States v. City Bank*, 21 How. 356; 6 McLean, 130.

SECT. 190. — The words "either of the" were here added in the 5th line, in place of "said" in the cited act. 1 Com. D. 111.

SECT. 191. — This section was evidently drawn with reference to the opinion of the Attorney-General in September, 1866, and establishes a rule contrary to that announced. 15 A. G. Op. 596, 626. The purpose of this provision is to declare the effect of the settlement of an account by the accounting officers of the Treasury as regards the executive branch of the government, not to define or explain the duties of those officers relative to the settlement itself. Its provisions comprehend all balances arising upon settlement of accounts, which it becomes the duty of the Comptroller to certify to the heads of departments. It is not required that all balances thus certified by the comptroller should have been in the course of the settlement previously stated by the auditor. If the comptroller does accompany his certificate with evidence of the action of the auditor, or it does not appear what the auditor's action has been, the head of the department to whom the certificate goes should withhold his requisition for payment until he receives satisfactory evidence on that point. 15 A. G. Op. 139.

Except as here specified, the comptrollers are subject to the regulations and directions of the secretary, like other subordinate officers of the department. *Pittsburgh Savings Bank v. United States*, 16 Ct. Cl. 335. It was formerly held that the decision of a head of a department, directing payment of a particular claim, was binding upon the subordinates by whom the same was to be audited and passed. 5 A. G. Op. 87, 630. But under this section, as compiled from § 1 of the cited act of 1868, he may indeed withhold his warrant, and thus restrain, but cannot actively direct a credit to an account, or find an amount due, contrary to the finding of the accounting officer. *Delaware River Steamboat Co. v. United States*, 5 Ct. Cl. 55.

"*Shall not be subject to be changed or modified.*"—This does not apply to the Commissioner of Customs and the Comptrollers, and their power to re-open settlements made by themselves or their predecessors depends upon other rules than this provision. 15 A. G. Op. 192. This section is limited to cases where balances are found upon the settlement of accounts or claims, and certificates thereof are transmitted to the head of the proper department for his warrant or requisition. It does not extend to cases where no balance

is certified, or where the whole account or claim is disallowed, and has no bearing upon the question of the power of the officers who settle accounts to reopen them. *Id.*

*"Conclusive upon the executive branch of the Government."*—This means that the findings are not to be revised by any other officer or officers of that branch. 15 A. G. Op. 192. Such findings are not conclusive upon the legislative or judicial branches, but can only be revised by Congress or the courts. 14 A. G. Op. 65; *Pittsburgh Savings Bank v. United States*, 16 Ct. Cl. 335. It is the duty of the head of a department to issue his requisition for payment of the amount certified without regard to his opinion of the merits, except that he may, before signing the requisition, submit facts affecting the correctness of the balance to the Comptroller, whose decision thereon is final and conclusive. 15 A. G. Op. 596, 626; 13 *Id.* 6. None of the officers of the executive departments have authority to settle and pay claims for unliquidated damages. *Power v. United States*, 18 Ct. Cl. 263.

SECT. 192. — Generalized from the cited provision, which imposed this duty on the heads of certain departments only.

SECT. 193. — See note, § 60. This appears to supersede the first part of § 2 of St. 1836, ch. 59 (5 St. 25), which is omitted from the Revision. In accordance with this section, by St. July 5, 1884 (23 St. 131, 319), a detailed statement of the expenditure of the contingent fund for the District of Columbia is to be reported annually to Congress. Detailed statements to Congress of the expenditures for contingent expenses in the departments are also required by 18 St. 85, ch. 328, § 1. 22 St. 552 provides —

"It shall be the duty of the heads of the several executive departments to submit to Congress each year, in the annual estimates of appropriations, a statement of the number of buildings rented by their respective departments, the purposes for which rented, and the annual rental of each."

SECT. 194. — The act of 1842, cited in the margin, made this requirement only of the Secretaries of State, of the Treasury, of War, of the Navy, and of the Postmaster-General.

SECT. 195. — This section is new, being intended to avoid frequent repetition of a like requirement. 1 Com. D. 113.

SECT. 197. — Amended by 19 St. 240, ch. 69, § 1, par. 1, by adding at the end of the section the following :—

"Except supplies of stationery and fuel in the public offices and books, pamphlets, and papers in the Library of Congress."

SECT. 198. — The words "of the Interior" in the 3d line are here substituted for "of State" in the original act. By 20 St. 13, ch. 4, § 2, the lists are to be made up to the last day of June of each year in which a new Congress is to assemble, and filed as soon thereafter as practicable in the Interior Department. 22 St. 274 contains the proviso —

"That hereafter no extra compensation shall be allowed any officer or clerk of the Interior Department for compiling the Biennial Register."



## TITLE V.

## THE DEPARTMENT OF STATE.

SECT. 200. — There are now three Assistant Secretaries of State, the first receiving a salary of \$4500, and the others \$3500 each. 23 St. 166, 395; 18 St. 85, ch. 328, § 1, par. 5. See below, § 202, note.

SECT. 201. — 15 A. G. Op. 6. The present salary of the chief clerk is \$2750, and that of each chief of bureau \$2100. 23 St. 166, 395; 18 St. 4, ch. 11.

SECT. 202. — The Secretary of State may prescribe duties for the officers named in § 200, the employees in the Department, and the solicitor, not interfering with his duties as an officer of the Department of Justice, and may make changes and transfers therein when he deems it necessary. 18 St. 85, ch. 328, § 1, par. 8. Reference must be made to the State Department for the official acts of the President respecting public measures not immediately connected with the duties of other departments. *Lockington v. Smith*, Pet. C. C. 466. And in foreign relations, the President acts through this department and under its official seal. *Ex parte Van Hoven*, 4 Dillon, 411.

SECT. 203. — *Chadwick v. United States*, 3 F. R. 750, 753.

SECT. 204. — Amended by 18 St. 294, ch. 9, § 2, by striking out "and signed" in the 2d line, and also the clause beginning with "and" in the 11th line, and ending with "State" in the 16th line. A bill becomes a law upon the date of the President's approval, covering generally the whole day of approval; and the President is not required to affix a date to his signature to a bill. *Gardner v. The Collector*, 6 Wall. 499; *Lapeyre v. United States*, 17 Id. 203; *In re Wynne*, Chase's Dec. 227, and 4 Bank Reg. 5. If a question arises as to the time when a statute takes effect, the records kept in the office of the Secretary of State, the journals of the two houses of Congress, and the United States Statutes at Large may be resorted to for such information. *Gardner v. The Collector*, *supra*.

SECT. 207. — The further provision of the act of 1799, cited in the margin, extending (St. May 28, 1796; 1 St. 477) for one year, requiring a statement also of communications received from agents employed in foreign countries, is omitted, having expired by limitation.

SECT. 208, par. 6. — This clause appears to be superseded by St. May 7, 1874, ch. 149 (18 St. 42), by which collectors of customs are required to make returns to the Secretary of the Treasury of the lists delivered to them of passengers arriving in vessels, in such manner as he shall prescribe. See note, § 4267.

SECT. 209. — See note, § 60.

SECT. 210. — St. April 5, 1888 (25 St. 620), provides —

"That the Public Printer be, and he is hereby, authorized and directed to furnish the Department of State, out of the usual number, with ten copies of each bill and joint resolution, and twenty copies of each executive document, miscellaneous document, and report of committee of either House of Congress."

SECT. 211. — See note, §§ 1712, 1713. 23 St. 235, 324 (see also 21 St. 259, ch. 235), makes appropriations

"for printing and distributing the publications by the Department of State of the consular and other commercial reports, including circular letters to chambers of commerce, *Provided*. That no part of such reports discussing partisan, political, religious, or moral questions shall be published."

SECT. 212.—The last clause of the act of 1870, cited in the margin, providing that the oaths, &c., are to be deemed made under the pains and penalties of perjury, is here omitted, being embraced within the general definition of perjury, *post*, title "Crimes." 1 Com. D. 125. By 18 St. 85, ch. 328, § 1, par. 7, a fee of \$5 is to be collected for each citizen's passport, and these fees are to be paid into the United States Treasury, quarterly at least. 20 St. 40, ch. 74, provides for passports, free of charge, for colored citizens going to Brazil to engage in work on the Madera and Marore Railway. See Rev. Stats. § 4075. St. March 23, 1888, ch. 34 (25 St. 45), provides —

"That from and after the passage of this act a fee of one dollar shall be collected for each citizen's passport issued from the Department of State. That all acts or parts of acts inconsistent with this are hereby repealed."

SECT. 213.—The last clause of § 6 of St. 1789, cited in the margin, "for authenticating a copy of a record or paper under the seal of office, twenty-five cents," was repealed by St. April 23, 1856, ch. 20 (11 St. 5).



## TITLE VI.

## THE DEPARTMENT OF WAR.

SECT. 214. — The Secretary of War is a civil officer, and not in the "military service," within army regulation No. 1002. *United States v. Burns*, 12 Wall. 246; 4 Ct. Cl. 113. He cannot grant or convey any interest in government lands without express or implied authority from Congress. 13 A. G. Op. 46. Nor can he lawfully withhold his requisition for balances duly certified. *Id.* 5. He has no general power to bind the government by indorsing or accepting negotiable paper. *The Floyd Acceptances*, 7 Wall. 666; 1 Ct. Cl. 270.

SECT. 215. — See notes, §§ 172, 1628. Amended by 19 St. 240, ch. 69, by adding at the end of the section the following:—

"There shall be in the said Department an inferior officer, to be appointed by the said principal officer to be employed therein as he shall deem proper, and to be called the chief clerk in the Department of War, and who, whenever the said principal officer shall be removed from office by the President of the United States, or in any other case of vacancy, shall during such vacancy, have the charge and custody of all records, books, and papers, appertaining to the said Department."

The present subordinate officers of the War Department are: 1 chief clerk, at \$2750; 1 disbursing clerk, at \$2000; 1 stenographer, at \$1800; 3 chiefs of division, at \$2000 each; 5 clerks of class four; 7 clerks of class three; 8 clerks of class two; 28 clerks of class one; 7 clerks at \$1000 each, &c. 23 St. 179, 410. 23 St. 179 repeals 22 St. 237, authorizing the appointment of an Assistant-Secretary of War. See 22 St. 340, § 2. The appropriation act of Oct. 2, 1888, charges the Secretary of War with the custody, care, and protection of the Washington Monument.

See note to § 177; 18 St. 85, ch. 328; 21 St. 67, ch. 38. By 21 St. 30, ch. 35, § 3, the examiner of State claims in the office of the Secretary of War has the pay, &c., while on duty, of mounted officers one grade higher than his own in his regiment or corps. This act was prospective only in its operation (16 A. G. Op. 378), and was repealed by 22 St. 118.

SECT. 216. — By 18 St. 33, ch. 117, the Secretary of War is required to make frequent inquiries as to the conformity to law of the disbursements made by disbursing officers of the Army, their accounts and deposits, provided that no officer so detailed shall be connected with the department or corps making the disbursement; and reports of such inspections are to be forwarded to Congress with the Secretary's annual report. It is the duty of the Secretary to see that contracts with his department are properly and faithfully executed, and to take all necessary measures to protect the rights of the Government therein. *United States v. Adams*, 7 Wall. 463; 2 Ct. Cl. 70. See notes, §§ 3709, 3744. In order to relieve the parties to contracts suspended by the Secretary of War from the delay and expense of resorting to Congress, or to the Court of Claims, especially where the place of their performance is distant from Washington, he may appoint a board of commissioners to adjust the claims arising under them. But neither the commissioners nor the Secretary possesses the power to compel a hearing before such board. *Id.*

The rules and orders publicly promulgated through the Secretary of War are the acts of the Executive, and bind all within the sphere of his authority. 15 A. G. Op. 290, 293; *United States v. Eliason*, 16 Pet. 291; *Wilcox v. Jackson*, 13 Id. 498. Thus

the head of the War Department was the proper officer for organizing the draft, so far as the authority of the President extended, and for making the regulations of the draft public, which, when made known through him, were the acts of the President. *McCall's Case*, 5 Phila. 259, 269.

SECT. 220. — The constitutional validity of this provision has been questioned, as infringing the powers of the President as Commander-in-Chief, although there appears to be no adjudication upon the question. 1 Com. D. 132.

SECT. 222. — 23 St. 219, 506, 515 provide for a joint commission to consider the organizations of the Signal Service, Geological Survey, Coast and Geodetic Survey, and the Hydrographic Office of the Navy Department, with the view to secure greater efficiency and economy of administration of the public service in said bureaus. 23 St. 505, making appropriation for the Signal Service, provides that hereafter the work of no other department, bureau, or commission authorized by law shall be duplicated by this bureau. By 23 St. 505 (see also Id. 218 ; 24 St. 247),

"the Secretary of War is authorized, in his discretion, to detail for the service in the Signal Corps not to exceed four commissioned officers, exclusive of the second lieutenants of the Signal Corps authorized by law; and of two officers lately serving in the Arctic Seas."

By 23 St. 180, 411 ; 24 St. 616, appropriations are made for the office of the Chief Signal Officer

"to carry into effect the appropriations for observation and report of storms, and for the construction, maintenance, and repairs of military telegraph lines: *Provided*, That the Secretary of War shall each year, in the annual estimates, report to Congress the number of persons so employed, and the amount paid to each."

St. Oct. 12, 1888, makes enlisted men of the Signal Corps responsible for public property in their possession. The appropriation act of Oct. 2, 1888, provides —

"That any person performing duty in any capacity as officer, clerk, or otherwise, in the office of the Chief Signal Officer at the date of the passage of this act, who has heretofore been paid as an enlisted man in the Signal Corps, and whose office, employment, or place is specifically provided for herein, under the direction of the Secretary of War, may be continued in such office, clerkship, or employment without a new appointment thereto after September 1, 1888."

The sundry civil expenses appropriation act of Oct. 2, 1888, also provides —

"That no part of this money shall be used in payment of enlisted men of the Signal Corps on clerical or messenger duty at the office of the Chief Signal Officer; for mileage to officers when traveling on Signal Service duty under orders, \$2500: *Provided further*, That this amount shall be disbursed under the same limitations prescribed for payment of mileage to officers in the act making appropriations for the support of the Army for the fiscal year ending June 30, 1889; for commutation of quarters to commissioned officers at places where there are no public quarters, \$4752. And the Secretary of War is authorized, in his discretion, to detail for the service in the Signal Corps not to exceed five commissioned officers of the Regular Army, to be exclusive of the second lieutenants of the Signal Corps authorized by law; and the Regular Army officers herein authorized to be detailed for the Signal Corps shall receive their pay and allowances from the appropriation for the support of the Army; and no money herein appropriated shall be used for pay and allowances of second lieutenants appointed or to be appointed from the sergeants of the Signal Corps, under the provisions of the act approved June 20, 1878, in excess of the number of fourteen, or for the pay and allowances of exceeding 320 enlisted men of the Signal Corps."

The deficiency appropriation act of Oct. 19, 1888, provides —

"That the Secretary of the Navy be, and he is hereby, authorized, in his discretion, to loan any scientific instruments in the possession of any of the bureaus under his charge, and not in use, to persons taking observations, or making investigations in connection with, or for the use of, the Signal Service under such regulations as he may prescribe, taking such security for the safe-keeping and return of such instruments on demand as he may deem necessary."



SECT. 223. — 22 St. 319, ch. 433, provides "that the construction of new lines of telegraph shall be under the supervision and direction of the several military commanders, subject to the approval of the Secretary of War." 24 St. 193 provides that the Secretary of War shall each year, in the annual estimates, report to Congress the number of persons employed for observation and report of storms, and for the construction, maintenance, and repairs of military telegraph lines, and the amount paid to each. 18 St. 51, ch. 205, authorizes the Secretary of War to construct and operate a designated telegraph line in Texas and the Indian Territory to connect military posts. See also 20 St. 206, ch. 359, § 1, par. 9. 18 St. 250, ch. 461, provides —

"That any person or persons who shall wilfully or maliciously injure or destroy any of the works or property or material of any telegraphic line constructed and owned, or in process of construction, by the United States, or that may be hereafter constructed and owned or occupied and controlled by the United States, or who shall wilfully or maliciously interfere in any way with the working or use of any such telegraphic line, or who shall wilfully or maliciously obstruct, hinder, or delay the transmission of any communication over any such telegraphic line, shall be deemed guilty of a misdemeanor, and, on conviction thereof in any district court of the United States having jurisdiction of the same, shall be punished by a fine of not less than \$100 nor more than \$1000, or with imprisonment for a term not exceeding three years, or with both, in the discretion of the court."

SECT. 225. — Change "78" to "79" in margin. The last clause of the cited section is here omitted, relating to perjury, being embraced under the general provisions of the subsequent title "Crimes." 1 Com. D. 133. 19 St. 240, ch. 69, amends this section by adding at the end thereof the following : —

"In settling the accounts of the commanding officer of a company for clothing and other military supplies, the affidavit of any such officer may be received to show the loss of vouchers or company books, or any matter, or circumstance tending to prove that any apparent deficiency was occasioned by unavoidable accident or lost in actual service, without any fault on his part, or that the whole or any part of such clothing and supplies had been properly and legally used and appropriated ; and such affidavit may be considered as evidence to establish the facts set forth, with or without other evidence, as may seem to the Secretary of War just and proper under the circumstances of the case."

SECT. 226. — Charts furnished to persons not in the government service are to be paid for at cost price of paper and printing paid by the government. 20 St. 50, ch. 91, and 284, ch. 68.

SECT. 228. — See notes, §§ 216, 1194. This section embodies so much of the act of 1820, cited in the margin, as defines the Secretary's duty, with modifications deemed necessary to adapt it to the changes since made in the fiscal year, and prescribing the disposal of unexpended appropriations. 1 Com. D. 133.

SECT. 231. — By 22 St. 240, the Secretary of War is each year to report to Congress, in the annual estimates, the number of persons employed in the office of the Chief of Engineers to carry into effect the appropriations for rivers and harbors, &c., and the amount paid to each. 24 St. 335, § 8, provides —

"That the Secretary of War shall report to Congress, at its next and each succeeding session thereof, the name and place of residence of each civilian engineer employed in the work of improving rivers and harbors by means and as the result of appropriations made in this and succeeding river and harbor appropriation bills, the time so employed, the compensation paid, and the place at and work on which employed."

## TITLE VII.

## THE DEPARTMENT OF THE TREASURY.

## CHAPTER I.

## THE DEPARTMENT.

SECT. 234. — The present salary of each Assistant-Secretary is \$4500. St. Jan. 20, 1874, ch. 11 (Sup. 2); 23 St. 167, 396. See next note.

SECT. 235. — See note, § 169. As to the present salaries of offices, &c., named in this section, see 23 St. 167, 396; Sup. 159-164. See also 18 St. 6, ch. 18. The office of chief clerk was tacitly abolished by 18 St. 374, ch. 130, § 2, in the bureaus therein named. 15 A. G. Op. 3. The office of chief clerk and that of superintendent of the Treasury building are not distinct, although the compensation is here allowed in distinct amounts. Upton's Case, 19 C. Cl. 46. See 23 St. 167, 396. There appears to have been no previous statute for the appointment of the Supervising Architect or the force in his office, apart from the appropriations to maintain the office commencing in 1864 (13 St. 149) and the Secretary's general power to prescribe regulations. See 22 St. 226, 539. The appropriation act, 23 St. 398, provides —

“The services of skilled draughtsmen, civil engineers, computers, accountants, modelers, assistants to the photographer, copyists, and such other services as the Secretary of the Treasury may deem necessary and specially order, may be employed in the Office of the Supervising Architect to carry into effect the various appropriations for public buildings, to be paid for from such appropriations: *Provided*, That the expenditures on this account for the fiscal year ending June 30, 1886, shall not exceed \$130,000; and the Secretary of the Treasury shall each year, in the annual estimates, report to Congress the number of persons so employed and the amount paid to each.”

By recent acts, appropriations are also made for special examinations of national banks and bank-plates; for expenses of the national currency (to be reimbursed by the national banks), for the bureau of engraving and printing, office of life-saving service, bureau of navigation, secret service division, &c. 23 St. 170-172, 400-403. The Bureau of Navigation in the Treasury Department was constituted by 23 St. 118, ch. 221.

SECT. 236. — *United States v. Johnston*, 124 U. S. 250; *Cooke v. United States*, 91 U. S. 389, 398. This section does not apply to judgments of the Court of Claims. *United States v. Jones*, 119 U. S. 477; *Gordon v. United States*, 2 Wall. 561. The right of set-off where the government is both debtor and creditor is founded upon this section, and exists independently of Rev. Stats. § 1766, or of St. March 3, 1875, ch. 149 (Sup. 185); but a public officer cannot make the government an agent or trustee for the collection of private debts by assignment or otherwise. *Taggart's Case*, 17 C. Cl. 322; *United States v. Mann*, 2 Brock. 9. The authority to set off, against each other, claims by and against the United States, is exclusively in the Secretary of the Treasury, and a Federal court cannot set off a claim allowed by the Treasury to a defendant, against a judgment. *United States v. Griswold*, 30 F. R. 604. The courts cannot order the withdrawal of money from the Treasury, as by mandamus against one of its officers who refuses to allow and pay a claim, as such order would be in effect to entertain a suit against the United States. *United States v. Guthrie*, 17 How. 303; *Reeside v. Walker*, 11 Id. 290; *Kendall*



*v. United States*, 12 Pet. 524; *State v. Durham*, 4 Mackey, 235. In other respects the doctrine that the United States cannot be sued without provision therefor by act of Congress, has no application to its agents and officers holding possession of property for public uses. *United States v. Lee*, 106 U. S. 196. The Treasury Department may prescribe its own rules for the adjustment of claims, and, if reasonable, such rules will be respected. But when they go to a total denial of justice, and absolutely preclude the allowance of a just and legal claim, a court cannot, if it has jurisdiction of the subject, disregard the rights of the parties. *United States v. Mann*, 2 Brock. 9. On the other hand, the department is not bound to pass an account which it considers unjust and unreasonable, although it is supported by the decision of a Federal court. 1 A. G. Op. 635. See *United States v. Ralston*, 17 F. R. 895; *United States v. Smith*, 1 Wood. & M. 184. State courts cannot enjoin the officers of an executive department from executing its orders. 16 A. G. Op. 257. When an account has once been adjusted by the accounting officers, it cannot be reopened, unless relief is afforded by special act. 4 A. G. Op. 378; 12 Id. 386. 23 St. 258 provides —

“That the Secretary of the Treasury may prescribe rules and regulations governing the recognition of agents, attorneys, or other persons representing claimants before his Department, and may require of such persons, agents and attorneys, before being recognized as representatives of claimants, that they shall show that they are of good character and in good repute, possessed of the necessary qualifications to enable them to render such claimants valuable service, and otherwise competent to advise and assist such claimants in the presentation of their cases. And such Secretary may after due notice and opportunity for hearing suspend, and disbar from further practice before his Department any such person, agent, or attorney shown to be incompetent, disreputable, or who refuses to comply with the said rules and regulations, or who shall with intent to defraud, in any manner wilfully and knowingly deceive, mislead, or threaten any claimant or prospective claimant, by word, circular, letter, or by advertisement.”

Prior to this enactment, the head of a department could, for the protection of public interests, suspend or decline to recognize agents or attorneys guilty of fraudulent practice. 13 A. G. Op. 150; 16 Id. 488; 12 Id. 66.

24 St. 227, contains the proviso —

“That hereafter receipts for miscellaneous work authorized by law to be performed by the Bureau of Engraving and Printing for the several Departments of the Government, and the amounts properly chargeable to national banks for engraving their plates shall be deposited, and covered into the Treasury as miscellaneous receipts.”

SECT. 237. — This section and § 257, *post*, do not prohibit United States officers entitled to fees for services from demanding payment thereof at any time. *Patterson v. United States*, 21 Ct. Cl. 322.

SECT. 239. — Amended by 18 St. 316, ch. 80, by striking out “assessors and assistant-assessors” in the seventh line.

SECT. 242. — Taken from provisos attached to appropriations for the Treasury. As to salaries, number and classes of clerks in the Department, see the appropriation acts, Sup. 159; 23 St. 167, 396.

SECT. 244. — A new draft, being the substance of three statutes, the two cited in the margin, and § 8 of the act of 1789 establishing the Treasury. 1 St. 67.

## CHAPTER II.

### THE SECRETARY OF THE TREASURY.

SECT. 245. — The phraseology is somewhat changed from the acts cited, which do not appear to intend any substantial difference between the duties of the two secretaries. 1 Com. D. 155. The Assistant-Secretary is the aid and not the deputy of the Secretary,



and his acts are valid only when authorized by the latter or by law; but a letter from him to a customs collector respecting his deposits of public money, is presumably authorized by the Secretary. *United States v. Adams*, 11 Sawyer, 103; 24 F. R. 348; *Chadwick v. United States*, 3 F. R. 750, 756.

By 20 St. 178, ch. 329, § 1, par. 9, Rev. Stats. § 3545 applies to the several mints and assay offices, for the purpose of enabling them to make speedy returns to depositors; and the Secretary may use coin certificates for payment of bullion to depositors, issued under § 254, *post*, and the charges collected may be used to defray the expenses. So much of this act as authorizes the issue of coin certificates in exchange for bullion deposited for coinage at mints and assay offices other than those mentioned in Rev. Stats. § 3545 was repealed by 20 St. 377, ch. 182, § 1.

SECT. 248. — See notes §§ 169, 2931. It being the duty of the Secretary to superintend the collection of the revenue, and of the Comptroller to provide for the payment of moneys collected, and to direct prosecutions for all debts due the Government (Rev. Stats. § 269), the legal title to land may be acquired by the United States as security for a debt. *Neilson v. Lagow*, 12 How. 98, 107; see also *Dugan v. United States*, 3 Wheat. 172; *United States v. Tingey*, 5 Pet. 117; *United States v. Bradley*, 10 Id. 343; *United States v. Linn*, 15 Id. 290. The subordinate officers of the Treasury are not empowered to supervise or revise the decision of the Secretary concerning the issuance of warrants. 5 A. G. Op. 630. The authority to superintend the collection of the revenue includes the power to relieve importers from entries made under innocent mistake or ignorance of material facts affecting the value of their dutiable merchandise, by permitting, before the payment of duties, the production and substitution of amended invoices and the reformation of the entries in conformity thereto. 11 A. G. Op. 532. Where the Secretary of the Treasury, being in doubt as to the revenue law, declined to order payment, the Court of Claims was held to have jurisdiction. *Ramsay v. United States*, 21 Ct. Cl. 443. Such Secretary, by his regulations, can only carry out a revenue law, and cannot alter or amend it. *Morrill v. Jones*, 106 U. S. 466. He is not authorized to compromise a criminal prosecution. *United States v. George*, 6 Blatch. 406. He cannot refund duties erroneously paid under protest, for which the collector has accounted. 3 A. G. Op. 237. Nor can he correct an alleged error of a Federal court and refund money said thereby to have been erroneously paid. 1 Id. 405.

SECT. 249. — See notes, §§ 2652, 2984.

SECT. 251. — This section comprehends the making of rules and regulations for the transportation of appraised merchandise in bond from one collection district to another. 15 A. G. Op. 128. The Secretary cannot make regulations which are unreasonable, not authorized by law, or inconsistent therewith. *Morrill v. Jones*, 106 U. S. 466; *Campbell v. United States*, 107 Id. 410; *Balfour v. Sullivan*, 8 Sawyer, 648; 17 F. R. 231; *Pascal v. Sullivan*, 10 Sawyer, 284; 21 F. R. 496; *United States v. Leng*, 18 F. R. 15, 21; *Lennig v. Maxwell*, 3 Blatch. 125; *Munsell v. Maxwell*, Id. 364; *Greely v. Thompson*, 10 How. 225. But any regulations made by the Secretary under this section have the force of law, if fairly within its purpose and scope, not inconsistent with law, or an infringement upon existing legal rights of individuals. *United States v. Hutton*, 10 Ben. 268; 15 A. G. Op. 128. An "instruction" is a direction to govern the conduct of the particular officer to whom it is addressed. A "regulation" affects a class or classes of officers. *Landram v. United States*, 16 Ct. Cl. 74, 86. It does not include a mere order of a Secretary or of the President. *Harvey v. United States*, 3 Ct. Cl. 38. The construction of the Tariff Act by the Treasury Department is not conclusive upon either party; and the collector is not justified in imposing duties not warranted by law, in pursuance of its instructions. The article must be admitted to entry upon payment of the duty required by law on the class of articles to which it is proved to belong. *Lennig v. Maxwell*, 3 Blatch.



125, 126; *Pascal v. Sullivan, supra*; *Balfour v. Sullivan, supra*. Neither does a collector have any authority, even under instructions from the Treasury Department, to charge an arbitrary rate of commissions, where the law requires "a charge for commissions at the usual rates" to be added on the appraisal of goods, to make up their dutiable value. The rates of the commission must be determined in the same manner as the value of the goods. *Munsell v. Maxwell*, 3 Blatch. 364. If the President, through circulars from the Treasury Department, has regulated the manner in which the cost of goods invoiced in a foreign depreciated currency shall be estimated in United States currency, for the purpose of determining the rate of duties thereon, such regulations are in force in respect to depreciations occurring since the act of Congress fixing the value of the foreign coin in United States currency; unless the importer accompanies his invoice by a consular certificate of the value of such depreciated foreign coin. *Rich v. Maxwell*, 3 Blatch. 127.

SECT. 252. — Repealed by 19 St. 241, ch. 69. The courts are to look to the laws themselves, and not necessarily to the construction placed upon them by the Departments. *Greely v. Thompson*, 10 How. 225.

SECT. 254. — 20 St. 25, ch. 20, authorizing the coinage of the standard silver dollar, does not authorize the payment in silver of certificates of deposit issued under this section. See note, § 3513. By 20 St. 102, ch. 170, the Secretary may constitute any superintendent of a mint or assayer of any assay office an assistant treasurer, without additional compensation, to receive gold coin and bullion on deposit for the purposes provided in this section. See note, § 245.

SECT. 256. — The authority here given to the Secretary to employ not more than three persons, to assist the government officers in discovering and collecting public money withheld, was repealed by 18 St. 192, ch. 393. The employment contemplated is of persons to discover *and* collect, and as such persons' compensation is to be paid from the moneys collected, no appropriation would be necessary to provide for such compensation. *Sanborn Contract*, 15 A. G. Op. 133, 137.

SECT. 257. — See notes, §§ 237, 2984. By 18 St. 186, ch. 391, § 3 (see note on § 3091), the Secretary is required annually to report to Congress, in detail, all payments by him for the detection of smuggling, for which he is thereby authorized to make suitable compensation. 18 St. 469, ch. 136, § 4, requires the Secretary to include, in his annual report to Congress, a detailed statement of the moneys refunded under the revenue laws, together with copies of the rulings under which repayments are made, provided that when the Secretary shall so request, the Attorney-General shall take an appeal to the Supreme Court. 23 St. 254 provides —

"That the Secretary of the Treasury shall, at the commencement of each session of Congress, report the amount due each claimant whose claim has been allowed in whole or in part to the Speaker of the House of Representatives and the presiding officer of the Senate, who shall lay the same before their respective Houses for consideration. And hereafter all estimates of appropriations and estimates of deficiencies in appropriations intended for the consideration and seeking the action of any of the committees of Congress shall be transmitted to Congress through the Secretary of the Treasury, and in no other manner; and the said Secretary shall first cause the same to be properly classified, compiled, indexed, and printed, under the supervision of the chief of the division of warrants, estimates, and appropriations of his Department."

Clause 4. The act of 1868 refers to St. May 3, 1802 (2 St. 192).

SECT. 258. — See, in addition to the provision cited, the act of March 3, 1863, ch. 89, § 4 (12 St. 762).

SECT. 259. — The words "during the preceding year" were here added (1 Com. D. 162), and the word "agriculture" in the fourth line was stricken out by 19 St. 240, ch. 69. As to banks, the act of Jan. 30, 1863, ch. 14, § 1 (12 St. 637), provided for an annual report "upon the banks of the United States;" but it was not until 1866 that

national banks were required to communicate information to the Secretary of the Treasury. As to earlier reports upon banks, see 5 St. 719, Res. 16.

SECT. 262. — The words in the second line, "at the commencement of" and "a copy of," were here added. 1 Com. D. 163. By subsequent acts (18 St. 85, ch. 328, § 1; 18 St. 355, ch. 129; 23 St. 168, 398) a detailed statement of contingent expenditures in any department or bureau is to be presented to Congress at the beginning of each regular session. See also 23 St. 168, 398.

SECT. 263. — Substituted for the sections cited of the act of 1850; the last five words of this section were here added. 1 Com. D. 163.

SECTS. 266, 267. — The words "at the seat of Government" were here substituted for "of the city of Washington" in the cited act, and "Affairs" substituted for "Department" in the last line of § 266. 1 Com. D. 163.

## CHAPTER III.

### THE COMPTROLLERS.

SECT. 268. — Each Comptroller now receives a salary of \$5000, and each of the two deputy-comptrollers, \$2700. 23 St. 168, 398. The office of Comptroller originated in St. Sept. 2, 1789. See notes, §§ 276, 380, below. By St. March 3, 1817, his office was continued under the title of First Comptroller, and the office of Second Comptroller was created, with whom his duties were thereby divided.

SECT. 269. — See notes, §§ 248, 317, 3143; 15 A. G. Op. 194; *United States v. Johnston*, 124 U. S. 250. The words "and by the Commissioner of the General Land Office," in the fourth line, were inserted by the Revision. 1 Com. D. 165. The third paragraph of this section does not authorize the subordinate officers of the Treasury to supervise or revise the decisions of the Secretary. 5 A. G. Op. 630, and other opinions referred to therein. As the Comptroller has charge of the adjustment of accounts against the government, a rejection of an account by him is a rejection by a department authorized to hear and determine the same within the meaning of the proviso of 24 St. 505, § 1, giving the Federal courts jurisdiction of claims against the United States. *Bliss v. United States*, 34 F. R. 781. 22 St. 539 provides —

"That the Deputy First Comptroller in the Department of the Treasury shall be, and is authorized, in the name of the First Comptroller, to countersign all warrants, except accountable warrants, and to sign all other papers in like manner under the direction of the First Comptroller; and in case of the death, resignation, absence, or sickness of the Deputy First Comptroller, the Secretary of the Treasury may, by an appointment, under his hand and official seal, delegate to any officer in the office of the First Comptroller the authority to perform the duties of the Deputy First Comptroller until a successor is appointed or such absence or sickness shall cease."

SECT. 272. — The cited provision was here altered, as its concluding sentence made the Comptroller's report include officers to whom further time had been allowed for settlement of accounts. 1 Com. D. 166.

SECT. 273. — 15 A. G. Op. 41. The word "warrant" has the same meaning as "requisition" used in Rev. Stats. § 3673. *Id.* 196. "Settled," as used in this section, is equivalent to "finally acted upon." *Id.* 139. See note, § 277, below.

SECT. 274. — See notes, §§ 468, 2083.



## CHAPTER IV.

## THE AUDITORS.

SECT. 276. — St. March 3, 1817 (3 St. 366), provided for five Auditors, being the offices now existing except that of Sixth Auditor; there was but one Auditor before that act, created by St. Sept. 2, 1789. See note, § 380. Each Auditor now receives a salary of \$3600, and each Deputy Auditor \$2250. 23 St. 169, 399. It is not the duty of the Auditors, except the Sixth Auditor, to give decisions, and their opinions upon disputed questions have no official weight. *Ridgway v. United States*, 18 Ct. Cl. 707; *Ludington v. United States*, 15 Id. 453.

SECT. 277. — This section does not authorize the Third Auditor and Second Comptroller of the Treasury to adjust a claim for alleged loss or damage arising on the breach of a contract wherein the government agreed to furnish the claimant with transportation for men and animals, &c. The authority conferred by this section to settle claims for damages, however sustained, does not extend beyond the classes of cases specifically described. *Higgins' case*, 15 A. G. Op. 39. Every account within the scope of this section must be examined both by the Auditor, whose action is merely primary, and by the Comptroller, whose action is revisory and final. 15 A. G. Op. 139; *United States v. Johnston*, 124 U. S. 250; § 273, *supra*. Where the Comptroller, on revision, does not concur in the action of the Auditor disallowing an account, but finds and admits a balance arising thereon; or where he disagrees with the Auditor in allowing an account, and rejects it; or increases or diminishes the balance reported by the Auditor in such account, — in any of these cases the account is finally adjusted by the action of the Comptroller, and further action by the Auditor is not required. 15 A. G. Op. 139; *Longwill v. United States*, 17 Ct. Cl. 288. Certificates and orders made previous to the issue of Treasury drafts for payment are only departmental proceedings from which parties gain no new rights. *McKnight v. United States*, 13 Ct. Cl. 292. And even an auditor's award upon a contract is not final and conclusive upon the claimant, though accepted by him. *Bogert v. United States*, 2 Ct. Cl. 159.

Cl. 1. "*Shall receive and examine.*"—This merely invests the Auditor with power as an accounting officer. *Thomas v. United States*, 16 Ct. Cl. 522.

Cl. 2. *United States v. Brindle*, 110 U. S. 692. 18 St. 420, ch. 132, § 7, provides —

"That copies of all contracts made by the Commissioner of Indian Affairs, or any other officer of the Government, for the Indian service, shall be furnished to the Second Auditor of the Treasury before any payment shall be made thereon."

Cl. 3. Other duties of the Third Auditor are prescribed by 18 St. 204, ch. 455, § 1 Id. 72, ch. 285, § 2. See note, § 300. Certain provisions in the act of 1849, which were claimed to have given exclusive jurisdiction to the Third Auditor of claims for horses lost in battle, were repealed by Rev. Stats. § 5596. The provision of this section which declares that the Third Auditor shall receive and examine all accounts for compensation for the loss of horses, gives him no power except as an accounting officer. *Thomas v. United States*, 16 Ct. Cl. 522.

Cl. 5. *United States v. Bell*, 111 U. S. 478. 20 St. 167, ch. 312, authorizes a general account of advances for naval appropriations, and provides by § 3 —

"That the Fourth Auditor shall declare the sums due from the several special appropriations upon complete vouchers, as heretofore, according to law; and he shall adjust the said liabilities with the 'General account of advances.'"



Cl. 6. The Fifth Auditor is the proper officer to audit the accounts of a collector of internal revenue. *Soule v. United States*, 100 U. S. 8.

Cl. 7. See note, §§ 3835, 3852, 3855, 3963, 4049. The name previously given by statute to the Sixth Auditor was "The Auditor of the Treasury for the Post-Office Department," — a title inadvertently used in 19 St. 78, ch. 179, cited below, &c. 18 St. 340, ch. 128, § 4, provides that the Sixth Auditor shall keep the accounts in his office so as to show the expenditures of the Post-Office Department under each item of appropriation provided by law. 19 St. 78, ch. 179, § 4, provides —

"That the annual reports of the Auditor of the Treasury for the Post-Office Department to the Postmaster-General shall show the financial condition of the Post-Office Department at the close of each fiscal year, and be made a part of the Postmaster-General's annual report to Congress for that fiscal year;" repealing 18 St. 231, ch. 456, § 11.

By 22 St. 55, § 3, the amount of all money-orders unpaid for five years from their date, as ascertained and reported annually by this Auditor, is to be covered into the Treasury. 22 St. 528, ch. 123, § 5, provides —

"That the Auditor of the Treasury for the Post-Office Department shall, as soon as practicable after the close of the present fiscal year, transmit to the Postmaster-General a statement of the aggregate amount of all money-orders which at the beginning of said year shall have remained unpaid for a period of seven years or more after the date of their issue; and as soon as practicable after the close of each fiscal year thereafter he shall transmit in like manner a statement of the aggregate amount of all money-orders and postal notes which at the commencement of such year shall have remained unpaid for less than eight and not less than seven years after the date of their issue; and the Postmaster-General shall cause the aggregate amount of such unpaid orders and postal notes as reported annually by the Auditor to be deposited in the Treasury, to the credit of the Treasurer of the United States, for the service of the Post-Office Department. But nothing contained in this act shall be so construed as to prevent the payment, out of current money-order funds, by duplicate issued under the authority of the Postmaster-General, of any lost or invalid money-order or of any invalid postal note more than seven years old, upon the presentation of satisfactory proof to the Postmaster-General of the ownership of such money-order or upon the production of such invalid postal note in accordance with the provisions of § 1 of this act; and the total amount of such lost or invalid money-orders and invalid postal notes more than seven years old paid during each year by duplicate shall be deducted from the aggregate amount of unpaid money-orders and postal notes to be deposited at the close thereof in the Treasury as hereinbefore provided."

The duties of this office, which was originally created by St. July 2, 1836, had previously devolved upon the Fifth Auditor in addition to his other duties. The Sixth Auditor is an officer both of the Treasury and Post-Office Departments. 7 A. G. Op. 445. 22 St. 228, authorizes the Secretary of the Treasury to sell as waste paper the files of valueless papers accumulated in this Auditor's office.

SECTS. 278, 280, 285. — Substituted for the acts cited respectively in the margin. On § 278, see note, § 2083.

SECT. 283. — See note, § 276, Cl. 5.

SECT. 284. — Amended by 18 St. 316, ch. 80, by changing "purser" to "paymaster" in the fourth line. Money remaining in the hands of a disbursing officer is as much the money of the United States as if it had not been drawn from the Treasury; and until it is paid over by the government agent to the person entitled to it, the fund cannot, in any legal sense, be considered a part of his effects, and is not liable to attachment by his creditors. *Buchanan v. Alexander*, 4 How. 20.

SECTS. 288, 289. — These have the force of law, and become a part of the contract of enlistment. *Low v. Hanson*, 72 Maine, 105; *Reed v. Reed*, 53 Id. 527.

SECT. 291. — St. July 1, 1882 (22 St. 135), appropriates \$30,000, or so much thereof as may be necessary, for the expenses attendant upon the execution of the Neutrality Act. St. July 1, 1886, ch. 600 (24 St. 110), appropriates \$50,000 to enable the President to



meet unforeseen emergencies in the diplomatic and consular service, and to extend the commercial and other interests of the United States.

SECT. 297.—The punishment for perjury prescribed by St. 1872 was here omitted, as being sufficiently covered by the general provisions of the Title "Crimes," 1 Com. D. 175.

SECT. 299.—This section regulates a district attorney's compensation for services in all cases, except as provided by § 827. 16 A. G. Op. 99; 6 Id. 299. In general, a district attorney is not required to attend to suits in State courts, although the United States may be directly interested therein. When he appears in such courts, except in the cases provided for in § 771, he must do so pursuant to the previous direction of the Attorney-General, or secure the latter's subsequent approval, in order that he may recover compensation. This section contemplates that, where no fees are provided by law to which the compensation of a district attorney in respect to any part of his services can be assimilated, a fair and reasonable compensation for such part shall be made. Compensation allowed under this section should be included in the return provided for by § 833. 16 A. G. Op. 99. This provision does not apply to such services as those rendered to the receiver of a national bank under Rev. Stats. §§ 380, 5238, or to any services not rendered for the benefit of the United States, and not paid for from the public treasury. *Gibson v. Peters*, 35 F. R. 721.

SECT. 300.—By 18 St. 316, ch. 80, § 1, par. 7, two sections are here added, viz.:

"SEC. 300. A. All claims of loyal citizens in States not in rebellion, for quartermaster's stores actually furnished to the Army of the United States, and receipted for by the proper officer receiving the same, or which may have been taken by such officers without giving such receipt, may be submitted to the Quartermaster-General of the United States, accompanied with such proofs as each claimant can present of the facts in his case; and it shall be the duty of the Quartermaster-General to cause such claim to be examined, and if convinced that it is just, and of the loyalty of the claimant, and that the stores have been actually received or taken for the use of, and used by the Army, then to report each case to the Third Auditor of the Treasury, with a recommendation for settlement.

"SEC. 300. B. All claims of loyal citizens in States not in rebellion for subsistence actually furnished to the Army and receipted for by the proper officer receiving the same, or which may have been taken by such officers without giving such receipt, may be submitted to the Commissary-General of Subsistence, accompanied by such proof as each claimant may have to offer; and it shall be the duty of the Commissary-General of Subsistence to cause each claim to be examined, and if convinced that it is just, and of the loyalty of the claimant, and that the stores have actually been received, or taken for the use of, and used by the Army, then to report each case for payment to the Third Auditor of the Treasury with a recommendation for settlement.

"The provisions of the above two sections shall extend to the State of Tennessee, and to the counties of Berkeley and Jefferson in the State of West Virginia. But the provisions of the above two sections shall not authorize the payment of claims for the occupation of, or injury to, real estate in any State declared in insurrection during the rebellion."

It is immaterial whether the actual presentation of these claims was made before or after the adoption of this statute. 15 A. G. Op. 35.

By 18 St. 72, ch. 285, § 2, the Quartermaster-General, Commissary-General, and Third Auditor of the Treasury are to continue to act upon the claims for such stores brought before them under St. July 4, 1864, and the Secretary of the Treasury is to report the claims allowed to Congress for consideration. Under this Act, the submission of the claims to Congress takes away from these officers' reports such character of an award as they may have before had. *Ludington v. United States*, 15 Ct. Cl. 453. See also 20 St. 650, ch. 287. By 20 St. 524, ch. 77, claims are not to be allowed under the act of 1874, or by the Court of Claims, or by Congress, where the claimant, or those under whom he claims, shall wilfully, knowingly, and with intent to defraud the United States, have claimed more than is justly due, or has presented false evidence in respect to the claim to Congress or to any department or court.

Claims embraced in § 300 B may be examined by the Commissary-General, whether they were presented to him before or after its enactment. 15 A. G. Op. 35.

## CHAPTER V.

## THE TREASURER.

SECT. 301. — The present salary of the Treasurer is \$6000. 23 St. 169, 400. By later statutes the Treasurer is given control of revenues of the District of Columbia. See 18 St. 501, ch. 162; 20 St. 102, ch. 180, § 7; 21 St. 284, ch. 243, § 9; 21 St. 458, ch. 134, § 1; 24 St. 501, ch. 355.

SECT. 303. — The Assistant-Treasurer now receives a salary of \$3600. 23 St. 169, 400. See *Folger v. United States*, 103 U. S. 30; 13 Ct. Cl. 86; *United States v. Butterfield*, 7 Ben. 412. As to other salaries in the office of the Secretary of the Treasury, see 18 St. 371, ch. 130, § 2.

SECT. 304. — Amended by 24 St. 9, ch. 41, to read as follows:—

“SEC. 304. The Treasurer may, in his discretion, and with the consent of the Secretary of the Treasury, authorize the Assistant Treasurer to act in the place and discharge any or all the duties of the Treasurer of the United States; and in the event of the absence or illness of either the Treasurer or the Assistant Treasurer, or both, the Secretary of the Treasury may, on the recommendation of the Treasurer appoint for a term not exceeding thirty days at one time, from among the clerks in the Treasury, any one of said clerks to be Acting Assistant Treasurer during such absence or illness: *Provided, however*, That no such appointment shall be made until the official bond given by the principal of the office shall be made in terms to cover and apply to the acts and defaults of every such person so appointed from time to time. Such acting officer shall, moreover, for the time being, be subject to all the liabilities and penalties prescribed by law for the official misconduct in like cases of the Assistant Treasurer, for whom he acts.”

SECT. 305. — See notes, §§ 2095, 3659. “Either” in the 3d line was here substituted for “the” in the cited act. 1 Com. D. 178.

SECT. 307. — Debts due from the United States are not local assets at the seat of government only. *Wyman v. Halstead*, 109 U. S. 654; *Davis v. Chapman* (Va.), 1 S. E. Rep. 476. See note, § 1766.

## CHAPTER VI.

## THE REGISTER.

SECT. 312. — The Register still receives a salary of \$4000. 23 St. 170, 400.

SECT. 313. — 15 A. G. Op. 194.

SECT. 315. — “Effect” in the last line was here substituted for “legal force and validity” in the cited act. 1 Com. D. 181.

## CHAPTER VII.

## THE COMMISSIONER OF CUSTOMS.

SECT. 316. — The Commissioner of Customs still receives a salary of \$4000. 23 St. 168, 398. And see 18 St. 371, cited above, note to § 303, and 18 St. 4, ch. 11. This office was created by the cited act of 1849 (9 St. 396), prior to which act its duties were performed by the First Comptroller.

SECT. 317. — See notes, §§ 3625, 3743; 15 A. G. Op. 194. Amended by 19 St. 241, ch. 69, by adding the following:—

“And shall perform all the acts and exercise all the powers, relating to the receipts from customs and the accounts of collectors and the other officers of the customs or connected therewith, devolved by § 269 upon the First Comptroller in regard to other receipts and other accounts.”



## CHAPTER VIII.

## THE COMMISSIONER OF INTERNAL REVENUE.

SECT. 319. — The Commissioner's salary remains at \$6000. 23 St. 172, 403. As to the origin of this office, see note, § 380.

SECT. 321. — *Thacher v. United States*, 15 Blatch. 15. 23 St. 204, 493; 24 St. 521, making appropriations for detecting and bringing to trial and punishment persons guilty of violating the internal-revenue laws, or conniving at the same, including payments for information and detection of such violations, provides —

“And the Commissioner of Internal Revenue shall make a detailed statement to Congress once in each year as to how he has expended this sum, and also a detailed statement of all miscellaneous expenditures in the Bureau of Internal Revenue for which appropriation is made in this act.”

SECT. 322. — Substituted for the cited provision. 1 Com. D. 184. 15 A. G. Op. 6; 13 Id. 512. The Deputy Commissioner's salary is now \$3200. 23 St. 172, 403. St. Jan. 29, 1874, ch. 18 (18 St. 6), provides that there shall be only two Deputy Commissioners, one to be designated as First Deputy. 23 St. 403, in making an appropriation for 66 clerks at \$900 each in the Bureau of Internal Revenue, provides that thereafter no vacancies shall be filled in the grade of clerks at \$900 each in that Bureau until the number is reduced to 50.

## CHAPTER IX.

## THE COMPTROLLER OF THE CURRENCY.

SECT. 324. — See notes, §§ 5191, 5195, 5240. This office was established by the National Banking Act of June 3, 1864. A receiver of a national bank is appointed by the Comptroller under the general direction of the Secretary, and his appointment is in effect the appointment of the head of a Department within the meaning of the Constitution. *Frelinghuysen v. Baldwin*, 12 F. R. 395; *Price v. Abbott*, 17 F. R. 506. The Comptroller has no authority to submit the rights of the United States to litigation in any court in the absence of statutory authority therefor. *Case v. Terrell*, 11 Wall. 199, 202; *Van Antwerp v. Hubbard*, 7 Blatch. 426; 8 Id. 282.

SECT. 325. — The Comptroller's salary is still \$5000. 23 St. 170, 400.

SECT. 327. — 15 A. G. Op. 6. The Deputy's salary is now \$2800. 23 St. 170, 400. See also 18 St. 371, ch. 130, § 2.

SECT. 330. — Substituted for a part of the act of 1864 cited in the margin. Amended by 18 St. 316, ch. 80, by adding thereto —

“A description of the seal, with an impression thereof, and a certificate of approval by the Secretary of the Treasury, shall be filed in the office of the Secretary of State.”

SECT. 333. — Amended by the same act by inserting after “Congress” in the 2d line the words “at the commencement of its session.”

## CHAPTER X.

## THE BUREAU OF STATISTICS.

SECT. 334. — The officer in charge of the Bureau now receives \$3000, and the chief clerk \$2000. 23 St. 171, 401. The former office of director of this Bureau was abolished by St. July 20, 1868, and its duties intrusted to the Special Commissioner of the Revenue, whose term expired by limitation Jan. 1, 1869, since which date they appear to have devolved upon the division clerk mentioned in the text.

SECT. 335. — Amended by 19 St. 240, ch. 69, by striking out the word "agriculture" in the fourth line. The Bureau of Statistics appears to have originated in St. 1844. 1 Com. D. 189.

SECT. 337. — The duty of preparing the report was transferred from the Register to the Chief of the Bureau of Statistics by the cited act of 1866, and in the seventh clause of this section "Bureau of Statistics" is therefore substituted for "Register of the Treasury." 1 Com. D. 193.

SECT. 339. — 18 St. 343, ch. 129, § 1, provides —

"It shall be the duty of the officer in charge of the Bureau of Statistics to gather, collate, and annually report to the Secretary of the Treasury, for transmission to Congress, statistics and facts relating to commerce with foreign nations and among the several States, the railroad systems of this and other countries, the construction and operation of railroads, the actual cost of such construction and operation of railroads, the actual cost of transporting freights and passengers on railroads, and on canals, rivers, and other navigable waters of the United States, the charges imposed for such transportation of freight and passengers, and the tonnage transported; and the reports now by law required to be prepared and published monthly in the said Bureau of Statistics shall hereafter be prepared and published quarterly, under the direction of the Secretary of the Treasury."

St. March 3, 1875, ch. 129, § 1, par. 3 (18 St. 343) provides that the reports shall be published quarterly, and that there shall also be reported to Congress statistics and facts relating to foreign and domestic commerce and railroads, the actual cost of their construction and operation, cost of transportation on railroads and by water in the United States, the charges imposed and the tonnage transported.

## CHAPTER XI.

## BUREAU OF THE MINT.

SECT. 344. — 18 St. 85, ch. 328, § 1, provides that the salaries of the various mints shall be at the rates thereby appropriated for.

SECT. 345. — See *post*, Title 37, and the appropriation acts, 23 St. 175, 406. 21 St. 322, ch. 33, establishes an assay office at St. Louis.



## TITLE VIII.

## THE DEPARTMENT OF JUSTICE.

SECT. 346.—The appointment and duties of the Attorney-General were first prescribed by the Judiciary Act of 1789, § 35, the provisions of which are distributed in various parts of the Revised Statutes according to the subject-matter. 1 Com. D. 201. Although there is no express statutory authority for that purpose, yet the Attorney-General is invested with the general superintendence of all suits in which the United States is plaintiff, and may bring an action in its name to set aside and declare void an instrument issued under its apparent authority. *United States v. San Jacinto Tin Co.*, 125 U. S. 278; 1 Kent Com. 308.

SECT. 347.—The Solicitor-General's salary is now \$7000. 23 St. 192, 424.

SECT. 349.—The office of Naval Solicitor was abolished by 20 St. 178, ch. 329, § 1, par. 17. See note, § 416; 18 St. 4, ch. 11.

SECT. 351.—See note to § 169; 15 A. G. Op. 6. As to salaries, &c., see the appropriation acts, 23 St. 192, 424.

SECT. 352.—After the passage of the cited act of 1870, providing for suitable rooms in the Treasury building or in some other building in its vicinity, a removal was made of the business of the Department of Justice to independent quarters, and appropriations were made by Congress accordingly. 1 Com. D. 204.

SECT. 353.—St. Aug. 8, 1888 (25 St. 387), provides —

“That hereafter the commissions of all judicial officers, including marshals and attorneys of the United States, appointed by the President, by and with the advice and consent of the Senate, and all other commissions heretofore prepared at the Department of State upon the requisition of the Attorney-General, shall be made out and recorded in the Department of Justice, and shall be under the seal of said Department and countersigned by the Attorney-General, any laws to the contrary notwithstanding: *Provided*, That the said seal shall not be affixed to any such commission before the same shall have been signed by the President of the United States.”

SECT. 354.—19 St. 240, ch. 69, inserted “of” after “questions” in the second line.

SECT. 355.—“Purchase” here includes any mode by which the United States may acquire title, whether by purchase as ordinarily understood, or by condemnation and expropriation. *Ex parte Hebard*, 4 Dillon, 380; 7 A. G. Op. 114, 121. 20 St. 206, ch. 359, authorizing the Light-House Board to establish a small pier-head light on the pier of the Portage Lake Ship Canal, Lake Superior, and to lease so much of said pier as may be necessary for the purpose, excepts the structure from the operation of Rev. Stats. §§ 355, 4661, so far as title to the site and cession of jurisdiction are involved.

Sect. 355 originated in Joint Resolution of Sept. 11, 1841 (5 St. 468), by which the payment of the purchase-money of any site or land for the purpose of erecting buildings thereon was not made a condition subsequent to the consent of the Legislature to the purchase; but the expenditure of government money by the erection of buildings was prohibited until such consent was granted. It was not made the duty of the Attorney-General to investigate the fact of consent by the State Legislature. If a law of a State amounts to consent to the purchase of property, any exceptions, reservations, or qualifications in it are void. 10 A. G. Op. 34. This section does not forbid the purchase of land encumbered by unmaturing liens. In such cases the department should stipulate with



the vendors that the amount of purchase-money required to discharge the encumbrances shall be withheld until they are due, when, if they are paid by the vendors, such portion so retained shall be paid them, and if this is not done, the Government will apply it to their payment. 10 A. G. Op. 353. The purchase-money for land needed for public improvements may be paid, although the State Legislature has not consented to the purchase. 15 A. G. Op. 212; 10 Id. 35. See notes on §§ 1136, 1838; Sup. 267, 382.

Where land is donated or sold to the General Government as a site for a public building, for the construction of which an appropriation is made, the consent of the State Legislature to a grant, and not to the mere use of the land for a specified purpose, is now required before any part of the appropriation can be lawfully expended in the erection of the building. 16 A. G. Op. 414; 8 Id. 104, 118, 181, 388, 405, 418; 13 Id. 460. If a State law gives unreserved consent to the purchase, by Government, of land in the State, this statute is satisfied, although it is provided that all process issued under State authority shall be served thereon. 9 A. G. Op. 263. If a State gives consent to the purchase of land and expressly reserves all jurisdiction over it, expenditures are not authorized by this section. 8 A. G. Op. 33, 102. A constitutional convention is not the legislature within the meaning of this section, and an ordinance passed by it is not a valid consent to the purchase of land. 12 A. G. Op. 428. This section does not require that the State shall cede its jurisdiction and make that of the United States exclusive. If the Legislature consents to the purchase, the eighth section of the Constitution provides for exercising exclusive legislation, which is full jurisdiction "over all places purchased by the consent of the Legislature of the State in which the same shall be." 9 A. G. Op. 129. But this provision does not apply to land ceded by a State, but not purchased; in which case the State, while granting exclusive jurisdiction, may reserve the right to tax the property and franchises of corporations situated within the ceded territory. *Fort Leavenworth R. Co. v. Lowe*, 114 U. S. 525. In passing upon titles to land for the Government, the Attorney-General cannot relax the rules of law on account of the advantages the purchase may give. 6 A. G. Op. 432.

The Federal Government may take private property for a public purpose under the right of eminent domain, and may delegate the power to fix the compensation to a tribunal created under State laws, or it may create a special tribunal for the purpose. *Fort Leavenworth R. Co. v. Lowe*, 114 U. S. 525; *United States v. Jones*, 109 Id. 513; 48 Wis. 513; *Kohl v. United States*, 91 U. S. 367; *United States v. Fox*, 94 U. S. 320; *Great Falls Manuf. Co. v. Garland*, 25 F. R. 521; *Avery v. Fox*, 1 Abb. U. S. 246; *Sweaney v. United States*, 62 Wis. 396; *Re United States Petition*, 96 N. Y. 227; 16 A. G. Op. 543. The estate acquired may be a fee simple or in the nature of an easement. 16 A. G. Op. 387. But the right of acquiring lands by eminent domain, which calls for a judicial proceeding, is to be resorted to only in cases where provision is made therefor by statute. 16 A. G. Op. 370. A State Legislature may make such provision on behalf of the Federal Government. *Re United States*, 96 N. Y. 227. The provision of 22 St. 168, ch. 294, authorizing land not donated to be taken to increase the water supply of the city of Washington, and the compensation to be ascertained, not by a jury, but by the Court of Claims, is constitutional, although it authorizes the taking before the ascertainment and payment of compensation. *Great Falls Manuf. Co. v. Garland*, 25 F. R. 521.

See 22 St. 122. The act of Aug. 1, 1888, ch. 728 (25 St. 357), provides:—

"That in every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses he shall be, and hereby is, authorized to acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so, and the United States circuit or district courts of the district wherein such real estate is located, shall have jurisdiction of proceedings for such condemnation, and it shall be the duty



of the Attorney-General of the United States, upon every application of the Secretary of the Treasury, under this act, or such other officer, to cause proceedings to be commenced for condemnation, within thirty days from the receipt of the application at the Department of Justice.

“SEC. 2. The practice, pleadings, forms and modes of proceeding in causes arising under the provisions of this act shall conform, as near as may be, to the practice, pleadings, forms and proceedings existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of the court to the contrary notwithstanding.”

SECT. 356.—If the question proposed does not arise in the administration of a department, the Attorney-General is not authorized to give an official opinion in response to a call from its head, though made at the request of a committee of Congress. 15 A. G. Op. 138; 10 Id. 267. The response may be that the question presented is sufficiently serious and doubtful fairly to call for a judicial decision, although, in a matter of public interest pending in one executive department, it is inexpedient for the Attorney-General to advise another executive department to prosecute an appeal. 15 A. G. Op. 461, 574; 16 Id. 404. The Attorney-General cannot entertain appeals from the decisions of heads of departments. 6 Id. 289. And if a department has determined a question of law and the case is no longer before it, the Attorney-General will not give an opinion upon it. 12 Id. 433; 9 Id. 421. A case referred to the Attorney-General by the head of a department, at the request of a subordinate officer thereof, and which the law makes it the duty of such subordinate to decide, is not within the law, and no opinion can be given thereon. 11 Id. 4. The Attorney-General is not authorized to give an opinion concerning the weight and credibility of testimony offered in support of a claim. 14 A. G. Op. 54. He will not give an opinion as to the sufficiency of the grounds upon which the judgment of a court of competent jurisdiction is based (10 Id. 347); or answer abstract or hypothetical questions of law (13 Id. 531, 568); or act as arbitrator between an individual and the government, or render an award (1 Id. 209); or investigate the truth of an alleged fraudulent collusion to obtain money from the Treasury (1 Id. 253); or settle a controversy involving matters of fact. 12 Id. 206. He is not authorized to give legal opinions at the call of either house of Congress, or of Congress itself, or concerning any matters pending in Congress upon the request of any committee thereof. 12 Id. 544; 14 Id. 17; 15 Id. 475. He cannot, under the Constitution, make the United States a party to a suit in the supreme court between different States. *Florida v. Georgia*, 17 How. 478, 491. He is not bound to advise the regents of the Smithsonian Institution, although the statutes make him a member of the Institution (6 Id. 24); or to consider a question concerning the Board of Health of the District of Columbia, not arising in the administration of any of the executive departments. 13 Id. 535. An application for a pardon presents only a question of fact, upon which the Attorney-General is not authorized to give official opinions to any department. 14 Id. 20, and references therein. Where the Assistant Attorney-General attached to the Interior Department, having prepared an opinion upon a case referred to him by the Secretary thereof, submitted it to the Attorney-General, the latter refused to approve or disapprove it because he was not called upon by the President or by the head of a department, and his opinion was not authorized by law. 14 Id. 21.

SECT. 359.—*United States v. Lawrence*, 13 Blatch. 295, 305. This section was framed, on the basis of the acts cited, to state a general rule to be followed in the absence of particular directions, and yet leave the subject under the Attorney-General's control. 1 Com. D. 206. The Attorney-General's authority to “conduct and argue” suits includes all acts which an attorney-at-law may rightfully do in private suits, except the admission of adverse facts not officially known to him; thus, *e. g.*, he may stipulate that a judgment for the government shall be set aside, if the Supreme Court shall hold adversely to it in a similar case. *Campbell v. United States*, 19 Ct. Cl. 426. It is not the Attorney-



General's duty to attend to a case in the Supreme Court in which a private citizen is plaintiff, and the sergeant-at-arms of the House of Representatives defendant. 5 A. G. Op. 720. Neither an order of the President nor a direction of the Attorney-General can restrict or enlarge the jurisdiction of the courts. In determining the extent of such jurisdiction, the courts look to the law, and within that jurisdiction they are free from the control of any other department of the government. *United States v. Lawrence*, 13 Blatch. 295, 305. Since the enactment of this section, in a cause moved for trial by a United States district attorney, it is inconsistent to aver that such motion is made in opposition to the directions of the Attorney-General; for when, having knowledge of the moving of a criminal trial, he permits the moving thereof, he in law directs the same, and the court must consider the trial as moved by the government. *Id.* 305. 24 St. 477, ch. 340, § 4, makes it the duty of the Attorney-General to enforce, by bill in equity or other proper process, forfeitures of property acquired, held, or owned in violation of that act, which restricts the ownership of real estate to American citizens in the Territories and in the District of Columbia. By 22 St. 485, ch. 116, § 5, the Attorney-General, or his assistants, is to appear and protect the interests of the United States in cases transmitted to the Court of Claims under that act, which is for the relief of Congress and the departments in the investigation of claims.

SECT. 361. — The practice of the departments is to heed the advice of the Attorneys-General, although its effect is not declared by statute. 5 A. G. Op. 97.

SECT. 362. — This act did not transfer the settlement of the accounts of district attorneys and marshals from the Secretary of the Interior to the Attorney-General. 10 A. G. Op. 95.

SECT. 363. — *Townsend v. United States*, 22 Ct. Cl. 207. Counsel retained by the government to discharge a stipulated professional duty may be lawfully paid therefor, in whole or in part, before or during its performance, and in anticipation of its completion. 7 A. G. Op. 686.

SECTS. 365, 366. — These provisions are prospective in their operation. 15 A. G. Op. 169. The words "as an attorney or counsellor" in the third line of § 365 were here added. 1 Com. D. 207. Peculiar services, such as the examination of title to land, are not strictly within the letter or the spirit of § 365; and it is competent for the head of a department, in his discretion, to employ a conveyancer or attorney to perform them. 13 A. G. Op. 580. The Secretary of War is not authorized to employ counsel to appear in habeas corpus proceedings without the consent of the Attorney-General, and a claim for services therein cannot be allowed without the latter's approval. *Id.* The Attorney-General is not authorized to stipulate to pay an attorney, under the name of a fee, a sum which, as is understood beforehand, is much larger than the required professional services can be worth, and is intended to cover, in addition thereto, services not professional. Nor is he empowered to contract for the collection of claims of the United States, stipulating to pay for such service a part of the money recovered. 14 *Id.* 655.

SECT. 368. — See notes, §§ 824, 833. Under this provision the decision of the Attorney-General is conclusive, and not subject to collateral attack in the courts. *Schloss v. Hewlett*, 81 Ala. 266. But in such a case as that provided for by the last clause of R. S. § 824, of an allowance to the district attorney of a counsel fee, such allowance, involving an exercise of discretion by the court before which the case is tried, cannot be reduced by the Attorney-General or by the accounting officers. *Waters v. United States*, 21 Ct. Cl. 30. By 20 St. 7, ch. 1, the United States attorney in the District of Columbia is to make emolument returns to the Attorney-General, and his accounts are to be rendered, audited, and paid in the same manner as the accounts of other district attorneys are rendered, audited, and paid.

SECT. 370. — The words "or Territory" were here added. 1 Com. D. 208.



SECT. 372. — Parts of §§ 1, 2, of the cited act of 1830 are omitted as obsolete. 1 Com. D. 209.

SECT. 374. — Substituted for a clause in the provision cited. 1 Com. D. 210.

SECT. 377. — The Solicitor of the Treasury may grant indulgences upon custom-house bonds, by instructions to district attorneys in whose hands they may be for prosecution. This may be done conditionally in advance. 3 A. G. Op. 247. See R. S., § 2778. A district attorney is not authorized to institute a suit in the name of the Government without instructions, except in a case of urgency, which he is bound to communicate to the proper officer immediately, in order that he may be instructed concerning it. 8 A. G. Op. 454.

SECT. 380. — See note, § 299; *Frelinghuysen v. Baldwin*, 12 F. R. 396. The original superintendence of the collection of debts due the United States, &c., seems to have been conferred upon the Comptroller of the Treasury; but as the volume of such business increased, the superintendence of classes of claims was conferred upon other officers, as, *e. g.*, upon the Solicitor of the Treasury, by St. May 29, 1830, ch. 153 (4 St. 414); upon the Auditor of the Post-Office Department by St. July 2, 1836, ch. 270, §§ 14, 16 (5 St. 82); upon the Commissioner of Internal Revenue by St. March 2, 1867, §§ 3, 4 (14 St. 471), and St. July 1, 1862, ch. 119 (12 St. 432). 1 Com. D. 189.

SECT. 380 is directory, and cannot be set up by stockholders to defeat a suit against them by a receiver acting with private counsel with the approval of the Treasury officers. *Kennedy v. Gibson*, 8 Wall. 498. The appointment of special counsel by the receiver of an insolvent national bank, which is sanctioned by the comptroller, does not affect the district attorney's right to compensation for his services in suits to which the receiver was a party, the services having been diligently and fully performed, so far as the receiver would permit. *Gibson v. Peters*, 35 F. R. 721.

SECT. 384. — See note, § 193. By 18 St. 85, ch. 328, § 1, par. 29, the Attorney-General is to report, in detail, the items, amounts, and causes of expenditure of the contingent expenses of his department to Congress annually; and by 21 St. 43, ch. 52, § 3, he is to include in his annual report all payments of expenditures during any fiscal year out of any appropriation fund subject to requisitions by him. 24 St. 507, ch. 359, § 11, providing for the bringing of suits against the United States, directs the Attorney-General to report to Congress, at the beginning of each session, the suits under that act in which a final judgment or decree has been rendered, giving the date of each, and a statement of the costs taxed in each case.

SECT. 386. — See 18 St. 113, ch. 333, §§ 6, 7; 20 St. 251, Res. 22, providing for the distribution of the laws of the United States. 22 St. 336, provides —

“To supply district judges, district attorneys, and clerks of the United States courts who have not already received the same with the Revised Statutes of the United States, and the annual statutes published since the first revision, a sufficient sum of money is hereby appropriated, *Provided*, That all statutes heretofore or hereafter furnished by the United States to district judges, district attorneys, and clerks of the United States courts under this or any other law, shall not become the property of these officers, but on the expiration of their official term shall be by them turned over and delivered to their respective successors in office, and the following provision in the act making appropriations for sundry civil expenses of the government for the fiscal year ending June 30, 1882, and for other purposes, approved March 3, 1881, namely ‘To supply district judges and district attorneys, who have not already received the same, with the reports of the Supreme Court and Statutes at Large of the United States, and also to furnish complete sets of the same, where there are none, to such points where United States courts are authorized to be held and to supply broken sets where there are missing volumes, a sufficient sum of money is hereby appropriated,’ be and the same is hereby repealed.”

So much of § 386 as charges the Department of Justice with the distribution of the Supreme Court reports was repealed by 25 St. 662.

## TITLE IX.

## THE POST-OFFICE DEPARTMENT.

**SECT. 389.** — The salary of each Assistant Postmaster-General continues to be \$4,000. 23 St. 190, 422; 18 St. 4, ch. 11. The duties of assistant secretaries and assistant postmasters-general, not being specifically assigned by law, are left to the direction of the superior officers. *McCullum v. United States*, 17 Ct. Cl. 92. 19 St. 335, ch. 103, provides —

“**SECT. 2.** That from and after the passage of this act the bonds of all postmasters may by the direction of the Postmaster-General be approved and accepted, and the approval and acceptance signed by the First Assistant Postmaster-General in the name of the Postmaster-General; and all contracts for stationery, wrapping-paper, letter-balances, scales, and street letter-boxes, for the use of the postal service may be signed in like manner by the First Assistant Postmaster-General in the place and stead of the Postmaster-General, and his signature shall be attested by the seal of the Post-Office Department.

“**SECT. 3.** That the Second Assistant Postmaster-General on the order of the Postmaster-General may sign with his name, in the place and stead of the Postmaster-General, and attest his signature by the seal of the Post-Office Department, all contracts made in the said Department for mail transportation and for supplies of mail-bags, mail-catchers, mail-locks, and keys and all other articles necessary and incidental to mail-transportation.

“**SECT. 4.** That the Third Assistant Postmaster-General, when directed by the Postmaster-General, may also sign, in his name, in the place and stead of the Postmaster-General, and attest his signature by the seal of the Post-Office Department, all contracts for supplies of postage-stamps, stamped envelopes, newspaper-wrappers, postal-cards, registered-package envelopes, locks, seals, and official envelopes for the use of postmasters, and return of dead letters, that may be required for the postal service.”

22 St. 4, ch. 16, provides —

“That the Postmaster-General may, by appointment under his hand and official seal, delegate to the Third Assistant Postmaster-General authority to sign in his stead all warrants, registered and countersigned by the Auditor of the Treasury for the Post-Office Department, for the payment of money from the public Treasury on account of the postal service.

“**SECT. 2.** That warrants signed by the said Third Assistant Postmaster-General shall be in all cases of the same validity as if they had been signed by the Postmaster-General himself.”

**SECT. 390.** — The salary of Assistant Attorney-General of the Post-Office Department remains at \$4,000. 23 St. 192, 424.

**SECTS. 391, 392.** — Amended by 18 St. 19, ch. 46, providing that the officer shall be one authorized to administer oaths by the laws of the United States, or of any State or Territory; that the oath or affirmation shall include support of the Constitution of the United States, and

“May be taken before any officer, civil or military, holding a commission under the United States, and such officer is hereby authorized to administer and certify such oath or affirmation.”

**SECT. 393.** — Compare the appropriation acts, 23 St. 190, 422; 18 St. 4, ch. 11.

**SECT. 394.** — This provision, without proviso, is repeated and continued in the appropriation act, 18 St. 231, ch. 456, § 1.

**SECT. 396.** — See note, § 389. By 19 St. 143, ch. 287, § 9; *Id.* 319, ch. 102, § 2; 20 St. 359, § 2, and 21 St. 385, ch. 130, § 2, —

“The Secretaries, respectively, of the Departments of State, of the Treasury, War, Navy, and of the Interior, and the Attorney-General, are authorized to make requisitions upon the Postmaster-General



for the necessary amount of official postage-stamps for the use of their departments, not exceeding the amount stated in the estimates submitted to Congress; and upon presentation of proper vouchers therefor at the Treasury, the amount thereof shall be credited to the appropriation for the service of the Post-Office Department for the same year."

CL. 8. — The Postmaster-General's failure to sue for balances due from postmasters within the time prescribed by law may render him personally chargeable with such balances, but does not discharge the postmasters or their sureties from liability upon their official bonds to the government; nor does an order from the department directing a postmaster to retain the balances due until drawn for by the general Post-Office work such discharge. *Locke v. United States*, 3 Mason, 446; *Dox v. Postmaster-General*, 1 Pet. 317. The Postmaster-General may discontinue post-offices. *Ware v. United States*, 4 Wall. 617. A mandamus may issue to enforce performance of a purely ministerial act by the Postmaster-General, which neither he nor the President has authority to deny or control. *Kendall v. United States*, 12 Pet. 524; *Ex parte Hoyt*, 13 Id. 279; *Ex parte De Groot*, 6 Wall. 479; *Mississippi v. Johnson*, 4 Id. 475, 498. In this respect the courts of the District of Columbia have a larger power than the circuit courts. *Gaines v. Thompson*, 7 Id. 350. But mandamus will not lie to compel acts by any head of a department requiring discretion or judgment, such as the readjustment of a postmaster's salary as fixed by a preceding Postmaster-General (*United States v. Key*, 3 Mac Arthur, 328, 337); or an order by the Secretary of the Interior to the Commissioner of the Land Office to cancel an entry for land (*Gaines v. Thompson*, 7 Wall. 347; see *Secretary v. McGarrahan*, 9 Id. 298; *Litchfield v. Register*, Id. 571; *United States v. Guthrie*, 17 How. 284; *Commissioner of Patents v. Whiteley*, 4 Wall. 522); or an order by the Secretary of the Treasury to draw a warrant for the payment of money when the law allows him a discretion in making the payment. *United States v. Boutwell*, 3 Mac Arthur, 172.

SECT. 397. — The final words of the cited provision (after "fuel" at the end of this section), "which shall be accounted for as now provided by law," were omitted in the Revision. 1 Com. D. 221.

SECT. 398. — *Postmaster-General v. Early*, 12 Wheat. 136; 15 A. G. Op. 484. This section does not authorize the Postmaster-General to negotiate a postal convention providing for the payment of indemnity for the loss of registered letters or articles. 15 A. G. Op. 462.

SECT. 403. — Under the various acts establishing and regulating the Post-Office Department, and especially under St. April 30, 1810, ch. 37, § 29, which directs the Postmaster-General to cause a suit to be commenced against any postmaster who does not duly render his accounts, and pay over the balance to the Postmaster-General; and provides "that all suits which shall hereafter be commenced for the recovery of debts or balances due to the general Post-Office, whether they appear by bond or obligations made in the name of the existing or any preceding Postmaster-General, or otherwise, shall be instituted in the name of the Postmaster-General of the United States," it was held that the Postmaster-General could lawfully take from a deputy Postmaster-General a bond conditioned "to pay all moneys that shall come to his hands for the postages of whatever is by law chargeable with postage, to the Postmaster-General of the United States for the time being," &c. *Postmaster-General v. Early*, 12 Wheat. 136.

SECT. 406. — 15 A. G. Op. 485. See note, § 3674.

SECT. 409. — This section authorizes the Auditor for the Post-Office Department to mitigate or remit any fine, penalty, or forfeiture arising out of the operations or business of the postal service, with the written consent of the Postmaster-General. 14 A. G. Op. 179. Where the agreement with a mail contractor stipulated that "in all cases there is to be a forfeiture of the pay of a trip when the trip is not run," it was held competent for the

Postmaster-General to waive the forfeiture provided for, in any case arising upon the agreement, according as it seemed to him just and proper under the particular circumstances. 14 A. G. Op. 179. With the written consent of the Postmaster-General the Sixth Auditor may compromise, release, and discharge a claim for a penalty for the violation of the postal laws. 13 Id. 540. The discretion vested in the Postmaster-General by this section is to be exercised on ascertaining the fact that the interests of the department require it. 16 Id. 484.

SECT. 413. — The sixth clause of this section clearly implies a right in the Postmaster-General to remit a fine or deduction arising out of a contract for the transportation of the mail. 14 A. G. Op. 179. 22 St. 253 provides —

“hereafter the annual report of the Postmaster-General shall not be published in said Official Postal Guide. . . . And the Postmaster-General may authorize the publication and sale of post-route maps to individuals at the cost thereof, the proceeds of said sales to be applied as a further appropriation for said purpose.”

SECT. 414. — By 20 St. 453, ch. 180, §§ 2, 6, the estimate for postal-car service is to be separated from the general estimates, and the report to Congress shall include recommendations founded upon data obtained from railroad companies. By 18 St. 343, ch. 129, § 3, estimates for appropriations are to be furnished to the Secretary of the Treasury by Oct. 1 of each year, and certain abstracts are to be included in the Book of Estimates. See also 21 St. 331.

23 St. 156, 385, making appropriations for the Offices of Postmaster-General and the Assistant Postmaster-Generals, provides —

“Post-office inspectors shall be allowed \$4 per day in lieu of the charges now permitted, for personal expenses; and not exceeding \$5000 of this amount may be expended for fees to United States attorneys, marshals, clerks of courts, and counsel necessarily employed by post-office inspectors of the Post-office Department, subject to approval by the Attorney-General. . . . The Postmaster-General is authorized to designate postmasters at money-order post-offices as disbursing officers for the payment of the salaries of officers and employees of the postal service, and for such other payments as postmasters are now authorized to make from postal revenues. . . . Postmasters are authorized, with the approval of the Postmaster-General, to assign at any time any clerk or employee of their respective post-offices to duty in any branch thereof: *Provided always*, That any employee shall be paid from money-order funds for such time as he is engaged in money-order work.”



## TITLE X.

## THE DEPARTMENT OF THE NAVY.

SECT. 416. — As to employees and salaries, see 23 St. 183, 413; 18 St. 11, ch. 4. 21 St. 164, ch. 129, provides for the appointment, for the term of four years, from the officers of the Navy or the Marine Corps, of a judge-advocate-general of the Navy, whose office shall be in the Navy Department. 22 St. 550 repeals the provision of Aug. 5, 1882, authorizing the appointment of an Assistant Secretary of the Navy. A writ of prohibition does not lie to the Secretary of the Navy convening a naval court-martial. *Smith v. Whitney*, 116 U. S. 167; *United States v. Whitney*, 4 Mackey, 535. 21 St. 290, ch. 249, provides for the pay of machinists honorably discharged from the Navy. 23 St. 295, ch. 43, § 3, provides —

“That the Secretary of the Navy is hereby directed to report to Congress, at its next and each regular session thereafter, the amount expended during the prior fiscal year, from the appropriations for the pay of the Navy, Bureaus of Navigation, Ordnance, Equipment and Recruiting, Yards and Docks, Medicine and Surgery, Provisions and Clothing, Construction and Repair, and Steam-Engineering, for civilians employed on clerical duty, or in any other capacity than as ordinary mechanics and workmen, and to submit, under the estimates for pay of the Navy and for the respective Bureaus enumerated above, specific estimates for such civilian employees for the fiscal year 1887, and each fiscal year thereafter.”

SECT. 417. — By 18 St. 121, ch. 339, vessels of the Navy, &c., may be furnished, upon the written application of the Governor of the State, for nautical schools at New York, Boston, Philadelphia, Baltimore, Norfolk, and San Francisco; officers of the Navy may be detailed as superintendents of, or instructors in, such schools, which shall not be used as places of punishment. 21 St. 505, ch. 141, extends the act of 1874 to the ports of Wilmington, Charlestown, Savannah, Mobile, New Orleans, Baton Rouge, Galveston, and in Narragansett Bay. The Secretary of the Navy cannot grant to a city the right to construct and maintain a sewer upon the grounds of a United States naval hospital. 16 A. G. Op. 152.

SECT. 420. — A part of § 8 of the cited act of 1842 was omitted from the Revision as conferring powers exhausted by their first exercise. 1 Com. D. 234.

SECT. 421. — *Smith v. Whitney*, 116 U. S. 179. The cited acts of 1862 and 1871 are here so treated that the President may make a given appointment either from the class indicated by the act of 1862, or from that indicated by the act of 1871, as he judges best. 1 Com. D. 235. Contracts made by the United States, through the Secretary of the Navy, to furnish provisions for the naval service, cannot be rescinded by the chief of the bureau having charge of such contracts and supplies, without the sanction of the head of the department. *United States v. Shaw*, 1 Cliff. 317. The term of office of the chief of a bureau appointed to fill a vacancy, whose commission was limited to the end of the next session of the Senate, and who at the next session (extra) was nominated by the President for the term of four years and was confirmed at the ensuing session of the Senate, begins with his confirmation, notwithstanding language to the contrary in the nomination and confirmation. 16 A. G. Op. 657.

SECT. 426. — *Wales v. Whitney*, 114 U. S. 564.

SECT. 429, cl. 1.—Abbreviated and modified from the cited provision of 1820, the part of which relating to the Secretary of War, is stated in the Revision in connection with his department. 1 Com. D. 237.

CL. 3.—“Showing” in the first line is here added, and the words “and showing” in the fifth line are here substituted for “a statement of” in the original act. 1 Com. D. 237. The provisions of 2 St. 536, ch. 28, § 5; 5 St. 401, ch. 51, § 4; and 17 St. 154 ch. 195, § 2, were also considered in connection with this section. Id.

20 St. 167, ch. 311, requires the Secretary of the Treasury to transmit to Congress annually a tabular statement of the receipts and expenditures in the naval service under each appropriation, together with an account of balances in the hands of disbursing agents, and a report of any amounts lost or unaccounted for by voucher. See also 21 St. 331, ch. 73.

SECT. 430.—18 St. 297, ch. 18, provides —

“That no allowance shall be made in the settlement of any account for travelling expenses [*of officers travelling under orders*] unless the same be incurred on the order of the Secretary of the Navy, or the allowance be approved by him.”

20 St. 355, ch. 180, § 1, provides —

“The Superintendent of Railway Mail Service and the Chief of Special Agents shall be paid their actual expenses while travelling on the business of the department.”

SECT. 432.—See note, § 226. The Nautical Almanac is a “nautical book.” 16 A. G. Op. 127.

SECT. 436.—See Res. 10, of Feb. 11, 1880 (21 St. 301); 16 A. G. Op. 127.



## TITLE XI.

## THE DEPARTMENT OF THE INTERIOR.

## CHAPTER I.

## THE DEPARTMENT.

SECT. 438. — The salary of the Assistant Secretary is now \$4000. 23 St. 185, 415; 18 St. 4, ch. 11.

SECT. 439. — 23 St. 497, provides —

“For an additional Assistant Secretary of the Interior, who shall be known and designated as First Assistant Secretary of the Interior, \$4500.”

SECT. 440. — As to employees and salaries, see 23 St. 185, 415. By 22 St. 391, Res. 62 and 642, Res. 25, 200 copies of the second edition of the U. S. Revised Statutes are to be delivered to the Secretary of the Interior for use in his Department. 18 St. 402, ch. 131, § 14, provides —

“That hereafter the commissions of all officers under the direction of and control of the Secretary of the Interior shall be made out and recorded in the Department of the Interior, and the seal of the said Department affixed thereto; any laws to the contrary notwithstanding: *Provided*, That the said seal shall not be affixed to any such commission before the same shall have been signed by the President of the United States. And all commissions heretofore issued in conformity to the provisions of § 3 of the act of May 31, 1854, and all official acts done by officers thus commissioned are hereby declared legal and valid.”

## CHAPTER II.

## THE SECRETARY OF THE INTERIOR.

SECT. 441. — See notes, §§ 481, 2057, 2071, 2103; *Pengra v. Munz*, 29 F. R. 835. The office of Director of the Geological Survey, salary \$6000, is established under the Interior Department by St. 1879, March 3, ch. 182, § 1 (20 St. 377). As to the officers and employees in this Department, see 23 St. 180, 420. 20 St. 169, ch. 316, establishes the office of Auditor of Railroad Accounts, now styled Commissioner of Railroads (21 St. 385, ch. 130, § 1; 23 St. 188, 419), as a bureau of the Interior Department, the Auditor to receive a salary of \$5000, and to be appointed by the President with the advice and consent of the Senate, &c. By 24 St. 386, ch. 104, § 18, the Secretary of the Interior is to furnish offices and necessary office supplies to the Interstate Commerce Commission, and to approve its employees and fix their compensation. By 22 St. 405, § 4, he is to supply accommodations for the Civil Service Commission. 24 St. 525 provides for the removal to the Pension Building of the General Land Office, Bureau of Education, Office of Commissioner of Railroads, and Bureau of Labor, and the vacating of the buildings rented for and then occupied by said offices and Bureaus, or portions thereof. 20 St. 473, ch. 195, establishes the Census Office in the Interior Department. And 20 St. 377,

ch. 182, establishes under this department the office of Director of the Geological Survey. St. June 27, 1884, ch. 127 (23 St. 60), provides—

“That there shall be established in the Department of the Interior a Bureau of Labor, which shall be under the charge of a Commissioner of Labor, who shall be appointed by the President, by and with the advice and consent of the Senate. The Commissioner of Labor shall hold his office for four years, and until his successor shall be appointed and qualified, unless sooner removed, and shall receive a salary of \$3000 a year. The Commissioner shall collect information upon the subject of labor, its relation to capital, the hours of labor, and the earnings of laboring men and women, and the means of promoting their material, social, intellectual, and moral prosperity. The Secretary of the Interior upon the recommendation of said Commissioner, shall appoint a chief clerk, who shall receive a salary of \$2000 per annum, and such other employees as may be necessary for the said Bureau: *Provided*, That the total expense shall not exceed \$25,000 per annum. During the necessary absence of the Commissioner, or when the office shall become vacant, the chief clerk shall perform the duties of Commissioner. The Commissioner shall annually make a report in writing to the Secretary of the Interior of the information collected and collated by him, and containing such recommendations as he may deem calculated to promote the efficiency of the Bureau.”

23 St. 419 provides, as to this Bureau,—

“And the Secretary of the Interior shall in submitting the estimates annually for the expenses of this Bureau give in detail the number and salaries of officers and employees therein.”

24 St. 346, Res. 29 directs the Commissioner of Labor, under the direction of the Secretary of the Interior, to investigate and report upon convict labor in the penal institutions of the States and Territories and the District of Columbia. St. June 13, 1888. (25 St. 182), establishes a Department of Labor, as follows:—

“That there shall be at the seat of Government a Department of Labor, the general design and duties of which shall be to acquire and diffuse among the people of the United States useful information on subjects connected with labor, in the most general and comprehensive sense of that word, and especially upon its relation to capital, the hours of labor, the earnings of laboring men and women, and the means of promoting their material, social, intellectual, and moral prosperity.

“SEC. 2. That the Department of Labor shall be under the charge of a Commissioner of Labor, who shall be appointed by the President, by and with the advice and consent of the Senate; he shall hold his office for four years, unless sooner removed, and shall receive a salary of \$5000 per annum.

“SEC. 3. That there shall be in the Department of Labor, to be appointed by the Commissioner of Labor: One chief clerk, at a salary of \$2500 per annum; four clerks of class four, all to be statistical experts; five clerks of class three, one of whom may be a stenographer; six clerks of class two, one of whom may be a translator and one of whom may be a stenographer; eight clerks of class one; five clerks, at \$1000 per annum; one disbursing clerk, who shall also have charge of accounts, at a salary of \$1800 per annum; two copyists, at \$900 each per annum; two copyists, at \$720 each per annum; one messenger; one assistant messenger; one watchman; two assistant watchmen; two skilled laborers, at \$600 each per annum; two char-women, at \$240 each per annum; six special agents, at \$1600 each per annum; ten special agents, at \$1400 each per annum; four special agents, at \$1200 each per annum, and an allowance to special agents for travelling expenses not to exceed \$3 per day while actually employed in the field and outside of the District of Columbia, exclusive of actual transportation including sleeping-car fares; and such temporary experts, assistants, and other employees as Congress may from time to time provide, with compensation corresponding to that of similar officers and employees in other departments of the Government.

“SEC. 4. That during the necessary absence of the Commissioner, or when the office shall become vacant, the chief clerk shall perform the duties of Commissioner.

“SEC. 5. That the disbursing clerk shall, before entering upon his duties, give bond to the Treasurer of the United States in the sum of \$20,000, which bond shall be conditioned that the said officer shall render a true and faithful account to the Treasurer, quarter yearly, of all moneys and properties which shall be by him received by virtue of his office, with sureties to be approved by the Solicitor of the Treasury. Such bond shall be filed in the office of the First Comptroller of the Treasury, to be by him put in suit upon any breach of the conditions thereof.

“SEC. 6. That the Commissioner of Labor shall have charge in the building or premises occupied by or appropriated to the Department of Labor, of the library, furniture, fixtures, records, and other property pertaining to it, or hereafter acquired for use in its business, and he shall be allowed to expend



for periodicals and the purposes of the library, and for the rental of appropriate quarters for the accommodation of the Department of Labor within the District of Columbia, and for all other incidental expenses, such sums as Congress may provide from time to time.

"SEC. 7. That the Commissioner of Labor, in accordance with the general design and duties referred to in section one of this act, is specially charged to ascertain, at as early a date as possible, and whenever industrial changes shall make it essential, the cost of producing articles at the time dutiable in the United States, in leading countries where such articles are produced, by fully-specified units of production, and under a classification showing the different elements of cost, or approximate cost, of such articles of production, including the wages paid in such industries per day, week, month, or year, or by the piece; and hours employed per day, and the profits of the manufacturers and producers of such articles; and the comparative cost of living, and the kind of living. 'It shall be the duty of the Commissioner also to ascertain and report as to the effect of the customs laws, and the effect thereon of the state of the currency, in the United States, on the agricultural industry, especially as to its effect on mortgage indebtedness of farmers;' and what articles are controlled by Trusts, or other combinations of capital, business operations, or labor, and what effect said trusts, or other combinations of capital, business operations, or labor have on production and prices. He shall also establish a system of reports by which, at intervals of not less than two years, he can report the general condition, so far as production is concerned, of the leading industries of the country. The Commissioner of Labor is also specially charged to investigate the causes of, and facts relating to, all controversies and disputes between employers and employees as they may occur, and which may tend to interfere with the welfare of the people of the different States, and report thereon to Congress. The Commissioner of Labor shall also obtain such information upon the various subjects committed to him as he may deem desirable from different foreign nations, and what, if any, convict made goods are imported into this country, and if so from whence.

"SEC. 8. That the Commissioner of Labor shall annually make a report in writing to the President and Congress, of the information collected and collated by him, and containing such recommendations as he may deem calculated to promote the efficiency of the Department. He is also authorized to make special reports on particular subjects whenever required to do so by the President or either House of Congress, or when he shall think the subject in his charge requires it. He shall, on or before the fifteenth day of December in each year, make a report in detail to Congress of all moneys expended under his direction during the preceding fiscal year.

"SEC. 9. That all laws and parts of laws relating to the Bureau of Labor created under the act of Congress approved June 27, 1884, so far as the same are applicable and not in conflict with this act, and only so far, are continued in full force and effect, and the Commissioner of Labor appointed under said act, approved June 27, 1884, and all clerks and employees in the Bureau of Labor authorized to be appointed by said act or subsequent acts, shall continue in office and employment as if appointed under the provisions of this act, and until a Commissioner of Labor, other officer, clerks, and employees are appointed and qualified as herein required and provided; and the Bureau of Labor, as now organized and existing, shall continue its work as the Department of Labor until the Department of Labor shall be organized in accordance with this act; and the library, records, and all property now in use by the said Bureau of Labor are hereby transferred to the custody of the Department of Labor hereby created, and on the organization of the Department of Labor on the basis of this act the functions of the Bureau of Labor shall cease.

"SEC. 10. That on the passage of this act the Commissioner of Labor shall at once submit estimates for the expenses of the Department of Labor for the next fiscal year, giving in detail the number and salaries of officers and employees therein."

St. Oct. 12, 1888, provides —

"That from and after the passage of this act the Secretary of the Interior, through the Commissioner of Public Lands, be, and he is hereby authorized to sell the photolithographic township plats or maps of the States and Territories now remaining on hand in that Department to citizens of the United States at the following prices: Authenticated copies, fifty cents per copy; unauthenticated copies, twenty-five cents per copy; the proceeds of said sales to be covered into the Treasury of the United States by the Secretary of the Interior."

*Cahn v. Barnes*, 5 F. R. 331; *United States v. Odeneal*, 10 Id. 618. The Secretary of the Interior has a power of supervision and appeal in all matters relating to the General Land Office (see the next chapter), which is coextensive with the Commissioner's authority to adjudge; and when the Secretary's authority is questioned in a State court,



which maintains his decision against the title set up, the Supreme Court of the United States may revise the case on writ of error. *Magwire v. Tyler*, 1 Black, 195. The Secretary of the Interior has authority to decline to recognize, or to transact business with attorneys practising therein, who are guilty of misconduct. 16 A. G. Op. 488; 13 Id. 150.

SECT. 445.—The words in the 4th line, “presented to him during the preceding year,” were added by the Revision. 1 Com. D. 251. By 18 St. 420, ch. 132, § 8 the Secretary of the Interior is to print, and lay before Congress, on or before Nov. 1 in each year, a statement of the items paid out of the appropriations for the Indian Department; and the report of the Commissioner of Indian Affairs, with the reports of agents, is to be printed and laid before Congress on the first day of its session.

### CHAPTER III.

#### THE GENERAL LAND OFFICE.

SECT. 446.—The General Land Office was originally a bureau of the Treasury Department under St. April 25, 1812 (2 St. 717), and was transferred to the Department of the Interior on its creation in 1849.

SECT. 448.—As to employees and salaries, see 23 St. 186, 416, and the appropriation act of July 11, 1888, which provide for an Assistant Commissioner (salary \$3000), to be appointed by the President with the advice and consent of the Senate, to sign such letters, papers, and documents, and to perform such other duties as may be directed by the Commissioner, and to act as Commissioner when that officer is absent, or his office vacant.

SECT. 450.—By 20 St. 178, ch. 329, § 1, these duties devolve upon, and are to be discharged by one of the executive clerks designated by the President. The duty of signing, under § 450, is properly complied with by the signature of the Secretary being subscribed in his own proper handwriting; the name of the President, for whom it is signed, being written by the clerk who engrosses the patent. 3 A. G. Op. 623.

SECT. 452.—Generalized from the act of 1836, which was regarded as superseding the act of 1812. 1 Com. D. 253.

SECT. 453.—*Cahn v. Barnes*, 5 F. R. 331; *United States v. Chaplin*, 31 Id. 894; *United States v. Barnhart*, 33 Id. 459. See notes, §§ 441, 2478. 18 St. 316, ch. 80, changes “agents” to “grants” in the 5th line of this section. This section gives the Commissioner of the General Land Office direct supervision over registers and receivers of the land offices, the judgments of the latter not being conclusive, but subject to the revision of the Commissioner. *Barnard v. Ashley*, 18 How. 43, 45. The Commissioner “exercises a general superintendence over the subordinate officers of his department, and is clothed with liberal powers of control, to be exercised for the purposes of justice, and to prevent the consequences of inadvertence, irregularity, mistake, and fraud, in the important and extensive operations of that officer for the disposal of the public domain. The power exercised in this case is a power to correct a clerical mistake, the existence of which is plainly shown by the record, and is a necessary power in every department.” *Bell v. Hearne*, 19 How. 252, 262. The Commissioner is authorized by various acts relating to timber in Western States to make regulations to carry out their provisions. St. June 3, 1878, ch. 151, § 3 (20 St. 89); St. June 14, 1878, ch. 190, § 5 (20 St. 113), amending 18 St. 21, ch. 55, § 6. (Sup. 9). See also 18 St. 62, ch. 223, § 3. Prior to St. May 30, 1862 (12 St. 409), a Surveyor General could enter into contracts without their being first approved by the Commissioner. *McKee’s Case*, 1 Ct. Cl. 336. 24 St. 210, 498 (see also 23 St. 416) appropriates to meet expenses of protecting timber on



the public lands; for the protection of public lands from illegal and fraudulent entry or appropriation; for salaries and expenses of agents employed in adjusting claims for swamp lands, and for indemnity for swamp lands; and provides—

That agents and others employed under these provisions, “while travelling on duty, shall be allowed per diem in lieu of subsistence at a rate to be fixed by the Secretary of the Interior, not exceeding \$3 per day, and for actual necessary expenses for transportation.”

SECT. 454. — Bullion Mining Co. *v.* Eureka Hill Mining Co., 11 Pac. Rep. 526.

SECT. 459. — 15 A. G. Op. 343. Sect. 5 of the cited act of 1836, providing for a Solicitor of the General Land Office, is here omitted, although not expressly repealed, the appropriation for that officer appearing to have been discontinued. 1 Com. D. 255. A patent for land is sufficiently authenticated by the countersignature of the recorder, and the seal of the office. 3 A. G. Op. 630.

SECT. 460. — The words, in the 6th line, “and the seal of the General Land Office,” were added by the Revision, 1 Com. D. 255.

SECT. 461. — Amended by St. April 2, 1888, ch. 54 (25 St. 76), by striking out the ten words after “words” in the 4th line, and inserting the following in place thereof—

“And thirty cents each for photolithographed copies of township plats or diagrams, unverified, not to exceed ten copies to any one person, and twenty-five cents each for all copies in excess of ten.”

## CHAPTER IV.

### THE COMMISSIONER OF INDIAN AFFAIRS.

SECT. 462. — The Commissioner's salary is now \$4000. 23 St. 186, 416.

SECT. 463. — See notes, §§ 2045, 2058, 2083, 2129. *United States v. Brindle*, 110 U. S. 691; *United States v. Odeneal*, 10 F. R. 618. 19 St. 176, ch. 289 (see also 18 St. 420, ch. 132, § 7) provides in part—

“Hereafter contracts for transportation [*of goods for the various tribes of Indians*] involving an expenditure of more than \$1000 shall be advertised and let to the lowest bidder. . . .

“SEC. 3. That in all lettings of contracts in connection with the Indian service, the proposals or bids received shall be filed and preserved; and in the annual report of the Commissioner of Indian Affairs, there shall be embodied a detailed and tabular statement of all bids and proposals received for any services, supplies, or annuity-goods for the Indian service, together with a detailed statement of all awards of contracts made for any such services, supplies, and annuity-goods for which said bids or proposals were received;

“And an abstract of all bids or proposals received for the supplies or services embraced in any contract shall be attached to, and filed with, the said contract when the same is filed in the office of the Second Comptroller of the Treasury.

“SEC. 4. That hereafter the estimates for appropriations for the Indian service shall be presented in such form as to show the amounts required for each of the agencies in the several States or Territories, and for said States and Territories respectively.

“SEC. 5. And hereafter the Commissioner of Indian Affairs shall have the sole power and authority to appoint Traders to the Indian tribes, and to make such rules and regulations as he may deem just and proper, specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians.

“SEC. 6. That the Commissioner of Indian Affairs shall advertise for all supplies. *Provided*, that the purchase of supplies for sixty days may be made in open market. *And provided further* that to meet any exigency of the service purchases may be made in open market to an extent not to exceed two thousand dollars at any one time.”

SECT. 464. — An Indian agent's expenditures, for the benefit of the Indians, on land reserved and held by themselves, are not to be charged to the United States. *United States v. Duval, Gilpin*, 356. St. May 1, 1884, ch. 37 (23 St. 17), provides that—

"Hereafter no Department or officer of the United States shall accept voluntary service for the Government or employ personal service in excess of that authorized by law except in cases of sudden emergency involving the loss of human life or the destruction of property."

22 St. 451 provides —

"SEC. 8. That any disbursing or other officer of the United States or other person who shall knowingly present, or cause to be presented, any voucher, account, or claim to any officer of the United States for approval or payment, or for the purpose of securing a credit in any account with the United States, relating to any matter pertaining to the Indian service, which shall contain any material misrepresentation of fact in regard to the amount due or paid, the name or character of the article furnished or received, or of the service rendered, or to the date of purchase, delivery or performance of service, or in any other particular, shall not be entitled to payment or credit for any part of said voucher, account, or claim; and if any such credit shall be given or received, or payment made, the United States may recharge the same to the officer or person receiving the credit or payment, and recover the amount from either or from both, in the same manner as other debts due the United States are collected; *Provided*, That where an account contains more than one voucher the foregoing shall apply only to such vouchers as contain the misrepresentation; *And provided further*, That the officers and persons by and between whom the business is transacted shall be presumed to know the facts in relation to the matter set forth in the voucher, account, or claim: *And provided further*, That the foregoing shall be in addition to the penalties now prescribed by law, and in no way to affect proceedings under existing law for like offenses. That, where practicable, this section shall be printed on the blank forms of vouchers provided for general use."

SECT. 465. — See note, § 2052. The final words "of Indian Affairs" were added by the Revision. 1 Com. D. 257.

SECT. 466. — St. March 3, 1885, ch. 34 (23 St. 377), requires the Secretary of the Interior to make a complete list of all claims for Indian depredations, to investigate the same, and report to Congress. 22 St. 345, ch. 439, provides —

"That the proper accounting officers of the Treasury are authorized and directed to examine and audit all the unpaid claims heretofore filed in the departments for services rendered and supplies furnished under directions of the Indian Bureau or any of its agents; and in cases where said services and supplies are found to have actually been applied to the benefit of the Indians to report to Congress the balances equitably due on said accounts respectively, notwithstanding no sufficient appropriation existed."

SECTS. 468, 469. — See notes, §§ 445, 463.

## CHAPTER V.

### THE COMMISSIONER OF PENSIONS.

THIS office was at first temporary under St. March 2, 1833, and later acts, and was made perpetual by the cited act of 1849. Power was conferred upon the Secretary of the Navy by an act of 1804, to establish rules and regulations for the examination and adjudication of claims of Navy pensioners to be placed upon the roll. It was ruled thereunder that this did not authorize him to establish a regulation that an application could not be entertained after the lapse of twenty-five years from the time the disability was alleged to have occurred. 5 A. G. Op. 62, 73.

SECT. 470. — The salary of the Commissioner is now \$5000; and that of the two deputy commissioners \$3600 each. 23 St. 186, 417. 19 St. 223, ch. 27 requires the Commissioner to report the total annual amount paid for additions and reductions on the annual pension rolls. St. Aug. 5, 1882, ch. 389 (22 St. 248), contains the proviso —

"That the duties of first and second deputy commissioners shall be such as are now fixed by law for the deputy commissioner of pensions: and in case of death, resignation, absence, or sickness of the Commissioner his duties shall devolve upon the first deputy commissioner until his successor is appointed, or such absence or sickness ceases, and in case of the like absence of the Commissioner and first deputy commissioner, the second deputy commissioner shall act as Commissioner in like manner."



SECTS. 471-474. — *United States v. Scott*, 25 F. R. 470. See notes, §§ 4692, 4744, 4766. Sect. 12 of St. July 14, 1862 (12 St. 469) is here omitted, the appropriation for the special agent for the Pension Office there provided for, having apparently been discontinued. 1 Com. D. 259. The Commissioner of Pensions is to judge and determine all applications for pensions, and to construe and interpret all questions which may arise as to the construction of the several acts relating to pensions, subject only to the direction of the Secretaries of War and of the Navy, to whom appeal may be made. The judgments, decrees, and awards of this tribunal are necessarily conclusive and final, when they act within the scope of their authority, and they are the exclusive judges of the law and the facts in the case. *Rogers, J., in Stokely v. De Camp*, 2 Grant's (Pa.) Cases, 17. The Commissioner of Pensions is not the "head of a department" under Art. 2, § 2, of the Constitution. *United States v. Germaine*, 99 U. S. 508. The whole matter of ascertaining, determining, and certifying who is lawfully entitled to a pension, is confided to certain executive officers, and not to the judiciary; no right to a pension is fixed until those officers declare it so; and if they decide against the right, there is no appeal except to Congress. *Daily v. United States*, 17 Ct. Cl. 144. 23 St. 417, provides —

"That vacancies occurring in the clerical force of the Pension Office during the fiscal year 1886 shall not be filled by promotion or original appointment until a reduction of 150 in all is made; and thereafter the number shall not be increased, and the number in the several grades shall remain as existing when said reduction is completed. For per diem, when absent from home on duty, for special examiners, or other persons employed in the Pension Office detailed for the purpose of making special investigations of matters pertaining to the Pension Bureau, in lieu of expenses for subsistence, at a rate to be fixed by the Secretary of the Interior, not exceeding \$3 per day, and for actual and necessary expenses for transportation and assistance. . . . For an additional force of 150 special examiners, for one year, at a salary of \$1400 each, . . . and no person so appointed shall be employed in the State from which he is appointed; and any of those now employed in the Pension Office or as special examiners may be reappointed if they are found to be qualified."

The appropriation act of July 11, 1888 (see also 22 St. 240), provides —

"Not less than 280 of the clerks in the Surgeon-General's Office shall be exclusively engaged in preparing and making reports to expedite the settlement of pension applications called for by the Commissioner of Pensions. . . . And not less than 200 of the clerks in the Office of the Adjutant-General shall be exclusively engaged in preparing and making reports to expedite the settlement of pension applications and soldiers' claims."

The same act further provides —

"That five special examiners, or clerks detailed and acting as supervising examiners, and special examiners or clerks detailed as such, not exceeding three in number, with headquarters in the District of Columbia, may be allowed, in addition to their salaries and in lieu of per diem and all expenses for subsistence, a sum not exceeding \$900 each per annum: *Provided further*, That the salary and such allowance to each shall in no case exceed \$2400 per annum.

"For an additional force of 150 special examiners for one year, at a salary of \$1400 each, \$210,000; and no person so appointed shall be employed in the State from which he is appointed; and any of those now employed in the Pension Office or as special examiners may be reappointed if they be found to be qualified.

"For per diem in lieu of subsistence for 150 additional special examiners above provided for, while travelling on duty, at a rate to be fixed by the Secretary of the Interior, not exceeding three dollars per day, and for actual and necessary expenses for transportation and assistance, \$190,000."

24 St. 525 provides —

"That as soon as practicable after the completion as provided for in the sundry civil act approved August 4, 1886, and not later than December 1, 1888, the Secretary of the Interior shall cause to be removed to the Pension Building the General Land Office, Bureau of Education, Office of Commissioner of Railroads, and Bureau of Labor, and vacate the buildings rented for and now occupied by said offices and Bureaus, or portions thereof."



## 22 St. 175 provides —

"That in addition to the authority conferred by § 184, title four of the Revised Statutes, any judge or clerk of any court of the United States in any State, District, or Territory shall have power, upon the application of the Commissioner of Pensions, to issue a subpoena for a witness, being within the jurisdiction of such court, to appear, at a time and place in the subpoena stated, before any officer authorized to take depositions to be used in the courts of the United States, or before any officer, clerk, or person from the Pension Bureau designated or detailed to investigate or examine into the merits of any pension claim and authorized by law to administer oaths and take affidavits in such investigation or examination, there to give full and true answers to such written interrogatories and cross interrogatories as may be propounded, or to be orally examined and cross-examined upon the subject of such claim; and witnesses subpoenaed pursuant to this and the preceding section shall be allowed the same compensation as is allowed witnesses in the courts of the United States, and paid in the same manner.

"SEC. 4. — That the Commissioner of Pensions is hereby authorized to appoint surgeons who, under his control and direction, shall make such examination of pensioners and claimants for pension or increased pension as he shall require; and he shall organize boards of surgeons, to consist of three members each, at such points in each State as he shall deem necessary, and all examinations, so far as practicable, shall be made by the boards, and no examination shall be made by one surgeon excepting under such circumstances as make it impracticable for a claimant to present himself before a board: *Provided*, That the Commissioner may, when in his opinion the exigencies of the service require it, organize a board of three surgeons who, under his direction, shall review the work of any regularly-appointed board or surgeon: *Provided further*, That all examinations shall be thorough and searching, and the certificate contain a full description of the physical condition of the claimant at the time, which shall include all the physical and rational signs and a statement of all structural changes," &c.

## 23 St. 266, Res. 4, provides —

"That the Secretary of the Interior be, and is hereby authorized, if in his opinion the public interests will not suffer thereby, upon the request of either of the Committees hereinafter named, to detail from that department one clerk to act as assistant-clerk to the House Committee on Pensions, and one clerk to act as assistant-clerk to the House Committee on Invalid Pensions."

## CHAPTER VI.

## THE PATENT OFFICE.

SECT. 476. — The official residence of the Commissioner is at Washington. *Butterworth v. Hill*, 114 U. S. 128. By 18 St. 343, ch. 129, § 1, the grade of Third Assistant Examiner in the Patent Office ceased on and after July 1, 1876. 22 St. 9 (see also 23 St. 17, 417), making appropriation to enable the Secretary of the Interior to increase the clerical force of said office for the remainder of the current fiscal year, provides —

"That the compensation of the additional clerks herein authorized shall be fixed by the Secretary, not to exceed however a greater rate than \$1200 per annum for each clerk."

The first letters-patent were issued for a term not exceeding 14 years, under St. April 10, 1790, ch. 7 (1 St. 109; see also *Id.* 318, 393; 3 St. 481), passed under the authority conferred by Art. 1, § 8, of the Federal Constitution. This term was first changed by St. March 2, 1861, ch. 88, § 16 (12 St. 249), to 17 years, without the privilege of extension as to future patents; and the latter term, re-enacted in the revisory act of July 8, 1870, ch. 230 (16 St. 201), and in Rev. Stats., § 4884, still continues unchanged. By the above act of 1790 patents were obtained by applying to the Secretaries of State and of War and the Attorney-General as a board of adjudication. St. Feb. 21, 1793, ch. 11 (1 St. 318), required the application to be made to the Secretary of State, who issued the patent after examination and approval by the Attorney-General. The Patent Office, originally established as a bureau of the State Department by St. July 4, 1836, ch. 357 (5 St. 117), with the Com-



missioner of Patents as its head, was transferred to the Interior Department by St. March 3, 1849, ch. 108 (9 St. 395).

SECT. 477. — The salary of the Commissioner is now \$5000. 23 St. 187, 418. As to the other officers, employees, and salaries, see 23 St. 187, 418; 18 St. 344; Sup. 156.

SECT. 481. — The Secretary of the Interior is not authorized to revise the action of the Commissioner of Patents in adjudging an applicant entitled to a patent for priority of invention, the general control of a head of a department over a subordinate not extending to matters in which the latter is directed by statute to act judicially. *Butterworth v. Hoe*, 112 U. S. 50.

SECT. 487. — *Campbell v. James*, 17 Blatch. 45; *Robertson v. Secombe Manuf. Co.*, 10 Id. 489.

SECT. 490. — The first clause of the cited provision of 1871 is here omitted. This section and §§ 491, 492, do not apply to and regulate the production of certain back issues described in the contract stated in 15 A. G. Op. 538. By 18 St. 401, ch. 130, § 12, the Commissioner is to furnish, free of cost, one copy of the bound volumes of the specifications and drawings to each department upon the request of its head. 24 St. 625; 23 St. 187; 22 St. 249, making appropriation for photolithographing or otherwise producing plates for the Official Gazette, for photolithographing or otherwise producing copies of drawings of the weekly issues of patents, for producing copies of designs, trade-marks, and pending applications, and for the reproduction of exhausted copies, provides that said photolithographing or otherwise producing plates and copies, shall

“be done under the supervision of the Commissioner of Patents, and in the city of Washington, if it can there be done at reasonable rates; and the Commissioner of Patents, under the direction of the Secretary of the Interior, shall be authorized to make contracts therefor.”

SECT. 492. — The Committee on Printing have no power to waive an advertisement, except in case of an exigency of the public service; and such power is not implied in their power to prescribe rules for the action of the Commissioner of Patents. 15 A. G. Op. 539. An officer who has entered into a contract without complying with the law as to advertising for bids cannot, by permitting performance under it to proceed to any extent, make the contract obligatory on the government. 15 Id. 538; disapproving, 10 Id. 416.

## CHAPTER VII.

### THE SUPERINTENDENT OF PUBLIC DOCUMENTS.

SECT. 497. — 24 St. 647, Res. 13, provides —

“That the Secretary of the Interior be, and he is hereby, authorized to sell, at cost-price, to any party wishing to purchase the same, any public document of which copies available for this purpose, not required for official use, remain: *Provided*, That only one copy of any document be sold to any one person.

“SEC. 2. That the Secretary of the Interior shall have kept a detailed statement of each and every public document sold, with the name of the purchaser and date of the purchase, and that he shall annually publish, among the documents accompanying his annual report, a statement showing the number of each public document sold during the fiscal year, and the price thereof.”

SECT. 498. — As to the editing, printing, and distribution of the statutes, see note, § 386. 22 St. 336 repeals a part of 21 St. 454, and provides —

“To supply district judges, district attorneys, and clerks of the United States courts who have not already received the same with the Revised Statutes of the United States, and the annual statutes published since the first revision, a sufficient sum of money is hereby appropriated, *Provided*, That all

statutes heretofore or hereafter furnished by the United States to district judges, district attorneys, and clerks of the United States courts under this or any other law, shall not become the property of these officers, but on the expiration of their official term shall be by them turned over and delivered to their respective successors in office."

SECT. 504. — By Res. Dec. 18, 1880, and Feb. 8, 1881 (21 St. 515, 516), one copy of the Congressional Record and its Index is to be sent free to each legation abroad. See note, § 3760.

SECT. 507. — The Superintendent of Documents now receives a salary of \$2000. 23 St. 185, 416; Sup. 380.

SECT. 508. — The first eleven words of the 2d line, and the eleven words after "distributing" in the 3d line, were added by the Revision. 1 Com. D. 268. 22 St. 274 provides —

"That hereafter no extra compensation shall be allowed to any officer or clerk of the Interior Department for compiling the Biennial Register."

SECT. 510. — See note, § 198. Twenty-five hundred copies of the Biennial Register are to be printed by 20 St. 13, ch. 4, and distributed as there provided.

Cl. 4. — The Biennial Register of 1871 appears not to contain List No. 2, although the requirement does not appear to have been repealed. 1 Com. D. 269.

SECT. 511. — 24 St. 649, Res. 20, provides —

"That inasmuch as the Official Register of the United States is now supplied to depositories of public documents as one of the set of Congressional documents in leather binding, so much of the act of December 15, 1877, as provides for supplying depositories with this document is hereby repealed; and the Secretary of the Interior is authorized to send the Register to such library not a depository as shall be named to him for the purpose by each Senator, Representative, and Delegate in Congress."

## CHAPTER VIII.

### THE RETURNS OFFICE.

SECTS. 512-515. — See note, § 3744, as to the effect of the act of 1862.

## CHAPTER IX.

### THE OFFICE OF EDUCATION.

SECT. 517. — The Bureau of Education, originally independent under the cited act of March 2, 1867, was attached to the Interior Department by the cited act of 1868. As to the officers, employees, and salaries in this office, see 23 St. 188, 419.



## TITLE XII.

## THE DEPARTMENT OF AGRICULTURE.

SECT. 520. — St. June 16, 1880, ch. 235 (21 St. 259), appropriating for the completion of the United States Entomological Commission, provides —

“That after the close of the next fiscal year all work of the character herein provided for shall be exclusively under the control of the Agricultural Department, and all operations under the Interior Department shall be fully and finally closed before June 30, 1881.”

By 23 St. 31 (see also 22 St. 613; 24 St. 103), the Commissioner of Agriculture is to organize in his Department a Bureau of Animal Industry to prevent the exportation of diseased cattle, and to prevent pleuro-pneumonia and other contagious diseases among domestic cattle. See note, § 527, below. 24 St. 440, ch. 314 provides for the establishment of agricultural experiment stations, in connection with the colleges established in the several States under 12 St. 503, and its amendments. See, also, 23 St. 10; 22 St. 484. St. June 7, 1888, provides —

“That the grant of money authorized by the act of Congress entitled ‘An act to establish agricultural experiment stations in connection with the colleges established in the several States under the provisions of an act approved July 2, 1862, and of acts supplementary thereto,’ are subject as therein provided to the legislative assent of the States or Territories to be affected thereby; but as to such instalments of the appropriations as may be now due or may hereafter become due, when the legislature may not be in session, the governor of said State or Territory may make the assent therein provided, and upon a duly certified copy thereof to the Secretary of the Treasury he shall cause the same to be paid in the manner provided in the act of which this is amendatory, until the termination of the next regular session of the legislature of such State or Territory.”

24 St. 499 provides —

“The Commissioner of Agriculture is hereby authorized to use any part of this sum he may deem necessary or expedient, and in such manner as he may think best, to prevent the spread of pleuro-pneumonia, and for this purpose to employ as many persons as he may deem necessary, and to expend any part of this sum in the purchase and destruction of diseased or exposed animals and the quarantine of the same whenever in his judgment it is essential to prevent the spread of pleuro-pneumonia from one State into another, \$100,000 of this sum or so much thereof as may be necessary to be immediately available. . . .

“SEC. 2. That the bond of the Commissioner of Agriculture shall be in the penal sum of \$25,000.

“SEC. 3. That all machinery purchased under the provisions of this act shall be built in the United States, wholly of domestic material.”

SECTS. 521, 522. — The Commissioner's salary is now \$4500. 24 St. 495, which act also see as to the other officers, and salaries in this department. 22 St. 411 and 23 St. 39 provided —

“SEC. 2. That no part of the sums herein or hereafter appropriated for the Department of Agriculture shall be paid to any person, as additional salary or compensation, receiving at the same time other compensation as an officer or employee of the Government; and in addition to the proper vouchers and accounts for the sums appropriated for the said Department to be furnished to the accounting officers of the Treasury, the Commissioner of Agriculture shall, at the commencement of each regular session, present to Congress a detailed statement of the expenditures of all appropriations for said Department for the last preceding fiscal year.”



SECT. 524. — By 24 St. 499, ch. 351, §§ 2, 3, the bond of the Commissioner of Agriculture is to be in the penal sum of \$25,000, and all machinery purchased under the provisions of that act is to be built in the United States, wholly of domestic material.

SECT. 526. — See Rev. Stats. § 3677.

SECTS. 527, 528. — The provisions cited on § 527 are restrictions upon appropriations, here continued permanently. 1 Com. D. 282. By 22 St. 3, ch. 12 the Department of Agriculture is to receive permanently specimens exhibited at the Atlanta Exposition. 22 St. 44, ch. 77 appropriates \$20,000 for the distribution of seeds, under the direction of the Commissioner of Agriculture, in localities overflowed by the Mississippi River and its tributaries. By 18 St. 340, ch. 128, § 7, seeds and agricultural reports may be mailed free by the Commissioner of Agriculture, and by any member of Congress, including ex-delegates, for nine months after expiration of their terms. By 24 St. 102, 498; 23 St. 38, 355; 22 St. 90, 410; 21 St. 292, ch. 252, § 1, an equal proportion of two-thirds of all seeds &c., shall, upon their request, be supplied to members of Congress for distribution among their constituents, but only such as are suited to the particular locality, and such parts thereof remaining uncalled for at the end of the fiscal year shall be distributed by the Commissioner. See, also, 24 St. 497, 498; and St. July 18, 1888, quoted below. 22 St. 92, 411, and 23 St. 39, 356, provide that no part of the sums appropriated shall be paid, as additional compensation, to an officer or employee of the government, and that the Commissioner shall report to each Congress a detailed statement of expenditures. 22 St. 413 provides for the holding of a World's Industrial and Cotton Centennial Exposition. 21 St. 292, ch. 252, § 2, provides —

“The Commissioner of Agriculture is hereby directed and required to account and report to the proper accounting officers of the Treasury, in the same manner and at the same times, as the heads of executive departments of the government are now required by law to account and report.”

St. July 18, 1888, appropriating for the Department of Agriculture for the fiscal year ending June 30, 1889, contains, *inter alia*, the following provisions:—

“Section of vegetable pathology . . . \$15,000, of which \$10,000 or so much thereof as may be necessary may be applied to the investigation of the disease in peach trees known as yellows, and remedies therefor. . . . For collecting and disseminating information relating to silk-culture; for purchasing and distributing silk-worm eggs, and for conducting at some point in the District of Columbia experiments with automatic machinery for reeling silk from the cocoon, and for expenses incurred in collecting, purchasing, preparing for transportation, and transporting cocoons, and for expenses of stations in connection therewith, and for necessary travelling expenses, \$20,000. And the Commissioner of Agriculture is hereby authorized to sell in open market any and all reeled silk and silk waste produced in these experiments, and to apply the proceeds of such sales to the payment of the legitimate expenses incurred therein; and the Commissioner of Agriculture shall make full report to Congress of the experiments herein provided for, and also of all sales and purchases made under this paragraph, with the names and residences of all producers of cocoons of whom purchases are made. For the encouragement and development of the culture of raising raw silk, \$5000, to be expended under the direction of the Woman's Silk Culture Association of the United States, located at Philadelphia, and to be paid directly to said association; and said association shall make a full and detailed report of the expenditures and results obtained under this appropriation, and also under the appropriation to said association made for the fiscal years 1887 and 1888, as provided by law, if not already made, to the Commissioner of Agriculture, who shall transmit the same to Congress, and \$2500 for the same purposes and under the same restrictions and conditions, to the California Ladies' Silk Culture Association of California (changed by Res. 37 of Sept. 6, 1888, to “Ladies' Silk Culture Society of California”), and for the continuation of the study and experiments by Joseph Neumann, of the wild native silk-worm of California, \$2500; and the said Joseph Neumann shall report the results of such work to Congress through the Commissioner of Agriculture on or before January 1, 1889. An equal proportion of two-thirds of all seeds, trees, shrubs, vines, cuttings, and plants shall, upon their request, be supplied to Senators, Representatives, and Delegates in Congress for distribution among their constituents; and the person receiving such seeds shall inform the Department of results of the experiments therewith: *Provided*, That all seeds, plants, and cuttings herein allotted to Senators, Representatives, and Delegates to Congress for distribution remaining uncalled for



at the end of the fiscal year shall be distributed by the Commissioner of Agriculture: *And provided also*, That the Commissioner shall report, as provided in this act, the place, quantity, and price of seeds purchased, and the date of purchase. But nothing in this paragraph shall be construed to prevent the Commissioner of Agriculture from sending flower, garden, and other seeds to those who apply for the same. And the amount herein appropriated shall not be diverted or used for any other purpose but for the purchase, propagation, and distribution of improved and valuable seeds, bulbs, trees, shrubs, vines, cuttings, and plants: *But provided, however*, That the Commissioner shall not distribute to any Senator, Representative, or Delegate seeds entirely unfit for the climate and locality he represents, but shall distribute the same so that each member may have seeds of equal value, as may be, and the best adapted to the locality he represents. . . .

"Salaries and expenses Bureau of Animal Industry: For carrying out the provisions of the act of May 29, 1884, establishing the Bureau of Animal Industry, \$500,000; and the Commissioner of Agriculture is hereby authorized to use any part of this sum he may deem necessary or expedient, and in such manner as he may think best, to prevent the spread of pleuro-pneumonia, and for this purpose to employ as many persons as he may deem necessary, and to expend any part of this sum in the purchase and destruction of diseased or exposed animals and the quarantine of the same whenever in his judgment it is essential to prevent the spread of pleuro-pneumonia from one State into another, and of this sum an amount not exceeding \$15,000 may be applied to the payment of expenses incurred during the fiscal year 1888: *Provided*, That \$15,000, or so much thereof as may be necessary, may be expended in continuation of the investigations and experiments, to be conducted within the United States, into the nature, causes, and remedies for the prevention and cure of hog cholera and swine plague. . . . To enable the Commissioner of Agriculture to continue experiments in the manufacture of sugar from sorghum cane, including the purchase and transportation of samples and supplies, \$100,000: *Provided*, That the Commissioner is hereby required to make a separate report to Congress stating fully and accurately an itemized account of every expenditure made under this provision and the results of all experiments made, and also including the purchase and transportation of samples and supplies. . . . That to carry into effect the provisions of an act approved March 2, 1887, entitled 'An act to establish agricultural experiment stations in connection with the colleges established in the several States, under the provisions of an act approved July 2, 1862, and of the acts supplementary thereto,' \$595,000; \$10,000 of which sum shall be payable upon the order of the Commissioner of Agriculture to enable him to carry out the provisions of § 3 of said act of March 2, 1887, and to compare, edit, and publish such of the results of the experiments made under § 2 of said act by said experimental stations as he may deem necessary; and for these purposes the Commissioner of Agriculture is authorized to employ such assistants, clerks, and other persons as he may deem necessary."

## TITLE XIII.

## THE JUDICIARY.

## CHAPTER I.

## JUDICIAL DISTRICTS.

SECT. 530. — The jurisdiction of Federal courts cannot be enlarged or restricted merely by State legislation or agreement; but when the true boundary line between neighboring States which constitute judicial districts is fixed by Commissioners of the States, with the assent of Congress, the jurisdiction of the Federal courts follows and extends to the line thus established. *Re Devoe Manuf. Co.*, 108 U. S. 401; *Hall v. Devoe Manuf. Co.*, 14 F. R. 183; *The Sarah E. Kennedy*, 25 Id. 569; *The L. W. Eaton*, 9 Ben. 289; *Maloney v. Milwaukee*, 1 F. R. 613; *Beekman v. Hudson River W. S. R. Co.*, 35 Id. 10.

SECT. 531. — Sect. 1 of St. Aug. 8, 1888 (25 St. 389), provides as to Kentucky —

“That the territory embraced within the following counties in said district, to wit: Daviess, Henderson, Union, Christian, Todd, Hopkins, Webster, McLean, Muhlenberg, Logan, Butler, Grayson, Ohio, Hancock, and Breckenridge, shall hereafter constitute and be known as the Owensborough division of said district; and regular terms of the circuit and district courts of the United States for said district shall be held semi-annually in the city of Owensborough, in said division, beginning on the fourth Monday in January and the first Monday in June, and continuing at each term for eighteen judicial days, if the business shall require it; and the judges of said courts shall have the same power to call special terms in said division as they may now do under the laws of the United States elsewhere in said district.”

By 21 St. 507, ch. 144, Louisiana is divided into two judicial districts, the eastern and the western. Sect. 1 of St. Aug. 8, 1888, provides —

“That all processes from the circuit and district courts of the United States from the western district of Louisiana against defendants residing in the parishes of Saint Landry, Saint Martin, Cameron, Calcasieu, La Fayette, and Vermillion, in the State of Louisiana, shall be returned to said courts at Opelousas; all process against defendants residing in the parishes of Rapides, Vernon, Avoyelles, Catahoula, Grant, and Winn shall be returned to Alexandria; all processes against defendants residing in the parishes of Caddo, De Soto, Bossier, Webster, Claiborne, Bienville, Natchitoches, Red River, and Sabine, shall be returned to Shreveport; and all processes against defendants residing in the parishes of Ouachita, Franklin, Richland, Morehouse, East Carroll, West Carroll, Madison, Tensas, Concordia, Union, Caldwell, Jackson, and Lincoln shall be returned to Monroe.”

Sects. 1, 2, of St. Aug. 13, 1888 (25 St. 438), provide —

“That all processes from the circuit and district courts for the eastern district of Louisiana against defendants residing in the parishes of Pointe Coupee, West Baton Rouge, Iberville, Ascension, East Feliciana, West Feliciana, East Baton Rouge, Saint Helena, and Livingston, shall be returned to said courts at Baton Rouge, Louisiana, and all processes against defendants residing in the other parishes of the eastern district of Louisiana shall be returned to New Orleans. SEC. 2. That the terms of court shall be held at New Orleans as now fixed by law. Terms of circuit and district courts shall be held at Baton Rouge semi-annually on the second Mondays of April and November.”

By 24 St. 308, ch. 928, a separate judicial district is formed called the southern district of California, out of the counties of San Diego, San Bernardino, Los Angeles,



Ventura, Santa Barbara, San Luis Obispo, Fresno, Tulare, and Kern in that State; the terms of the circuit and district courts therein to be held at Los Angeles on the second Mondays of August and January; those in the northern district to be held at San Francisco on the first Monday in February, second Monday in July, and fourth Monday in November. *United States v. Hackett*, 29 F. R. 849; *United States v. Benson*, 12 Sawyer, 477.

By 22 St. 400, ch. 13, §§ 2, 3, all that part of the Indian Territory lying north of the Canadian River and east of Texas and the 100th meridian not set apart and occupied by the Cherokee, Creek, and Seminole Indian tribes is annexed to the United States judicial district of Kansas; and all the portion of said Indian Territory not so annexed or set apart and occupied by the Cherokee, Creek, Choctaw, Chickasaw, and Seminole Indian tribes is annexed to the United States judicial district known as the northern district of Texas. This act does not require actual occupation of the land by a tribe in order to exclude the jurisdiction, the word "occupy" being synonymous with subject to the will or control of. *United States v. Rogers*, 23 F. R. 658. See note, § 572.

The State of Colorado now constitutes one judicial district, called that of Colorado, attached to and constituting part of the eighth judicial circuit; terms of the circuit court and district court for said district are now held, at Denver on the first Tuesdays in May and November, at Pueblo, on the first Tuesday in April, and at Del Norte on the first Tuesday in August. 24 St. 214, ch. 848; 21 St. 76; 20 St. 292; 18 St. 474; 19 St. 61; Sup. 177, 201, 215, 411, 517, 626. Upon the admission of Colorado as a State, the Territorial government and courts therein were extinguished. *Ames v. Colorado-Central Railroad Co.*, 4 Dillon, 251.

SECT. 532.—23 St. 18, ch. 38, transfers the counties of Sumter, Greene, Hale, and Pickens from the southern district, and the counties of Tuscaloosa, Bibb, Shelby, and Talladega from the middle district to the northern district. 24 St. 213, ch. 842, confines the jurisdiction of the district judge to the northern and middle districts, and authorizes the appointment of a district judge for the southern district with a yearly salary of \$3500.

SECT. 533.—Amended by 19 St. 230, ch. 41, by striking out the words from "Phillips" to "Izard" inclusive; also "Fulton," and adding Little Rock, Howard, Montgomery, Yell, Logan, and Newton. The phrase "Indian Territory" is substituted in this section for the "Indian Country" named in the earlier acts. *Choctaw Nation v. United States*, 21 Ct. Cl. 59; 119 U. S. 1. 18 St. 476, ch. 140, establishes the boundary between Arkansas and the Indian country. 24 St. 83, ch. 422, transfers the counties of Howard, Little River, and Sevier to the eastern district, provides for the transfer of pending actions, and that crimes previously committed in the western district shall be there tried. 24 St. 428 provides for holding the courts of the eastern district twice a year at Texarkana. See note, § 572. 24 St. 406, ch. 139, amends § 533 by adding thereto, after the words "the eastern district includes the residue of said State," the following:—

"Said eastern district shall be, and is hereby, divided into two divisions, to be known as the eastern and western divisions of the eastern district of Arkansas. The eastern division shall consist of the following counties, to wit: Mississippi, Crittenden, Lee, Phillips, Clay, Craighead, Poinsett, Greene, Cross, Saint Francis and Monroe, and the western division of the remaining counties in said district; but no additional marshal shall be appointed in said district. The court for the eastern division shall be held at Helena, and for the western division at Little Rock, as now provided for by law; and each of said courts shall have exclusive jurisdiction over all matters cognizable in said courts and arising in the counties comprising the division to the same extent, to all intents and purposes, as if said divisions were separate districts."

SEC. 2. That all crimes and offenses heretofore committed within either of said districts, shall be prosecuted, tried, and determined in the same manner and with the same effect as if this act had not been passed.



St. 1877 (19 St. 230) being silent as to cases then pending in the western district against residents of the counties thereby changed to the eastern district, those cases remained to be tried in the western district, a change of status of parties pending the suit not affecting the jurisdiction. *Culver v. Woodruff County*, 5 Dillon, 392.

SECT. 534. — The southern judicial district now embraces the counties of Hernando, Hillsborough, Polk, Manatee, and Monroe, and the northern judicial district includes the remaining counties. 20 St. 280, ch. 43. See note, § 572.

SECT. 535. — 21 St. 62, ch. 17, transfers the counties of Pike, Butts, and Jasper to the southern district, which it divides into two divisions, the eastern and the western, — the latter consisting of forty-three counties there specified, and the former of the remaining counties in said district, without an additional clerk or marshal in the district. 22 St. 47, ch. 87, establishes distinct district courts with distinct officers in the northern and southern districts.

SECT. 536. — 24 St. 442, ch. 315, transfers the counties of McDonough, Fulton, and Tazewell from the southern district to the northern district, which northern district is divided into northern and southern divisions, — the southern division, the courts for which are held at Peoria, including the counties of Peoria, Stark, Henry, Rock Island, Mercer, Henderson, Warren, Knox, McDonough, Fulton, Putnam, Marshall, Woodford, Tazewell, Livingston, and Iroquois; the terms of both courts for the northern district to be held at Chicago, as previously provided by law, and at Peoria in the southern division, on the third Mondays of April and October of each year.

SECT. 537. — The boundaries of the divisions were changed by 21 St. 155, ch. 120, § 3. 22 St. 172, ch. 312, divides this State into two judicial districts, the northern and the southern, the former including the counties of Clinton, Jones, Linn, Benton, Black Hawk, Grundy, Hardin, Hamilton, Webster, Calhoun, Sac, Ida, Monona, and all the counties north of them, and the latter, including the remaining counties, and divides each district into eastern, central, and western divisions.

SECT. 538. — 20 St. 175, ch. 326, § 1, transfers the counties of Chippewa, Schoolcraft, Marquette, Houghton, Keweenaw, Ontonagon, Isle Royale, Baraga, and Mackinaw to the western district, which it divides into southern and northern divisions.

SECT. 539. — 22 St. 101, ch. 218, includes, as they existed at the time of its passage, the counties named in this section, and those of Kemper, Neshoba, Benton, Alcorn, Prentiss, Sunflower, Lee, Montgomery, Grenada, Union, Webster, Clay, Calhoun, and Quitman, in the northern district, the southern district to include the residue of the State. 24 St. 127, ch. 745, transfers —

“The county of Attala, in the northern judicial district, from the western to the eastern division of said district, and provides that all crimes and offences theretofore committed within said western division shall be prosecuted, tried, and determined as if this act had not been passed.”

24 St. 430, ch. 279, § 1, as amended by St. April 11, 1888, provides —

“That the counties of Bolivar and Sunflower, Washington, Sharkey, Issaquena, and Warren shall constitute a part of the southern judicial district of Mississippi, and shall be known as the western division of said district; and circuit and district courts for the transaction of business pertaining to the persons and property in said western division shall be held at the city of Vicksburg on the first Mondays of January and July in each year, and shall be held for four weeks, or so long as business may require.”

Sect. 1 of St. April 4, 1888, provides —

“That the counties of Hancock, Harrison, Jackson, Marion, Perry, and Green, being a part of the southern judicial district of Mississippi, shall be known as the southern division of said district; and circuit and district courts, for the transaction of business pertaining to the persons and property in said southern division, shall be held at Mississippi City on the third Mondays of February and August in each year.”



SECT. 540. — The county of Pike was included in the eastern district, and that of Audrain omitted therefrom by 20 St. 35, ch. 51; and the western district was divided into eastern and western divisions by 20 St. 263, ch. 20. By 24 St. 424, ch. 271, the State of Missouri is divided into two judicial districts, and the eastern and western districts thereof are divided into divisions, with United States circuit and district courts therein. Sect. 1 of St. May 21, 1888, (25 St.) transfers the county of Audrain from the eastern to the western judicial district of the State.

SECT. 541. — In margin, change "1874" twice to "1875." See note, § 530. 18 St. 317 inserts "and west" after "north" in the fourth line. 18 St. 330 confers jurisdiction upon the Federal courts of the northern district of actions relating to the rights of the Seneca Nation. The limits of the jurisdiction of the southern district of New York and the district of New Jersey are coincident with the boundaries of the jurisdiction of those States over the same waters, under their agreement of Sept. 16, 1833, approved by Congress June 28, 1834, in which New Jersey retained exclusive jurisdiction over the wharves on its shore and over all vessels fastened thereto. The *Norma*, 32 F. R. 411; The *Mary McCabe*, 22 Id. 750. The district court of the northern district of New York should refuse to take jurisdiction of a case of collision, when the vessel offending was a Canadian vessel, bound on a voyage on the St. Lawrence between Canadian ports, and was seized in Canadian waters. Otherwise, where the seizure was made within the territorial limits of New York, in which case the character of the vessel, or of her voyage, or of the waters whereon she was seized, is not material. The *East*, 9 Ben. 76. An assault committed on a vessel in the body of a county is within the jurisdiction. *Roberts v. Skolfield*, 3 Ware, 184.

SECT. 542. — The *Artisan*, 8 Ben. 540. The United States circuit court for the southern district of New York has jurisdiction in the United States reservation at West Point. *Beekman v. Hudson River W. S. R. Co.*, 35 F. R. 3.

SECTS. 543, 546. — The States of North Carolina and South Carolina are here defined as each constituting one judicial district, although the act of 1802 (2 St. 162), ch. 31, § 7, designated the three divisions of North Carolina as "districts," and the act of 1823 (cited § 546) also so designated the divisions of South Carolina. 1 Com. D. 301, 307.

SECT. 544. — 20 St. 101, ch. 169, § 2, divides the northern district, without an additional clerk or marshal, into two divisions, the eastern and the western, the latter consisting of the twenty-four counties there named, and the former of the remaining counties in the district. *United States v. Eddy*, 28 F. R. 226. 21 St. 63, ch. 18, transfers the counties of Union, Delaware, Morrow, Knox, Coshocton, Harrison, and Jefferson to the southern district, which it divides, without an additional clerk or marshal, into two divisions, the eastern and the western, the former consisting of twenty-nine counties there named (including all those transferred as above), and the latter of the other counties in this district. Sect. 4 of the last cited act, providing that "all suits not of a local nature against a single defendant, inhabitant of said State, must be brought in the division of the district where he resides," confers merely a personal privilege upon the defendant which he may waive. *Page v. Chillicothe*, 6 F. R. 599.

SECT. 546. — See note, § 543. By St. Aug. 16, 1856, ch. 119, § 1 (11 St. 43), the district court was moved from Laurens to Greenville Court House.

SECT. 547. — 18 St. 480, ch. 148, transfers the county of Perry from the western to the middle district. 20 St. 132, ch. 196, provides for the appointment of a district judge of the western district, the then district judge of the State to remain the district judge for the middle and eastern districts. 20 St. 206, ch. 359, divides the western district into two divisions, the eastern and western. The county of Grundy, transferred in 1880 to the eastern district (21 St. 175, ch. 203), was reattached to the middle district by 23 St. 280, ch. 7, which also takes Fentress County from the middle district, and attaches it to

the southern division of the district of East Tennessee. 22 St. 402, ch. 25, attaches the county of Hardeman to the eastern division of the western district.

SECT. 548. — See note, § 572. 20 St. 318, ch. 97, divides Texas into three judicial districts, the northern, eastern, and western, with a new district judge, district attorney, and marshal for the northern district. 21 St. 10, ch. 18, transfers Jackson County from the western to the eastern district, makes all processes against defendants residing therein returnable at Galveston, and processes returnable previously at Brownville for certain counties returnable at San Antonio; and makes the several districts, as established by the act of Feb. 24, 1879, a part of the fifth circuit. 21 St. 197, ch. 213, § 2, adds Aransas County to the western district. These acts, so far as they restrict the return of civil process to places therein mentioned, apply only to the district courts, leaving the jurisdiction of the circuit court for the northern district, as affected by the citizenship or residence of parties litigant, to be regulated by St. March 3, 1875 (18 St. 470). *Pacific Railway Imp. Co. v. Metcalf*, 4 Woods, 404; 16 F. R. 7. See p. 63 *ante*.

## CHAPTER II.

### DISTRICT COURTS—ORGANIZATION.

SECT. 552. — As to Colorado, Alabama, and other States, see notes, § 530, *et seq.*

SECT. 554. — The salary of the district judge of Colorado is \$3500. 19 St. 61. Each of the judges in Tennessee (note, § 547) receives the same salary. 20 St. 132, ch. 196. The salary of the district judge for the southern district of California is \$4000. 24 St. 309. The salaries of the judges of the Federal courts, and those of the Territories and Court of Claims, are made payable monthly, by 21 St. 385, ch. 130.

SECT. 555. — The acts of a clerk *de facto* are valid with respect to third persons. *Cocke v. Halsey*, 16 Peters, 71. 24 St. 555, § 7, as re-enacted and corrected by St. Aug. 13, 1888, provides —

“That no person related to any justice or judge of any court of the United States by affinity or consanguinity, within the degree of first cousin, shall hereafter be appointed by such court or judge to or employed by such court or judge in any office or duty in any court of which such justice or judge may be a member.”

SECT. 556. — “Western” changed to “eastern,” and “Fort Smith” changed to “Little Rock,” by 19 St. 230, ch. 41. *Culver v. Woodruff County*, 5 Dillon, 392.

SECT. 558. — As to Tennessee, see 20 St. 206, ch. 359; Missouri, 20 St. 263, ch. 20; Georgia, 21 St. 62, ch. 17.

SECT. 560. — The cited act of 1849 made it “lawful” for the clerk of the district court of Iowa to appoint a deputy, and this was here made obligatory. 1 Com. D. 313. 21 St. 155, ch. 120, § 4, makes the clerk of the district court of Iowa clerk of the circuit court of that State, except at Des Moines.

SECT. 561. — The cited provision is here construed and stated according to the construction of the First Comptroller. 1 Com. D. 313.

SECT. 562. — In some districts several places are designated by law at which records shall be kept. The original provision of 1789 was framed to admit these exceptions. 1 Com. D. 313.



## CHAPTER III.

## DISTRICT COURTS—JURISDICTION.

SECT. 563.—See note, §§ 629, 633. As to jurisdiction over matters relating to the Seneca Nation, see note to § 541. 24 St. 464 gives the district court jurisdiction of crimes against the Indian police. By St. March 3, 1887, ch. 359, § 2 (24 St. 505), the district courts have concurrent jurisdiction with the Court of Claims as to set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, &c., where the amount of the claim does not exceed \$1000; the cases brought and tried under the act to be tried by the court without a jury. See notes, ch. 121, *post*. As to the character of the jurisdiction of the district courts, see *United States v. Ta-wan-ga-ca*, Hempst. 304; *The Confiscation Cases*, 20 Wall. 92, 107; *McCormick v. Sullivant*, 10 Wheat. 192; *Chemung Bank v. Judson*, 8 N. Y. 259; *Elliott v. Piersol*, 1 Pet. 328.

CL. 1. In the Revision no exception was here made with respect to the cases in which jurisdiction is expressly given to the circuit courts by St. Feb. 28, 1871, ch. 100, § 57 (16 St. 456). The Federal courts have no common-law jurisdiction in either civil or criminal cases; as *e. g.*, over libels upon the Government, not within the power to punish for contempt. *United States v. Hudson*, 7 Cranch, 32; *United States v. Coolidge*, 1 Wheat. 415, and 1 Gall. 488; *United States v. Bevans*, 3 Wheat. 336; *United States v. Holliday*, 3 Wall. 415; *United States v. Alberty*, Hempst. 444; *United States v. Roberts*, 2 N. Y. Leg. Obs. 99. They have no jurisdiction of an offence cognizable by a naval court-martial. *United States v. Mackenzie*, 1 N. Y. Leg. Obs. 371. See Rev. Stats. § 1624. Nor over criminal admiralty cases, except such as are given by statute. *United States v. Wilson*, 3 Blatch. 435; *United States v. New Bedford Bridge*, 1 Wood. & M. 491; *Corfield v. Coryell*, 4 Wash. 371. They have jurisdiction over a prosecution for forgery. *United States v. Randolph*, 1 Pittsb. 24. See, also, *Ex parte Bollman*, 4 Cranch, 75; *United States v. Bird*, 1 Sprague, 299, as to place of trial. As to the jurisdiction of the district court over crimes, see *United States v. Holliday*, 3 Wall. 414; *United States v. Wilson*, 3 Blatch. 435. See also Rev. Stats. §§ 5576, 5391; 18 St. 336. As to Alaska, see note, § 1957; *United States v. Stephens*, 12 F. R. 52; *United States v. Seveloff*, 2 Sawyer, 311; *United States v. Carr*, 3 Id. 302.

It is settled that the United States courts have no jurisdiction of any crimes or offences, without the express appointment of positive law, and cannot, therefore, take cognizance of crimes committed within the jurisdiction of a State, though also within the admiralty and maritime jurisdiction. *United States v. Wilson*, 3 Blatch. 435; *United States v. Bevans*, 3 Wheat. 336; *United States v. Barney*, 5 Blatch. 294; *United States v. Lancaster*, 2 McLean, 431; *United States v. Taylor*, 1 Hughes, 514.

It is within the jurisdiction to determine whether a matter for which a person is indicted is a crime against the laws of the United States. *Ex parte Parks*, 93 U. S. 18. As to offences in foreign countries, see §§ 4083 *et seq.*; *United States v. Seagrist*, 4 Blatch. 420; *United States v. Bennett*, 3 Hughes, 466. As to offences in ceded places, see note, § 539; *United States v. Paul*, 6 Pet. 141; *United States v. Barry*, 3 Int. Rev. Rec. 46.

"*Committed within their respective districts.*"—See *United States v. Worrall*, 2 Dall. 384; *United States v. Bird*, 1 Sprague, 299; *United States v. Greiner*, 4 Phila. 396; *United States v. Donlan*, 5 Blatch. 284; *United States v. Paul*, 6 Pet. 141.

"*Or upon the high seas.*"—See *DeLovio v. Boit*, 2 Gall. 428; 1 Kent Com. 367, and note; *United States v. Wilson*, 3 Blatch. 435; *United States v. Wiltberger*, 5 Wheat. 76;



United States *v.* Grush, 5 Mason, 290; United States *v.* Smith, 3 Wash. 78, note; The Martha Anne, Olcott, 18; United States *v.* Pirates, 5 Wheat. 184, 200; Miller's Case, Brown Adm. 156; United States *v.* Gordon, 5 Blatch. 18; United States *v.* Hamilton, 1 Mason, 152; The Abby, Id. 360; United States *v.* Coombs, 12 Pet. 72; note § 5339.

Cl. 2. The Palmyra, 12 Wheat. 1; Dole *v.* Ins. Co., 2 Cliff. 418; The Schooner Chapman, 4 Sawyer, 511; United States *v.* Palmer, 3 Wheat. 610; The Marianne Flora, 11 Id. 40; Talbot *v.* Janson, 3 Dall. 160; Ballinger *v.* Nowland, 5 Hughes, 387.

Cl. 3. See notes, §§ 629, cl. 4, 5292; Cooper *v.* New Haven Steamboat Co., 18 F. R. 588. Under the act of 1789, the district courts had exclusive jurisdiction of penalties and forfeitures, but subsequent acts gave jurisdiction of particular penalties and forfeitures to the circuit courts. Hall *v.* Warren, 2 McLean, 332; Ketland *v.* The Cassius, 2 Dall. 365; *Re* Leszynsky, 16 Blatch. 14; 1 Com. D. 17. By 18 St. 125, ch. 344, § 13, relative to the life-saving service, and requiring owners, agents, or masters of vessels to report accidents to collectors of customs, the penalties provided for by that act are to be prosecuted by indictment or information before the proper district court, for the use of the United States. 18 St. 186, 391, § 17, provides for the relief of persons charged with incurring fines under the customs revenue laws, by application to the district judge. See *post*, § 3469; 16 A. G. Op. 259, 473. The district courts have exclusive jurisdiction of all actions of penalties and forfeitures under the custom laws; and St. March 3, 1875, ch. 137, § 1, does not confer jurisdiction in such cases upon the circuit courts. United States *v.* Mooney, 116 U. S. 104; 11 F. R. 476.

By clauses 3 and 8 of this section, the district court has jurisdiction of seizures under § 4499. The Idaho, 29 F. R. 189, 191. And it has exclusive jurisdiction over proceedings *in rem* to enforce a forfeiture. Ketland *v.* The Cassius, 2 Dall. 365. See The Little Ann, 1 Paine, 40. The question of the existence of a forfeiture is exclusively for the Federal court. Slocum *v.* Mayberry, 2 Wheat. 1; Gelston *v.* Hoyt, 3 Id. 246. A judgment on a forfeited recognizance of bail is absolute and not *nisi*. United States *v.* Winstead, 12 F. R. 50. In revenue cases this provision extends only to seizures for forfeitures under the customs laws. United States *v.* 500 Boxes, 2 Abb. U. S. 500. An attachment of the vessel is not necessary to enforce a statutory lien for a penalty. Hatch *v.* The Boston, 3 F. R. 807. This clause includes only civil actions for the recovery of the penalty and forfeiture. The Nashville, 4 Biss. 188; United States *v.* Mann, 1 Gall. 3, 177. But recovery in such actions is not a bar to a criminal prosecution for the same cause. *Re* Leszynsky, 16 Blatch. 9. A lien for duties can be enforced only by a suit to forfeit the article seized. United States *v.* 350 Chests of Tea, 12 Wheat. 486.

The admiralty has no jurisdiction to recover fines and penalties unless they are made a lien on the vessel by statute. United States *v.* The Queen, 4 Ben. 237; The Waterloo, Blatch. & H. 114; The Irma, 12 Int. Rev. Rec. 42; Knowlton *v.* Boss, 1 Sprague, 163; United States *v.* 500 Boxes of Pipes, 2 Abb. U. S. 500; United States *v.* 350 Chests of Tea, *supra*; The Steamer Missouri, 3 Ben. 508; The Lewellen, 4 Biss. 156. On a seizure unauthorized by act of Congress the owner may sue in replevin in a State court to recover the thing. Slocum *v.* Mayberry, 2 Wheat. 1. See Freeman *v.* Howe, 24 How. 458. On this clause, see also a proceeding *in rem* for smuggling, in United States *v.* The Queen, 4 Ben. 237; United States *v.* 3880 Boxes of Opium, 8 Sawyer, 129; 12 F. R. 402; United States *v.* The Henrietta Esch, Id. 483. For false invoices, in United States *v.* Mooney, 11 F. R. 476. Suit by authority of § 4610 for penalties imposed by § 4609, in United States *v.* Kellum, 19 Blatch. 372; 7 F. R. 843. For overcrowding passengers, in The Laura M. Starin, 11 F. R. 177; The Laura, 19 Blatch. 562; 8 F. R. 612. Proceedings under §§ 3490–3493, in Bush *v.* United States, 13 F. R. 625; United States *v.* Griswold, 5 Sawyer, 25. For illegal fitting out of a vessel, in Ketland *v.* The Cassius, 2 Dall. 365. In action of debt, in United States *v.* Ebner, 4 Biss. 117; The Nashville, Id. 188;



United States *v.* Willetts, 5 Ben. 220; Matter of Rosey, 6 Id. 507. For seizures under the law of imports, in *Hall v. Warren*, 2 McLean, 332. For the enforcement of the revenue laws, in *The Joshua Levisness*, 9 Ben. 339; *Buchanan v. Bigg*, 2 Yeates, 232.

Cl. 4. See note on cl. 15, below; also, *Parsons v. Bedford*, 3 Pet. 447; *Duncan v. United States*, 7 Id. 450. This is a substantial re-enactment of the fourth section of the act of March 3, 1815. Under it, a receiver of a national bank is an officer of the United States, and, as such, may sue in the Federal courts in the district in which such bank is located. *Frelinghuysen v. Baldwin*, 12 F. R. 395; *Platt v. Beach*, 2 Ben. 303; *Stanton v. Wilkeson*, 8 Id. 357. See 24 St. 506, § 4. Where under the act of Feb. 21, 1793, the district court ordered a *scire facias* to issue against a patentee, it refused to permit the United States to be substituted as plaintiffs. *Wood v. Williams*, Gilpin, 517.

This provision applies to an action by a Postmaster-General for breach of bond by a postmaster. *Postmaster-General v. Early*, 12 Wheat. 136. See note, § 629. Also to persons holding office under any act of Congress. *Platt v. Beach*, *supra*. It includes an action of trover by a marshal to recover money held by him in that capacity, which he lost, and which was found by the defendant. *Henry v. Sowles*, 28 F. R. 481. An action of debt to recover a penalty brought in the name of the United States is an action at common law. *United States v. Bougher*, 6 McLean, 277; *Jacob v. United States*, 1 Brock. 520. So also is an information for conversion of property (*United States v. Stevenson*, 1 Abb. U. S. 495); and an action on a note held by the United States as indorsee, although the maker and payee were citizens of the same State. *United States v. Greene*, 4 Mason, 427.

Cl. 5. See § 3207.

Cl. 6. See §§ 3490-94.

Cl. 8. See §§ 566, 574, 575, 576, 589, 590, 629 (cl. 4), 631, 632, 635, 638, 698, 711 (cl. 3), 750, 862, 913, 917, 941, 4086, 5309, 5310, 5311; St. Feb. 16, 1875; 18 Stat. 315. This clause is constitutional. *Hine v. Trevor*, 4 Wall. 567. As to the last sentence of this clause, beginning "And such jurisdiction shall be exclusive," no jurisdiction of such causes is anywhere given by statute to the circuit courts, except where the parties are citizens of different States. *Blatchford, J.*, in *Terrell v. The B. T. Woolsey*, 4 F. R. 555. The provision of the Federal Constitution that "the judicial power of the United States shall extend . . . to all cases of admiralty and maritime jurisdiction" (Art. 3, § 2, subd. 1) does not involve a cession of the waters, nor give general jurisdiction over them. It does not divest the States of jurisdiction over crimes (*United States v. Bevans*, 3 Wheat. 336), nor does it take away the right of the States to protect oyster fisheries on soil below low-water mark within their jurisdiction. *Smith v. Maryland*, 18 How. 71; *McCready v. Virginia*, 94 U. S. 391. And vessels belonging to the government or to a State or municipal corporation are not liable to attachment, or to a seizure for the enforcement of a maritime lien. *The Fidelity*, 16 Blatch. 569; *The Pizarro*, 10 N. Y. Leg. Obs. 97; *The Exchange*, 7 Cranch, 116.

18 St. 316, ch. 80, adds the following to par. 8:—

"And shall have original and exclusive cognizance of all prizes brought into the United States, except as provided in § 629, par. 6."

The sources and character of the admiralty law are fully stated and set forth in *The Lotawanna*, 21 Wall. 558, 572; *The Scotland*, 105 U. S. 24; *Norwich Co. v. Wright*, 13 Wall. 104; *De Lovio v. Boit*, 2 Gall. 398; *Peele v. Ins. Co.*, 3 Mason, 27; *Hall v. Ins. Co.*, 2 Story, 176. The question as to the true limits of maritime law and admiralty jurisdiction is exclusively a judicial one. *Id.*

The jurisdiction of the district court over admiralty and maritime causes extends to all the cases included in the grant thereof in the Constitution. *Steamboat Co. v. Chase*,



16 Wall. 529. Its limits are determined by the judiciary, and neither Congress nor a State legislature can enlarge or narrow them. *The Genesee Chief*, 12 How. 443; *The St. Lawrence*, 1 Black, 522; *The Lottawanna*, 21 Wall. 558, 576; *The Mary Stewart*, 5 Hughes, 312; 10 F. R. 137; *Stewart v. Potomac Ferry Co.*, 12 Id. 296. Yet Congress, under its power to regulate commerce, may make most of the changes likely to be needed. *The Lottawanna*, 21 Wall. 577; *The Belfast*, 7 Id. 624. It can also prescribe the forms and modes of proceeding in the admiralty court. *The St. Lawrence*, 1 Black, 527. But a district court having jurisdiction of a contract as a maritime contract can enforce a lien when created by a State statute. *The Lottawanna*, 21 Wall. 580. Admiralty jurisdiction may be vested in courts created by a Territorial legislature. *American Ins. Co. v. Canter*, 1 Pet. 511. In *Benner v. Porter*, 9 How. 235, in a case of libel arising after the State was admitted into the Union, the jurisdiction of the Territorial courts was denied. Although admiralty jurisdiction does not strictly arise under the Constitution and laws of the United States, yet an act of Congress providing that the district courts of the Territory of Washington shall have the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the Federal courts, gives such courts jurisdiction in admiralty. *The City of Panama*, 101 U. S. 453. See *American Ins. Co. v. Canter*, 1 Pet. 511, 544.

The nature and extent of the jurisdiction must be determined by the laws of Congress, the decisions of the Supreme Court, and by usages prevailing in the courts of the States when the Constitution was adopted. *Ex parte Easton*, 95 U. S. 68. The practice of the colonial courts is good authority. *Cunningham v. Hall*, 1 Cliff. 43; *The Kate Tremaine*, 5 Ben. 60. The jurisdiction of the district court is exclusive, and a State law cannot confer it on State courts. Rev. Stats. § 711; *Stewart v. Ferry Co.*, 12 F. R. 296; *Hine v. Trevor*, 4 Wall. 555. And a State cannot confer jurisdiction in admiralty. *Orleans v. The Phœbus*, 11 Pet. 175; *The Hornet*, Crabbe, 426; *The Richard Busteed*, 1 Sprague, 441; *The Chusan*, 2 Story, 455; *The Mary Stewart*, 5 Hughes, 312; 10 F. R. 137. *Roach v. Chapman*, 22 How. 129; *The Harriet, Olcott*, 229. But liens given by a State statute can be enforced in admiralty. *Edwards v. Elliott*, 21 Wall. 532; *The Pacific*, 9 F. R. 120; *The Circassian*, 11 Blatch. 472. See also *re Long Island Transportation Co.*, 5 F. R. 608; *The Mary Stewart*, 10 Id. 137. Such statute cannot apparently give jurisdiction of libels *in rem* by personal representatives of a person whose death was caused by a marine tort. *Oleson v. The Ida Campbell*, 34 F. R. 432; *The Alaska*, 33 Id. 112; *The Harrisburg*, 119 U. S. 199. Jurisdiction in admiralty cannot be conferred by consent. *Winchester v. United States*, 14 Ct. Cl. 13.

Maritime torts may be prosecuted *in rem* in the district where the thing offending may be found, and *in personam* where the party liable therefor resides or is found. *The Rio Grande*, 23 Wall. 458. Jurisdiction *in personam* of a person not within the district may be gained by attachment of his property within the district. *Atkins v. The Disintegrating Co.*, 18 Wall. 272, 303. In general as to acquiring jurisdiction, see *Cooper v. Reynolds*, 10 Wall. 308, 366. In case of seizures on land and non-navigable waters, jurisdiction is acquired solely by a seizure in the district, which must be alleged and proved. *The Fideliter v. United States*, 1 Sawyer, 153. See *The E. W. Gorgas*, 10 Ben. 460, 472. A district court, having circuit court powers, was held to have acquired jurisdiction of a case commenced in the circuit court, by the parties appearing and going to trial before a jury of the district court. *Kerrison v. Stewart*, 1 Hughes, 67.

The district court has all the powers of a court of admiralty, both as an instance and as a prize court, with respect to both petitory and possessory suits. *Glass v. The Betsey*, 3 Dall. 6; *The Admiral*, 3 Wall. 612; *The City of Panama*, 101 U. S. 458; *The Tilton*, 5 Mason, 465; *Taylor v. The Royal Saxon*, 1 Wall. 322; *New England Ins. Co. v. The Brig Sarah Anne*, 13 Pet. 387; *Ward v. Peck*, 18 How. 267; *Bartlett v. Spicer*,



75 N. Y. 528. It may decree a sale of a wrecked ship on the master's application. The *Tilton*, *supra*. Its jurisdiction includes maritime contracts although executory. *Maury v. Culliford*, 10 F. R. 388; *Oakes v. Richardson*, 2 Lowell, 173; *Rich v. Parrott*, 1 Cliff. 55; *Morewood v. Enequist*, 23 How. 493; *The J. F. Warner*, 22 F. R. 345. It also includes maritime torts, seizures made on navigable waters, and captures *jure belli*. The *Betsey*, 4 Cranch, 443; *The Samuel*, 1 Wheat. 9; *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. 389; *The Belfast*, 7 Wall. 637. Having jurisdiction of the principal, it has also of all its incidents. The *Brig Alligator*, 1 Gall. 145; *McLellan v. United States*, Id. 229; *Tunno v. The Betsina*, 5 Am. Law Reg. 406; *Kellum v. Emerson*, 2 Curtis, 79; *The Alexander McNeil*, 20 Int. Rev. Rec. 126; *Lee v. Thompson*, 3 Woods, 167; *Andrews v. Wall*, 3 How. 568; *The Goldsmith*, 3 Newb. 123; *McDonough v. Dannery*, 3 Dall. 188; *Campbell v. Hadley*, 1 Sprague, 470; *Bartlett v. Spicer*, 75 N. Y. 532. This is true though the incidents alone would not be subject to the admiralty. *Davison v. Seal-skins*, 2 Paine, 324. Thus, it has jurisdiction over the proceeds of a sale (*The Siren*, 7 Wall. 159); over a surplus (*The Lottawanna*, 21 Wall. 582; *The Mundy*, 22 F. R. 173; *In re Transportation Co.*, 26 Id. 713); over an ordinary mortgage of a vessel, as against a fund in court for distribution. *Leland v. The Medora*, 2 Wood. & M. 92; *Deshon v. The Medora*, Id. 118. In case of a piratical taking, it has jurisdiction of the goods, although retaken on land; and goods taken by pirates and sold upon the land may be recovered from the vendee by a suit in admiralty. *Davison v. Seal-skins*, 2 Paine, 324. So far as its powers extend it acts on equitable principles. *Brown v. Lull*, 2 Sumner, 443, 449. The admiralty has jurisdiction over possessory actions on legal titles. The *Fannie*, 8 Ben. 429; *The North Cape*, 6 Biss. 505; *The J. B. Lunt*, 11 N. Y. Leg. Obs. 137; *Kellum v. Emerson*, 2 Curtis, 79; *Davis v. Child*, 2 Ware, 78; *Kynoch v. The Ives*, Newb. Adm. 205; *The Amelia*, 6 Ben. 475; *The Perseverance*, Blatch. & H. 385; *The Wm. D. Rice*, 3 Ware, 134. It has jurisdiction also over petitory suits. *Ward v. Peck*, 18 How. 267; *The Tilton*, 5 Mason, 465; *Taylor v. The Royal Saxon*, 1 Wall. Jr. 311; *The Friendship*, 2 Curtis, 426; *Grigg v. The Clarissa Ann*, 2 Hughes, 89; *Wenberg v. A Cargo*, 15 F. R. 285; *Re 528 Pieces of Mahogany*, 2 Lowell, 323. But see *The John Jay*, 3 Blatch. 67. The State courts have concurrent jurisdiction of suits for recovery of a vessel where the defendant's title is derived under a marshal's deed. *Daily v. Doe*, 3 F. R. 903; *The Royal Saxon*, 1 Wall. Jr. 311.

The residence or citizenship of the parties is immaterial, the admiralty courts having jurisdiction of suits between citizens of the same State when the other requisites are present. *Peyroux v. Howard*, 7 Pet. 324; *Waring v. Clarke*, 5 How. 441; *The Genesee Chief*, 12 How. 443. While the admiralty courts of this country have full jurisdiction over admiralty suits between foreigners, yet in every case it is a question of discretion. 2 Parsons on Shipping, 226; *The Aurora*, 1 Wheat. 96; *Taylor v. Carryl*, 20 How. 611; *The Maggie Hammond*, 9 Wall. 457. In such case, upon appeal, the action of the lower court will be followed, unless it plainly appears to the appellate court that such discretion was wrongly exercised below. *The Noddleburn*, 30 F. R. 142; 28 Id. 855. In certain cases our courts will take jurisdiction even against the protest of a consul, but will observe any treaty affecting the case. *The Elwine Kreplin*, 9 Blatch. 438; *The Belgenland*, 114 U. S. 364. But where the jurisdiction wholly depends upon a local statute, admiralty courts of another jurisdiction cannot take jurisdiction of a case not within such statute. *The Maggie Hammond*, 9 Wall. 451. As to such jurisdiction over foreigners, see also *Mostyn v. Fabrigas*, Cowp. 161, and notes; 1 Smith, Lead. Cas., 652, and *Malony v. Dows*, 8 Abb. Pr. 316.

Maritime contracts, wherever made, must be performed or substantially performed on public navigable waters, although they may be commenced and terminated elsewhere. *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. 392; *United States v.*



Burlington Ferry Co., 21 F. R. 336; The Flash, 1 Abb. Adm. 67; Wallis v. Chesney, 1 Am. Law Reg. 302; The John B. Cole, 4 N. Y. Leg. Obs. 373; The Robert Morris, 3 Penn. L. J. 493; The Benjamin, 6 Id. 277; The Plymouth, 3 Wall. 35; Ins. Co. v. Dunham, 11 Id. 1. The admiralty courts have jurisdiction over maritime contracts, although they are to be performed between ports of the same State. *Re Long Island Transportation Co.*, 5 F. R. 606; The Belfast, 7 Wall. 624; The Mary Washington, 1 Abb. U. S. 1; Chase, 125; The Leonard, 3 Ben. 263; The Elmira Shepherd, 8 Blatch. 341; The Emma Johnson, 1 Cliff. 633; The Sarah Jane, 1 Lowell, 203; *Ex parte Boyer*, 109 U. S. 629. Where the contract is for navigation, and the other service is merely incident, the whole service is maritime; but it is otherwise where the navigation is merely incident. The Canton, 1 Sprague, 437; The Mary, Id. 204; The Farmer, Gilpin, 524; The Louisa, 2 Wood. & M. 48. Some ingredients of a maritime nature will not be sufficient. *Plummer v. Webb*, 4 Mason, 380; *Kellum v. Emerson*, 2 Curtis, 79. The admiralty has no jurisdiction of a contract providing both for transportation and purchase of goods. *Peck v. Laughlin*, 37 Leg. Int. 18. Stipulations in a maritime contract of a merely personal nature are not within such jurisdiction. The Virginia, 2 Paine, 115; *Plummer v. Webb*, *supra*. But see The Pacific, 1 Blatch. 569. The admiralty jurisdiction now extends over "the navigable waters of the United States," including all those waters, salt or fresh, which form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water (The Genesee Chief, 12 How. 443; The Eagle, 8 Wall. 15; The Daniel Ball, 10 Id. 557; *Barney v. Keokuk*, 94 U. S. 324; The Montello, 20 Wall. 430); including, also, artificial canals, when channels of international or inter-state commerce (The Belfast, 7 Wall. 624; *Ex parte Boyer*, 109 U. S. 629; *Scott v. The Young America*, 1 Newb. Adm. 101; The B. & C., 18 F. R. 543); but not extending to small streams declared navigable by State statutes (*Duluth Lumber Co. v. St. Louis Boom and Imp. Co.*, 17 F. R. 419); or to lakes and rivers wholly within the limits of a State and having no navigable outlet to any other State or country. *United States v. Burlington Ferry Co.*, 21 F. R. 331. Public waters are subject to the admiralty, although they are in part in a foreign jurisdiction, and the cause of action there arises (The Eagle, 8 Wall. 15; The Sailor's Bride, Brown Adm. 68); and although such waters are wholly within the boundary of a county or State (The New World v. King, 16 How. 469; The Belfast, 7 Wall. 624; *Waring v. Clarke*, 5 How. 441; The Steamboat Magnolia, 20 How. 296; see *Ex parte Boyer*, 109 U. S. 632); but not including lands temporarily covered with water by a flood or other unusual cause. The Arkansas, 17 F. R. 383; *Jones v. Coal Barges*, 3 Wall. Jr. 53. The liability to temporary interruption does not destroy the character of a navigable stream. *Nelson v. Leland*, 22 How. 48; *Cheeseman v. Ferryboats*, 2 Bond, 363. Damages given by a State statute for a maritime tort, occurring on any navigable water of the United States, may be recovered in the proper district court in admiralty. *Holmes v. O. & C. R. Co.*, 6 Sawyer, 262; 5 F. R. 75; The Clatsop Chief, 7 Sawyer, 274; 8 F. R. 163. And a lien given by a foreign country can be enforced. The Champion, Brown Adm. 520.

In maritime contracts the subject-matter chiefly determines the jurisdiction. The Aurora, 1 Wheat. 96; The General Smith, 4 Wheat. 438; The St. Jago de Cuba, 9 Id. 409; *Waring v. Clarke*, 5 How. 459. The contract, claim, or service must concern rights and duties appertaining to commerce or navigation, or to a structure engaged in commerce. 1 Conkling's Adm. 8; The Belfast, 7 Wall. 637; The Hendrick Hudson, 3 Ben. 419. The true criterion for determining whether a water craft or vessel is a subject of admiralty jurisdiction is the business or employment for which it is intended, or is susceptible of being used, or in which it is actually engaged, rather than its size, form,



capacity, or means of propulsion. The *Kate Tremaine*, 5 Ben. 60; The *General Cass*, Brown Adm. 334. The character of the commerce, whether foreign, inter-state, or wholly internal, is immaterial. *United States v. Burlington Ferry Co.*, 21 F. R. 331. And the vessel need not be actually engaged in foreign or interstate commerce. The *Canton*, 1 Sprague, 437; The *Commerce*, 1 Black, 574; The *John B. Cole*, 4 N. Y. Leg. Obs. 373. This jurisdiction includes ships and steamboats (Tome *v. Four Cribs of Timber*, Taney, 533); three vessels constituting "one ship" (Brown *v. Certain Tons of Coal*, 34 F. R. 913); canal-boats (*Ex parte Easton*, 95 U. S. 74; The *Kate Tremaine*, 5 Ben. 60; The *E. M. McChesney*, 15 Blatch. 183; The *J. B. Cole*, 4 N. Y. Leg. Obs. 373); lighters, scows, and ferry-boats (Murray *v. Ferry-Boat*, 2 F. R. 86; Cheeseman *v. Two Ferry-boats*, 2 Bond, 363; The *Farmer*, Gilpin, 524; Endner *v. Greco*, 3 F. R. 411); tug-boats (The *Volunteer*, Brown Adm. 160; The *Ella B.*, 24 F. R. 508); elevators for transferring grain (The *Hezekiah Baldwin*, 8 Ben. 556); a dredge boat and its scows (The *Alabama*, 22 F. R. 450); derrick boats (Maltby *v. A Steam Derrick-boat*, 3 Hughes, 477); rafts (Cartier *v. The F. & P. M. No. 2*, 33 F. R. 511, and cases cited); A Raft of Spars, Abb. Adm. 485; 50,000 Feet of Lumber, 2 Lowell, 64; Cope *v. Vallette Dry-dock*, 10 F. R. 142, Muntz *v. A Raft*, 15 Id. 555; *contra*, Tome *v. Four Cribs of Timber*, Taney, 533; and Gastrel *v. A Cypress Raft*, 2 Woods, 213); barges (*Ex parte Easton*, 95 U. S. 74; The *Northern Belle*, 9 Wall. 526; The *General Cass*, Brown Adm. 334; The *Dick Keyes*, 1 Biss. 408; The *Enterprise*, 17 Int. Rev. Rec. 68; *contra*, Jones *v. The Coal Barges*, 3 Wall. Jr. 53); and steam pleasure-yachts. The *Mamie*, 8 F. R. 367. As to coal barges, see The *F. B. Nimick*, 2 F. R. 86, and The *Coal Barges*, 3 Wall. Jr. 53. It also includes a theatre on a floating hull. Franklin *v. Pendleton*, 7 N. Y. 508. But see The *Hendrick Hudson*, 3 Ben. 419.

Whether a contract is maritime depends on the subject-matter, and not the place where made. *Ins. Co. v. Dunham*, 11 Wall. 24; *Hartman v. Griffith*, 3 Blatch. 528. One criterion of a maritime contract is the system of law from which it arises, and by which it is governed. *Ins. Co. v. Dunham*, *supra*, 31. The character of the vessel, rather than the manner of her employment, is important in determining whether repairs are maritime services. Peppert *v. Robinson*, Taney, 492. Contracts, claims, or services purely maritime, and touching rights and duties appertaining to commerce and navigation, are causes within the statute. The *Belfast*, 7 Wall. 637. Services connected with the repair or improvement of a vessel, or rendered in aid of her navigation, directly by labor on the vessel, or in the sustenance and relief of those conducting her operations at sea, are maritime. Gurney *v. Crockett*, Abb. Adm. 490; The *Perseverance*, Blatch. & H. 385; The *Belfast*, 7 Wall. 624; Cox *v. Murray*, Abb. Adm. 340; The *Farmer*, Gilpin, 524; The *Pacific*, 1 Blatch. 568; *Coast Wrecking Co. v. Ins. Co.*, 7 F. R. 236; The *Bark San Fernando v. Jackson*, 12 Id. 341; The *Gold Hunter*, Blatchf. & H. 300; The *Harriet*, Olcott, 229. Thus this jurisdiction includes: materials and supplies furnished to a vessel, whether the vessel is foreign or belongs to a different State, or belongs to the same State or the same port as the person furnishing the materials and supplies (The *Lottawanna*, 21 Wall. 580; *Ex parte Easton*, 95 U. S. 68; The *General Smith*, 4 Wheat. 438; Endner *v. Greco*, 3 F. R. 451; The *Petrel v. Dumont*, 28 Ohio, St. 622; but see *Ramsay v. Allegre*, 12 Wheat. 611); provisions furnished to a passenger (The *Aberfoyle*, 1 Blatch. 360); services for the alteration and repair of a vessel (Lawrence *v. Morrisiana Co.*, 9 F. R. 208; The *Josephine*, 39 N. Y. 19; Blatchford, J., in *Terrell v. The B. F. Woolsey*, 4 F. R. 556); use of a dry dock (The *Steamship Mississippi*, 6 Id. 543; The *Vidal Sala*, 12 Id. 207; compare Cope *v. Vallette Dry-dock*, 10 Id. 142); contracts of a broker to procure a crew (The *Gustavia*, Blatch. & H. 189); contract to get oysters, and convey them to a place to plant them (The *Enterprise*, 3 Weekly Notes, 172); agreements between wreckers for services to be mutually performed



at sea (*Andrews v. Wall*, 3 How. 568); charter-parties, not including agreements to execute a charter-party (*The Belfast*, 7 Wall. 624; *New Jersey Steam Nav. Co. v. Merchant's Bank*, 6 How. 334; *Morewood v. Enequist*, 23 Id. 493; *The Alberto*, 24 F. R. 379; *Andrews v. Ins. Co.*, 3 Mason, 7; *The Tribune*, 3 Sumner, 144); affreightments (*The Moses Taylor*, 4 Wall. 427); demurrage (*Brown v. Certain Tons of Coal*, 34 F. R. 913); contracts to compress a cargo of cotton (*The Wivanhoe*, 26 Id. 927); the implied obligation to give a clean receipt (*The W. A. Morrell*, 27 Id. 570); transportation of passengers (*The Moses Taylor*, *supra*); policies of insurance (*De Lovio v. Boit*, 2 Gall. 495; *Ins. Co. v. Dunham*, 11 Wall. 1); contract to pay a premium on a marine policy (*The Guiding Star*, 9 F. R. 521); average (*Mutual Safety Ins. Co. v. The Cargo of Brig George, Olcott*, 39; *Dike v. Propeller St. Joseph*, 6 McLean, 573); contributions, jettisons, and marine hypothecations (*De Lovio v. Boit*, 2 Gall. 475); proceedings to set aside a collusive sale (*The Sparkle*, 7 Ben. 828); suits for possession (*The Daisy*, 29 F. R. 300; *The Director*, 26 Id. 768); questions between part owners as to possession and employment of the vessel (*Orleans v. Phoebus*, 11 Pet. 175; *Ward v. Thompson*, 22 How. 333; *Coyne v. Caples*, 8 F. R. 638; *The Seneca, Gilpin*, 10; *Revens v. Lewis*, 2 Paine, 202); pilotage (*Hobart v. Drogan*, 10 Pet. 108, 118; *Ex parte Easton*, 95 U. S. 68); exportation (*The Vengeance*, 3 Dall. 297; *Clarke v. United States*, 2 Wash. 521); wharfage, agreements of consortship, survey of vessels damaged by perils of the seas, and wages of mariners (*Ex parte Easton*, 95 U. S. 68; *The Kate Tremaine*, 5 Ben. 60; *Union Wharf Co. v. Starin*, 45 Conn. 585; *The Virginia Rulon*, 13 Blatch. 519); salvage (*Houseman v. The North Carolina*, 15 Pet. 40); removal of ballast from a foreign vessel (*Roberts v. The Windermere*, 2 F. R. 722); lockage (*Monongahela Nav. Co. v. The Bob Cornell*, 1 Id. 218); towage (*The W. T. Walsh*, 5 Ben. 72; *The May Queen, Sprague*, 588; *The Acadia, Brown Adm.* 73; *The Robert L. Stevens*, 22 How. Pr. 78); bills of lading (*The Leonidas, Olcott*, 12; *The Gold Hunter, Blatch. & H.* 300); bounties allowed by Congress (*The Lucy Anne*, 3 Ware, 253); distribution of head-money, (12 A. G. Op. 314); weighing, inspecting, and measuring of cargo (*Constantine v. The River Queen*, 2 F. R. 731); proceedings on §§ 4281, 4282 (see note there); accounts, when merely incident (*The Betsina*, 5 Am. Law Reg. 406; *Kellum v. Emerson*, 2 Curtis, 79); a suit *in personam* by a master (*Willard v. Dorr*, 3 Mason, 91; *The Leonidas, Olcott*, 12); suits by a mate (*Atkins v. Burrows*, 1 Pet. Adm. 244); by seamen (*Sheppard v. Taylor*, 5 Pet. 675); by the pilot, deck-hands, engineer, or firemen of a steamboat, and the cook, male or female, and steward of a vessel (*Wilson v. The Ohio, Gilpin*, 505; *United States v. Thompson*, 1 Sumner, 168, 170; *The Pekin, Gilpin*, 203; *Sage-man v. Schooner Brandywine, Newb. Adm.* 5); but not by a deck-hand after the vessel is sunk (*The M. M. Caleb*, 9 Ben. 159); by a surgeon (*Ross v. Walker*, 2 Wilson, 264; *Wilson v. The Ohio, Gilpin*, 505; *Trainer v. The Superior*, Id. 514; *contra, Gardner v. The New Jersey*, 1 Pet. 236); by a ship's carpenter (*Wilson v. The Ohio, Gilpin*, 505; *The Farmer*, Id. 524; *The Salisbury, Olcott*, 71); by a cooper for putting cargo in landing order (*The Onore*, 6 Ben. 564); by a cabin-boy, or chamber-maid (*Gurney v. Crockett, Abb. Adm.* 490, 492); by a cooper or boatswain (*United States v. Thompson*, 1 Sumner, 170); or by a clerk of a steamboat (*The Sultana, Brown Adm.* 13); by a stevedore (*The George T. Kemp*, 2 Lowell, 483); or ship-keeper (*The George T. Kemp*, Id. 482, criticising cases *contra*); a suit by a father for the services of his minor son, but not on a contract upon a special retainer without wages. *Plummer v. Webb*, 4 Mason, 380.

The following are *not* within the admiralty jurisdiction: Federal duties (*United States v. 350 Chests of Tea*, 12 Wheat. 486); *The Waterloo, Blatch. & H.* 114); services of musicians (*Trainer v. The Superior, Gilpin*, 514); services of a ship-keeper having guard of a vessel which is anchored in a harbor, or lying at a dock (*Gurney v. Crockett, Abb. Adm.* 490; but see *The George T. Kemp, supra*); claims for building a ship or supplying engines, timber, or other material for her construction (*The Iosco, Brown Adm.* 495; *The*



Count DeLesseps 17 F. R. 460; People's Ferry Co. v. Beers, 20 How. 400; Roach v. Chapman, 22 Id. 129; The Belfast, 7 Wall. 624; The J. B. Martin, 26 Wis. 488; Edwards v. Elliot, 21 Wall. 532; The Pacific, 5 Hughes, 257; Davis v. Mason, 44 Ark. 553; but see The Eliza Ladd, 8 Chi. Leg. N. 98); a mere mortgage of a ship, other than an hypothecated bottomry (Bogart v. The John Jay, 17 How. 399; The Ella J. Slaymaker, 28 F. R. 767; Schuchardt v. The Angelique, 19 How. 239; The Lottawanna, 21 Wall. 588; Britton v. The Venture, 21 F. R. 928); matters of account between part-owners (Orleans v. The Phœbus, 11 Pet. 175; Ward v. Thompson, 22 How. 333; Swain v. Knapp, 32 Minn. 429; 21 N. W. Rep., 414); even though relating to maritime affairs (Atkyns v. Burrows, 1 Pet. Adm. 244; Kellum v. Emerson, 2 Curtis, 79); unless merely incident (Tunno v. The Betsina, 5 Am. Law Reg. 406); contracts of partnership in the ship's earnings (Ward v. Thompson, *supra*); the ordering of a sale upon a dispute between part-owners as to the trade and navigation of the ship (Orleans v. The Phœbus, 11 Pet. 182; but see Andrews v. Betts, 8 Hun, 322); a contract to be performed on land or waters not navigable (The Belfast, 7 Wall. 637); preliminary contracts looking to a maritime contract (Andrews v. Essex F. & M. Ins. Co., 3 Mason, 16; Oakes v. Richardson, 2 Lowell, 177); work done on a vessel in a dry dock in scraping mud and barnacles from her, preparatory to cooping (Bradley v. Bolles, Abb. Adm. 569; but see The George T. Kemp, 2 Lowell, 482, and cases cited *supra*); possibly also injury to a vessel in consequence of breaking from her fastenings upon the ways as she was being hauled up for repairs (Ransom v. Mayo, 3 Blatch. 70, apparently overruled in Wortman v. Griffith, Id. 528; The Vidal Sala, 12 F. R. 207, 211); an action against an agent of a foreign ship, on his promise to be responsible for a previous breach of contract by his principal (Fox v. Patton, 22 Id. 746); claims for the storage of sails stripped from a vessel (Hubbard v. Roach, 2 Id. 393); equitable titles to vessels (Davis v. Child, 2 Ware, 78; Kellum v. Emerson, 2 Curtis, 79; The William D. Rice, 3 Ware, 134; Wenberg v. A Cargo of Mineral Phosphate, 15 F. R. 285); suits for specific performance (Kynoch v. The S. C. Ives, Newb. Adm. 205; Davis v. Child, 2 Ware, 78); or for an injunction (Paterson v. Dakin, 31 F. R. 682); proceedings *in rem* against a raft (Tome v. Four Cribs of Lumber, Taney, 533); or against a steamboat dismantled and fitted up as a saloon and hotel (The Hendrick Hudson, 3 Ben. 419; see Franklin v. Pendleton, 7 N. Y. 508); or against a floating dry-dock (Snyder v. A Floating Dry-dock, 22 F. R. 685); a libel *in rem* against a vessel by the administrator of a person killed by the vessel, where the State statutes give the administrator in such a case a right of action *in personam*. The Manhasset, 18 F. R. 918, reviewing cases; *contra*, The E. B. Ward, Jr. 17 Id. 456, citing cases. In an action for breach of contract against a person both owner and master of a vessel, who was to carry a cargo to its destination, *sell it*, and return the proceeds, less freight, to the consignor, the court held that it was substantially a contract to sell, and therefore was not a maritime contract. The New Hampshire, 21 F. R. 924. For an action for breach of a contract substantially for the purchase of salt, though joined to a contract of affreightment, see Peck v. McLaughlin, 14 Phila. 531. As to novation, see Fox v. Patton, 22 F. R. 746. The following are not cases in admiralty: contracts to be performed on non-navigable waters (The Belfast, 7 Wall. 624); agreements to repair a canal boat on inland canals (The Hornet, Crabbe, 426); or to furnish blocks to save a wrecked vessel (Squire v. Tons of Iron, 2 Ben. 21); contracts between consignor and consignee (Waterbury v. Myrick, Blatch. & H. 34, 50); a contract of a supercargo to sell in a foreign port (Alberti v. The Virginia, 2 Paine, 115); or a contract of bailment by a warehouseman (The Washington, 1 Chase, 125); a contract to prepare a cargo for storage and carriage (The Alexander McNeil, 20 Int. Rev. Rec. 175); a contract to procure persons to take care of a cargo (The Gustavia, Blatch. & H. 189); a contract to form a partnership to purchase a vessel (Turner v. Beacham, Taney, 583); or to transport passengers (The Yankee Blade,



19 How. 92); a contract to store wheat during the winter in a vessel, and in the spring to transport it (*The Pulaski*, 33 F. R. 383); or a contract to pay mariners a certain sum in case the voyage is altered (*L'Arina v. Mainwaring*, Bee, 199; *Grant v. Poillon*, 20 How. 168); or services performed by a master in any other character (*Willard v. Dorr*, 3 Mason, 91; a contract for winter wharfage (*The Murphy Tugs*, 28 F. R. 429); or one to procure a concession from a foreign government in respect of removing guano (*Wenberg v. A Cargo*, 15 Id. 285); an agreement to execute a charter-party (*Andrews v. Ins. Co.* 3 Mason, 7; *The Tribune*, 3 Sumner, 144); a claim by a drayman (*The Harriet*, Olcott, 229); or by a day-laborer for labor performed in port (*Graham v. Hoskins*, Olcott, 224; *The Island City*, 1 Lowell, 375); or for sweeping or scrubbing decks, keeping watch, &c. *Gurney v. Crockett*, Abb. Adm. 490; but see *The George T. Kemp*, 2 Lowell, 482. As to executory agreements, see *Bulkley v. Steam Co.*, 24 How. 386; *The Pauline*, 1 Biss. 397; *The Winslow*, 3 West. Law M. 78; *The Schooner Carrington*, 2 Id. 456; *Cox v. Murray*, Abb. Adm. 340; *Cunningham v. Hall*, 1 Cliff. 54.

The district court has no general equity power. *Dean v. Bates*, 2 Wood. & M. 87; *The Norwich*, 1 Ben. 89; *Wenberg v. A Cargo*, 15 F. R. 285. Thus it has no jurisdiction over trusts (*Davis v. Child*, 2 Ware, 78); or to decree the cancellation of an incumbrance (*Dean v. Bates*, *supra*); or to change a written agreement (*The Perseverance*, Blatch. & H. 385); or to try an equitable title, especially against a legal title (*Kellum v. Emerson*, 2 Curtis, 79; *The Ella J. Slaymaker*, 28 F. R. 767; *The Amelia*, 23 Id. 406; *The G. Reusens*, Id. 403); or to apportion a common fund. *The Norwich*, 1 Ben. 89. It has no power to direct the sale of a vessel (*The Orleans v. Phoebe*, 11 Pet. 175; *The Ocean Belle*, 6 Ben. 253; see *Tunno v. The Betsina*, 5 Am. Law Reg. 406; *Davis v. The Seneca*, Gilpin, 10, 34; *Lewis v. Kinney*, 5 Dillon, 159), except in case of wreck. *The Tilton*, 5 Mason, 465. But so far as the power of the admiralty courts extend, they act on equitable principles. *Brown v. Lull*, 2 Sumner, 443, 449.

In torts the admiralty jurisdiction is wholly dependent upon locality. *Philadelphia R. Co. v. The Philadelphia Towboat Co.*, 23 How. 215; *Leathers v. Blessing*, 105 U. S. 626; *The Professor Morse*, 23 F. R. 804; *The Maud Webster*, 8 Ben. 547. This locality is that of the thing injured, and not of the agent. *The Rock Island Bridge*, 6 Wall. 213, 216; *The Empire State*, 1 Newb. 541; *The Asa R. Swift*, Id. 553; *The Maud Webster*, *supra*; *The Plymouth*, 3 Wall. 20; *The Neil Cochran*, Brown Adm. 162; *The Ottawa*, Id. 356. The tort need not be committed on any vessel. *The Plymouth*, 3 Wall. 36. And the fact that the object is surrounded by navigable water does not give the admiralty jurisdiction if it is really a part of the land. *The Professor Morse*, 23 F. R. 807. But see *The Arkansas*, 17 F. R. 383.

Maritime torts extend to and include such torts as are remediable at common law by action on the case. *Philadelphia R. Co. v. Philadelphia Towboat Co.*, 23 How. 216; *Leathers v. Blessing*, 105 U. S. 626. The wrong or injury must have been done wholly upon navigable waters, *i. e.*, the cause of damage must there have been complete. *The Plymouth*, 3 Wall. 35; *The Genesee Chief*, 12 How. 454. The tort is still maritime, though committed in the course of a commercial transaction between different ports of the same State (*Re Long Island Transportation Co.*, 5 F. R. 606), and though not committed on board a vessel. *The Plymouth*, 3 Wall. 20, 36. Maritime torts include assaults or other personal injuries, collisions, spoliations, and damages, illegal seizures or other depredations on property, illegal dispossession or withholding of possession from owners of ships, controversies between part-owners as to the employment of ships, municipal seizures of ships, and cases of salvage and marine insurance (*The Kirkland*, 3 Hughes, 641; *The Yankee v. Gallagher*, McAll. 467; *Ex parte Easton*, 95 U. S. 68, 73; *The Columbia*, 27 F. R. 704; *The City of Panama*, 101 Id. 453); injury done to a vessel by piles left in a river, by running foul of an anchor left without a buoy, or by other



impediment left in the way (*Philadelphia R. Co. v. Philadelphia Towboat Co.*, 23 How. 216; *Leathers v. Blessing*, 105 U. S. 626); injuries to passengers whether carried gratuitously or for hire. *The New World v. King*, 16 How. 472; *The Highland Light, Chase*, 150. As to injury to one of a stevedores' gang, see *The Phoenix*, 34 F. R. 760; to a master, see *Spencer v. Kelley*, 32 Id. 838. They include also actions for ill-treatment (*Chamberlain v. Chandler*, 3 Mason, 242; *Re Long Island Trans. Co.*, 5 F. R. 602; *The Washington*, 9 Wall. 514; *The City of Brussels*, 6 Ben. 370); loss of baggage (*The H. M. Wright, Newb.* 494); injury by a pier extending into navigable water, built by a riparian proprietor for his own convenience without any governmental sanction (*Atlee v. Packet Co.*, 21 Wall. 389); injury from negligent care of the draw of a bridge (*Etheridge v. Philadelphia*, 26 F. R. 42); injury to a floating bath-house by a vessel (*The M. R. Brazos*, 10 Ben. 435); injury to a passenger at the moment of landing (*The Manhasset*, 19 F. R. 430); injury to merchandise damaged in water into which it was cast from a wharf by negligence of the wharfinger (*The City of Lincoln*, 25 Id. 835); injury to a vessel from bolts projecting from a wharf (*Leonard v. Decker*, 22 Id. 741; *Onderdonk v. Smith*, 21 Id. 588); also an action under § 4466, although the vessel is engaged exclusively in domestic commerce (*United States v. Burlington Ferry Co.*, 21 Id. 331); injury to a pier declared to be in navigable waters, and not proved to be part of the land (*New York v. Highland*, 6 Ben. 289); injury caused by a master's negligence, after the vessel has completed her voyage, and is securely moored to a wharf about to discharge her cargo. *Leathers v. Blessing*, 105 U. S. 626.

The district court has jurisdiction *in rem* against a vessel for damaging a raft in navigable waters. *The F. & P. M.*, No. 2, 33 F. R. 511; examining *The W. H. Clark*, 5 Biss. 295; *A Raft of Cypress Logs*, 1 Flip. 543; *Thackerey v. The Farmer*, Gilpin, 524; *Jones v. The Coal Barges*, 3 Wall. Jr. 53; *Ex parte Boyer*, 109 U. S. 629; *The Rock Island Bridge*, 6 Wall. 213; *Atlee v. Packet Co.*, 21 Id. 389; *Railroad Co. v. Tow Boat Co.*, 23 How. 209; *The Arkansas*, 17 F. R. 383; *Muntz v. A Raft of Timber*, 15 Id. 555. It also has jurisdiction of an action to recover money lost at gambling with the cognizance of the master (*Smith v. Wilson*, 31 How. Pr. 272); or to recover goods placed in the hands of a salvor on a fraudulent claim (*Houseman v. The North Carolina*, 15 Pet. 40); of an action against a person detaining on land goods taken at sea (*American Ins. Co. v. Johnson, Blatch. & H.* 9; *Davison v. Seal-skins*, 2 Paine, 324; *Houseman v. The North Carolina*, *supra*); of an action for an unlawful seizure of property (*Manro v. Almeida*, 10 Wheat. 473; *Martins v. Ballard, Bee*, 51; *The Martha Anne, Olcott*, 18); a suit against a master for tortiously taking and using a lighter (*The Florence*, 4 Cent. L. J. 249); a suit to recover the value of lost baggage (*The H. M. Wright, Newb.* 494); or a suit on a refusal to give a bill of lading to vendors, where a bill of lading had previously been given to an absconding vendee. *The Ferreri*, 9 F. R. 468; affirmed, 14 Id. 589.

So, torts not committed on navigable waters are not cognizable in admiralty. *The Commerce*, 1 Black, 579; *The Belfast*, 7 Wall. 637. This applies to and includes injury to a person on land caused by the explosion of a steamboat boiler (*The Plymouth*, 3 Wall. 20; *The Epsilon*, 6 Ben. 381; *The Mary Stewart*, 10 F. R. 137; 5 Hughes, 312); or to a building destroyed by fire communicated from a vessel anchored at a wharf (*The Plymouth*, 3 Wall. 20); damage to a derrick on a pier caused by the bowsprit of a vessel (*The Maud Webster*, 8 Ben. 547); or injury caused by a vessel to a wharf (*The Ottawa*, Brown Adm. 356; *The C. Accame*, 20 F. R. 642); or to an elevator on a wharf or bridge (*Johnson v. Elevator Co.*, 105 Ill. 462; *The Neil Cochran*, Brown Adm. 162); or injury to a marine railway (*The Professor Morse*, 23 F. R. 803; *Johnson v. Elevator Co.*, 105 Ill. 462); or injuries to a boom for detaining logs (*The City of Erie v. Canfield*, 27 Mich. 479); or injury to a derrick resting on the bottom of navigable water. *The Maud Webster*, 8 Ben. 547. A libel *in personam* for negligence in hauling a vessel



up to be placed in the yard for repairs, in pursuance of a contract made on land, is not maintainable. *Ransom v. Mayo*, 3 Blatch. 70.

The admiralty has exclusive jurisdiction of all matters of prize. *Taylor v. Carryl*, 20 How. 598; *The Hiawatha*, Blatch. Pr. Cas. 1. The courts of the captor's country have exclusive jurisdiction in matters of prize. *The Estrella*, 4 Wheat. 298. But the questions whether there is a valid prize, and whether in other respects the adjudicating court had jurisdiction, are examinable by other courts (*Rose v. Himely*, 4 Cranch, 269; *Talbot v. Janson*, 3 Dall. 168); and the courts of a neutral nation into which a captured vessel is brought may protect its neutrality. *The Estrella*, 4 Wheat. 298.

The admiralty has exclusive jurisdiction of ransom bills (*Maisonnaire v. Keating*, 2 Gall. 341), and of claims and of maritime torts arising after the capture. *The Siren*, 7 Wall. 152. A breach of a municipal regulation will not authorize a seizure on the high seas of a foreign subject or vessel. *Rose v. Himely*, 4 Cranch, 241, 279.

"*Saving to suitors in all cases the right of a common-law remedy, where the common law is competent to give it.*" — Sects. 4282, 4283 do not affect the jurisdiction of a State court. *Baird v. Daly*, 57 N. Y. 236; *Dougan v. Transportation Co.* 56 Id. 1. The above-quoted clause means a common-law remedy, and not merely a remedy in the common-law courts. *The Moses Taylor*, 4 Wall. 411; *The Hine v. Trevor*, Id. 571; *Steamboat Co. v. Chase*, 16 Wall. 522. It does not include all remedies given by State statutes. *The Hine v. Trevor*, *supra*; *Stewart v. Ferry Co.*, 12 F. R. 296. It gives the suitor his choice of a remedy in admiralty or at common law. *New Jersey Co. v. Merchant's Bank*, 6 How. 344; *The Wave*, Blatch. & H. 235; *Waring v. Clark*, 5 How. 441; *Dougan v. Transportation Co.*, *supra*; *The Waverly*, 7 Biss. 465; *The M. W. Wright*, Brown Adm. 290; *The Jarvis*, 1 Sprague, 485. Common-law courts deal with ships as personal property, liable to attachment and execution. *Ins. Co. v. Dunn*, 19 Wall. 223; *New Orleans v. S. S. Co.*, 20 Id. 387; *Taylor v. Carryl*, 20 How. 583; *Pelham v. The B. F. Woolsey*, 3 F. R. 457. See *The Sailor Prince*, 1 Ben. 234; *The Caroline*, 1 Lowell, 173; *Weston v. Morse*, 40 Wis. 455, 457. Actions in such courts may be maintained against the owners. *Hine v. Trevor*, 17 Iowa, 349; *Leon v. Galceran*, 11 Wall. 185. A State court has jurisdiction of an action by a creditor for supplies furnished at the home port or elsewhere (*Crawford v. Roberts*, 50 Cal. 235; *Southern Dry Dock Co. v. The Perry*, 23 La. An. 39); also of a suit by a seaman for wages (*Leon v. Galceran*, 11 Wall. 185); and of an action for damages to goods (*Rake v. The Owners*, 6 Bush, 25; *Parisot v. Helm*, 52 Miss. 617); and of a claim for damages for breach of a contract of affreightment (*Bohannon v. Hammond*, 42 Cal. 227; *Home Ins. Co. v. Northwestern P. Co.*, 32 Iowa, 223; *Baird v. Daly*, 57 N. Y. 237); or for damages resulting in death (*Steamboat Co. v. Chase*, 16 Wall. 522; *Sherlock v. Alling*, 93 U. S. 99; *Dougan v. Transportation Co.*, 56 N. Y. 1. See *The Atlas*, 93 U. S. 316); and of a suit for marine torts (*Stewart v. Harry*, 3 Bush, 438; *Percival v. Hickey*, 18 Johns. 257); including collisions (*Schoonmaker v. Gilmore*, 102 U. S. 118); of actions for fire caused by negligence (*Chisholm v. Transportation Co.*, 61 Barb. 363); and of actions of replevin, though the defendant claims under a deed at a marshal's sale (*Daily v. Doe*, 3 F. R. 903); suits on stipulations taken in admiralty (*Lacaze v. State*, 1 Addis. (Penn.) 59); action for penalty imposed by a city ordinance (*Ogdensburg v. Lyon*, 7 Lans. 215); an action on an express contract for salvage services (*Albany Ins. Co. v. Whitney*, 70 Penn. St. 248); or a bill in equity to redeem goods from a lien claimed for salvage services (*Cashmere v. De Wolf*, 2 Sand. 379); or a bill for the sale of a vessel and division of the proceeds among the owners. *Andrews v. Betts*, 15 N. Y. Sup. 322. Equitable remedies are not saved. *Pelham v. The B. F. Woolsey*, 3 F. R. 457. A State court cannot give a remedy between suitors having maritime claims on a vessel. *Stewart v. The Potomac Ferry Co.*, 12 Id. 296.

"*And of all seizures on land and on waters not within admiralty and maritime juris-*



*diction.*" — Seizures on land or on water, not within the admiralty and maritime jurisdiction, belong to the common-law side of the court. *United States v. Burlington County Ferry Co.*, 21 F. R. 338; *Clark v. United States*, 2 Wash. 520; *The Sarah*, 8 Wheat. 391; *United States v. The Betsey*, 4 Cranch, 443; *Whelan v. United States*, 7 Id. 112; *Ex parte Graham*, 10 Wall. 541; *The Samuel*, 1 Wheat. 9; *United States v. Winchester*, 99 U. S. 372. And the trial is by jury. *United States v. Winchester*, 99 U. S. 374; *United States v. Burlington County Ferry Co.*, *supra*; *The Sarah*, *supra*. Seizures on public waters are civil causes of admiralty and maritime jurisdiction (*United States v. La Vengeance*, 3 Dall. 297; *United States v. The Sally*, 2 Cranch, 405; *United States v. The Betsey*, 4 Id. 443; *De Lovio v. Boit*, 2 Gall. 398, 474; *United States v. Winchester*, 99 U. S. 374); and the trial is by the court. Cases *supra*. The place of seizure, and not the place where the offence was committed, determines the jurisdiction. *The Betsey*, 4 Cranch, 443; *New Jersey Steam Navigation Co. v. Merchant's Bank*, 6 How. 389. Compare *Clark v. United States*, 2 Wash. 519, as to jurisdiction over a seizure of landed goods, the forfeiture occurring at sea. Sect. 4499 does not change the rule. *The Idaho*, 29 F. R. 187. If an officer has a right under Federal laws to seize for a supposed forfeiture, the question whether the forfeiture has actually occurred belongs to the Federal court. *Slocum v. Mayberry*, 2 Wheat. 6. If the seizure is on the high seas, or within the waters of a foreign nation, that district court has jurisdiction to which the property is carried and in which it is proceeded against. *The Merino*, 9 Wheat. 402; Rev. Stats. § 734.

The jurisdiction is exclusive of State courts, after the seizure has been made. *Slocum v. Mayberry*, 2 Wheat. 1; *Gelston v. Hoyt*, 3 Id. 311. But the admiralty cannot entertain a libel to enforce the payment of duties, there being no seizure and no law warranting it. *United States v. 350 Chests of Tea*, 12 Id. 486, 498. No suit can be sustained against the ship, or an information against her cargo, to enforce the payment of duties, because the jurisdiction *in rem*, in revenue cases, extends only to seizures for forfeitures. *The Waterloo*, Blatch. & H. 114. The admiralty has jurisdiction to enforce a forfeiture by virtue of a fraud on the revenue laws, although part of the goods have been landed before seizure. *Merchandize v. United States*, Chase, 502. A suit against a vessel to recover a penalty for the importation of goods not described in her manifest is a civil case in admiralty, because the subject is maritime. *The Missouri*, 3 Ben. 508.

As to liability of the master and vessel for importation of goods not described in her manifest, see *United States v. The Queen*, 4 Ben. 237; 11 Blatch. 416. No seizure is necessary to give the court jurisdiction in admiralty of a proceeding against a vessel to recover a penalty, which is the enforcement of a navigation law of the United States, and not a seizure on land or on waters not within the admiralty jurisdiction. *The Joshua Levisness*, 9 Ben. 339. But see *Benedict's Adm.* § 301; *The Fideliter*, 1 Sawyer, 153; *The Rio Grande*, 23 Wall. 464.

*Prize.* — "And shall have original and exclusive cognizance of all prizes brought into the United States, except as provided in § 629, cl. 6." (Added to cl. 8 by 18 St. 316, ch. 80.)

The district and circuit courts have concurrent jurisdiction of proceedings to condemn property taken as prize under the insurrection statutes, and the exception above referred to relates to such concurrent jurisdiction. See § 563, par. 9, and § 629, par. 6. The jurisdiction of the prize court, upon the capture of a vessel, overrides jurisdiction of all claims on the instance side of the court. All such demands must be adjusted in the prize court. The fact of capture determines the jurisdiction, not the filing of a libel. As soon as captured, the property is in the custody of the law, awaiting the decision of the prize court; if it is condemned, all claims to it are adjusted by that court. *The Nassau*, 4 Wall. 634. The jurisdiction is exclusive. *Doane v. Penhallow*, 1 Dall. 218; *Novion v. Hallett*, 16 Johns, 327. It cannot be exercised by any officer or tribunal except the district court, as by a chaplain of a vessel of war, authorized by the President to



exercise admiralty powers in cases of capture. *Jecker v. Montgomery*, 13 How. 498. Before property captured can be properly disposed of it must be condemned as prize, in a regular judicial proceeding, in which all parties interested may be heard. This proceeding must be had in a court of admiralty deciding according to the law of nations. The proper court is the court of the nation or government to which the captor belongs. The district court is the only one having original jurisdiction in the United States. *Benedict's Adm.* §§ 306, 509; *Brown v. United States*, 8 Cranch, 110; *Glass v. The Betsey*, 3 Dall. 6; *The Amiable Nancy*, 3 Wheat. 546; *Prize Cases*, 2 Black, 635.

The jurisdiction exists in all forms, whether *in rem*, *in personam*, for condemnation, military salvage, restitution, damages, or distribution of prize-money. *Id.*; *Keane v. The Gloucester*, 2 Dall. 36. The jurisdiction does not depend on the locality of the capture, but extends to captures at sea, in creeks, havens, or rivers, and on land when made by a naval force or by the co-operation of a naval force. *The Emulous*, 1 Gall. 563, 575. But see *United States v. Winchester*, 99 U. S. 372. The arrest need not be made within the territorial authority of the court, to give it jurisdiction. 282 Bales of Cotton, *Blatch. Pr. Cas.* 302; *The Tropic Wind*, *Id.* 64; *The Hiawatha*, *Id.* 1. The admiralty has jurisdiction in case of capture of property found on a wharf, recently landed, made by a force sent from a vessel of war in boats. 680 Pieces of Merchandize, 2 Sprague, 233. Captures by naval forces in that capacity, under the direction of naval or admiralty authorities, as part of naval warfare, are *prize* within the meaning of the law, whether made on land or at sea; while property taken by land forces is booty, and governed by different rules. *Id.* A capture of property on waters which are navigable, when made by a land force on vessels used as transports to carry troops, such vessels not having been made part of the navy, is not a capture in co-operation with a naval force, but by a land force, and the admiralty has no jurisdiction. It has jurisdiction of captures on navigable waters by the navy, or where the navy has co-operated in making the capture, or by its presence and active assistance contributed immediately in effecting the capture, or where the capturing force operates from the sea, or where the capture has been of a place, as, *e. g.*, an island, used in naval warfare. *United States v. Bales of Cotton*, 1 Woolw. 236, per Mr. Justice Miller. A capture of cotton in a warehouse on land, at the mouth of a navigable river, by naval authorities, is not a cause of admiralty jurisdiction, but its disposition is controlled by the act concerning captured and abandoned property. *Cook v. United States*, 9 Ct. Cl. 288. The court of the district into which the property is carried has jurisdiction (*The Peterhoff*, *Blatch. Pr. Cas.* 463); also that of the district where the proceedings are instituted, when the captured vessel was destroyed because unfit to be sent in for adjudication. *The Zavalla*, *Id.* 173. The captured property need not be brought into the district. As a general rule, it is the duty of the captor to bring the property within the jurisdiction of the prize court; but this duty may be excused by existing circumstances. *Jecker v. Montgomery*, 13 How. 498, 516. The admiralty may take jurisdiction, though the property be appropriated to the use of the government, and not brought into the district. *The Advocate*, *Blatch. Pr. Cas.* 142; *The A. J. View*, *Id.* 143; *The Osceola*, *Id.* 150; *The Olive*, *Id.* 185. The prize court of one nation may carry into effect the decree of a prize court of another. *Penhallow v. Doane*, 3 Dall. 54; *Jennings v. Carson*, 4 Cranch, 2.

Captures by foreign ships of war, commissioned by a foreign government, are not cognizable as prize causes or otherwise in the courts of a neutral. The seizure may be inquired into, up to the point of ascertaining whether it was made by a commissioned vessel. As soon as this is ascertained to be the case, the proceedings are arrested. *L'Invincible*, 1 Wheat. 238, 257. The courts of a neutral may determine whether the capturing vessel is in fact the commissioned cruiser of a foreign power. *Id.*; *Glass v. The Betsey*, 3 Dall. 6. If the force of a foreign war vessel has been increased in the United States, being then a neutral, a capture by it, if brought within the territorial



jurisdiction, will be restored; so if the capture is made within the territorial limits of a neutral nation, and brought within its jurisdiction. *The Alerta*, 9 Cranch, 359; *Talbot v. Janson*, 3 Dall. 133; *The Estrella*, 4 Wheat. 298. The courts of a neutral power, if the capture is brought within its jurisdiction, have the right to determine whether its neutrality has been violated; and in such case the property will be restored to the original owner. *The Estrella*, 4 Wheat. 298; *The Gran Para*, 7 Id. 471.

Cl. 9. 18 St. 316, ch. 80, changes the words "seventy-six" to "eight" in the second line of this paragraph. The statutes for the prevention of the slave trade (1 St. 347; 2 St. 70, 71; 426, 428; Rev. Stats. § 5553), providing for forfeiture of vessels employed in it, gave to the circuit as well as the district courts jurisdiction of the proceedings to forfeit. And these forfeitures were held to be of admiralty and maritime jurisdiction triable without a jury. *United States v. La Vengeance*, 3 Dall. 297; *United States v. The Sally*, 2 Cranch, 406; *The Betsey*, 4 Id. 443; *The Sarah*, 8 Wheat. 391. As to proceedings for forfeiture of property employed in aid of insurrection, see note, § 5306, *post*.

Cl. 10. "*Suits by assignees of debentures for drawback of duties.*" See Rev. Stats. § 3040. Both the district and circuit courts have jurisdiction of these actions. Rev. Stats. § 563, § 9, § 639, § 6.

Cl. 11. Conspiracies against Civil Rights. See the Civil Rights Act, 18 St. 335, § 3, for provisions as to the jurisdiction, cited in notes, § 1977 *et seq.*

Cl. 12. See notes, §§ 629, par. 16, 1917; act of March 1, 1875; *Carter v. Greenhow*, 114 U. S. 320; *Smoot v. R. R. Co.*, 13 F. R. 337; *Ex parte Virginia*, 100 U. S. 339; *Neal v. Delaware*, 103 Id. 370; Civil Rights Cases, 109 Id. 3.

Cl. 13. See *Johnson v. Jumel*, 3 Woods, 69. The district and circuit courts of the United States were also given cognizance, exclusive of the courts of the several States, of violations of St. March 1, 1875, ch. 114 (18 St. 335; Sup. 148), to protect citizens in their civil and legal rights. This act was held unconstitutional in *United States v. Washington*, 4 Woods, 349. See *Smoot v. Kentucky Central Railway Co.*, 13 F. R. 337; 1 Com. D. 363; *Cohens v. Virginia*, 6 Wheat. 264; *Osborn v. United States Bank*, 9 Wheat. 738.

Cl. 15. See notes, §§ 629 cl. 11; 639, 5133 *et seq.*; *Leather Manufacturers' Bank v. Cooper*, 120 U. S. 778; *In re Yancey*, 28 F. R. 451; *Lyons v. Lyons Nat. Bank*, 19 Blatch. 287, and 8 F. R. 375. Sect. 59 of St. Feb. 25, 1863, ch. 58 (12 St. 681) gave jurisdiction of proceedings "by and against" banking institutions; and the Revision follows that act, and not § 57 of the revisory act of 1864, in which the omission of "by" was doubtless accidental, as was said in *Kennedy v. Gibson*, 8 Wall. 498, 506. Under this clause a district court has jurisdiction of a bill of equity filed by a national bank, praying for the appointment of a receiver of a defendant insolvent corporation. *Pittsburgh Nat. Bank v. Pittsburgh R. Co.*, 1 F. R. 190. Such bank can be sued only in the courts designated in § 57 of the act of 1864, that part of which section that expressly gave jurisdiction to any State, county, or Municipal court having jurisdiction in similar cases, was omitted from the Revision. *Cadle v. Tracy*, 11 Blatch. 101. *Hendee v. C. & P. R. Co.*, 26 F. R. 677. See now act of March 3, 1887 above; *Main v. Bank*, 6 Biss. 26; *N. O. Banking Ass. v. Adams*, 3 Woods, 21. A suit by a receiver is within this section. *Fifth Nat. Bank v. R. R. Co.*, 1 F. R. 190; *Frelinghuysen v. Baldwin*, 12 Id. 395.

Cl. 16. See, *e. g.*, as to the Seneca Nation, note to § 541. *In re Ah Fong*, 3 Sawyer, 144.

Cl. 17. This clause is constitutional. *Bors v. Preston*, 111 U. S. 261. The district court has jurisdiction of a suit by an alien against the consul of his nation residing in the district, to recover official fees illegally exacted. *Lorway v. Lousada*, 1 Lowell, 77; 1 Am. L. Rev. 92. As to the liability of a foreign consul to be proceeded against in the



Federal courts for violations of the criminal law of a State, see *Tennessee v. Davis*, 100 U. S. 257, 271. See 18 St. 318, ch. 80. But if the consul is sued jointly with another, and he is not liable, no judgment can be entered against either. *Bixby v. Janssen*, 6 Blatch. 315. Otherwise if he is liable. *Froment v. Duclos*, 30 F. R. 385. This provision applies to all cases in which consuls are necessary parties defendant. *Froment v. Duclos*, *supra*. By the repeal of Cl. 8 of § 711, by 18 St. 318, ch. 80, the United States courts have no longer exclusive jurisdiction, the State courts being thereby given concurrent jurisdiction. *Froment v. Duclos*, *supra*; *contra*, *Miller v. Sels*, 66 Cal. 341, where however this act was not cited in the opinion. See, on the former law, *Davis v. Packard*, 6 Pet. 41; 7 Id. 276; *Griffin v. Dominguez*, 2 Duer, 656; *Valarino v. Thompson*, 7 N. Y. 576; *Mannhardt v. Soderstrom*, 1 Binn. 138; *Hall v. Young*, 3 Pick. 80; *Sartori v. Hamilton*, 13 N. J. L. 107; *United States v. Ravara*, 2 Dall. 299, note; *State v. De la Foret*, 2 Nott & M. 217; *Flynn v. Stoughton*, 5 Barb. 115; *Commonwealth v. Kosloff*, 5 Serg. & R. 545; *Sagory v. Wissman*, 2 Ben. 240.

CL. 18. There is now no bankrupt law. See note, Title 61.

SECT. 565. — In case of an appeal to the circuit court, in instance causes, the disposition of the property follows the appeal, and the district court has no further power in respect thereto. *The Lottawanna*, 20 Wall. 201, 225; *The Seneca*, Gilpin, 34; *The Collector*, 6 Wheat. 194; *The Grotius*, 1 Gall. 503; *Mongomery v. Anderson*, 21 How. 388. In prize causes the property remains in the custody of the district court, and it may order the sale of perishable property. *Jennings v. Carson*, 4 Cranch, 26. The cases of *The Peterhoff*, Blatch. Pr. Cas. 620, and *The Sunbeam*, Id. 638, to the contrary, were decided under the acts of 1862 and 1863, and not under the act of 1864, which was continued in effect by the Revised Statutes.

SECT. 566. — Our admiralty jurisdiction was at first regarded as limited by the tide, but afterwards the district courts were held to have a general jurisdiction in admiralty upon the lakes, and the waters connecting them, by § 9 of the act of 1789; and, as a grant of jurisdiction, the enabling act of 1845, from which the latter part of § 566 is taken, thus became inoperative and ineffectual, with the exception of the clause giving to either party the right of trial by jury when requested. *The Eagle*, 8 Wall. 25; *The Lottawanna*, 21 Id. 588. By this § 566 the law is changed, the right to a jury trial being expressly given in the class of cases specified in the act of 1845. *Gillet v. Pierce*, Brown Adm. 553; *The Flora*, 1 Biss. 29; *The Globe*, 2 Blatch. 427; *The Revenue Cutter*, Brown Adm. 76; *The Volunteer*, Id. 159; *The General Cass*, Id. 334; *Allen v. Newberry*, 21 How. 244; *McCormick v. Ives*, Abb. Adm. 418. The statute is impracticable in many cases, because in cases arising upon contracts or torts upon or concerning two or more vessels, where one is within the class specified, and the other is not, as frequently occurs, two trials may be made necessary, and that upon the same state of facts, and often resulting perhaps in different and opposite judgments, thus involving inextricable confusion. No provision is made for the review of cases thus tried, and a valuable right is thus defeated. The party demanding a jury must bring himself by his pleadings within the provisions of the act. *Gillet v. Pierce*, *supra*; *The Empire*, 19 F. R. 558. In *Boyd v. Clark*, 13 Id. 908, both an appeal and a writ of error were taken. On the hearing Mr. Justice Matthews dismissed the writ of error and retained the appeal; holding that the provisions as to jury trial in the Seventh Amendment apply only to cases at common law, and that, upon appeal, admiralty cases tried by jury stand for trial in the circuit court, as if tried by the district judge. The practice of trying admiralty cases by jury has not obtained to any great extent, on account of the difficulties and objections above stated. In the district court for the Eastern District of Michigan the practice is to call to the aid of the court, in all difficult cases involving negligence, two experienced shipmasters, who sit with the judge and give their advice upon questions of seamanship.



or the weight of testimony. And this practice has obtained in other districts (The Emily, Olcott, 132; The Rival, 1 Sprague, 128); and appears to have been sanctioned by the Supreme Court. The Hypodame, 6 Wall. 216; The City of Washington, 92 U. S. 31; The Empire, 19 F. R. 558. See notes §§ 631, 633.

*"Any vessel of twenty tons burden, &c."* — It is sufficient if either vessel falls within these provisions; but if both vessels are foreign, or engaged in trade between places in the same State, or the action is not contract or tort, neither party appears entitled to a jury. The Erie Belle, 20 F. R. 63.

*"Lakes and navigable waters connecting the lakes."* — This does not include such rivers as the Ohio and Monongahela. The Hine v. Trevor, 4 Wall. 555; The F. W. Backus, Newb. Adm. 1; Bigley v. The Venture, 21 F. R. 880. And even upon the lakes the act does not appear to touch cases of salvage, jettison, or general average. 1 Com. D. 320; The Eagle, 8 Wall. 23. It excludes prize causes. Id. It extends to artificial means of communication like canals. The Young America, Newb. Adm. 101; The Avon, Brown Adm. 170. It does not apply to vessels engaged in the domestic commerce of a State. The Genesee Chief, 12 How. 443; The Hine v. Trevor, 4 Wall. 555; Jones v. The Coal Barge, 3 Wall. Jr. 53.

In admiralty causes arising upon the lakes, the verdict of a jury is merely advisory, and may be disregarded by the court. The Empire, 19 F. R. 558. Such causes when tried by jury are not reviewable upon writ of error, under Rev. Stats. §§ 633, 914; but may perhaps be re-examined upon appeal to the circuit court. Id.; Boyd v. Clark, 13 F. R. 908; Doty v. Jewett, 22 Blatch. 65. In such cases questions of law, arising upon facts found by the judge, are not open to revision in the circuit court. Doty v. Jewett, 22 Blatch. 65; Lyons v. Lyons Nat. Bank, 8 F. R. 369, and 19 Blatch. 279; United States v. 15 Hogsheads, 5 Blatch. 106; Blair v. Allen, 3 Dillon, 101; Wear v. Mayer, 2 McCrary, 172, and 6 F. R. 658. While an admiralty case can be tried by jury only where a statute permits it, yet a question of fact can be submitted to a jury, commissioner, or referees, to aid the court. Lee v. Thompson, 3 Woods, 167. See Dunphy v. Klein-smith, 11 Wall. 610. And the parties may by stipulation waive a jury in either the district or circuit court, and submit their case to the court upon agreed facts, independently of any statutory provision. Henderson's Distilled Spirits, 14 Wall. 44; Howard v. Crompton, 14 Blatch. 328; Campbell v. Boyreau, 21 How. 223.

The demand for a jury trial must show that the case falls within the statute. Gillet v. Pierce, Brown Adm. 553. Sects. 649, 700 apply only to trials in the circuit courts. Howard v. Crompton, 14 Blatch. 333. As to findings of fact in admiralty and patent cases, see St. 1875, Chap. 77, §§ 1, 2, stated in notes, §§ 631, 629, cl. 9. The Fourteenth Amendment does not restrict the power of a State to restrict jury trials in its courts, and the Seventh Amendment applies only to the Federal courts. Walker v. Sauvinet, 92 U. S. 90; Edwards v. Elliott, 21 Wall. 532. Trial by jury is rather a mode of exercising jurisdiction than any substantial part thereof. The Eagle, 8 Wall. 25. As to the power of a district court to refer to a referee causes involving long and complicated accounts, see Eakin v. United States, 1 U. S. L. J. 545. When a suit was brought upon a seizure in admiralty both against a vessel and the master, to recover a penalty, it was held proper to dismiss as to the master, he being entitled to a trial by jury. United States v. The Queen, 11 Blatch. 416; 4 Ben. 237. In cases of seizures on land, the claimant is entitled to a jury trial. The Sarah, 8 Wheat. 391; Morris' Cotton, 8 Wall. 507. *Quære*, whether the district court can try an action at law otherwise than by jury. Howard v. Crompton, 14 Blatch. 328. A trial of an equity case by jury, in the same manner as an action at law, is irregular, and the decree will be reversed. Dunphy v. Klein-smith, 11 Wall. 610. Proceedings under the confiscation acts of 1861 and 1862 might be according to admiralty forms, but must be according to the common-law practice as to the mode of trial. Semple v. United States,



Chase, 259; *The Confiscation Cases*, 20 Wall. 92; *Union Ins. Co. v. United States*, 6 Id. 759; *Armstrong's Foundry*, Id. 766; *Morris' Cotton*, *supra*. Under the act of 1824, conforming the practice in civil causes in Louisiana to that of the State courts, and under the rules established by the district court thereunder, a summary judgment on an appeal bond without trial by jury is valid. By becoming a party to the bond the defendant submits himself to the rule. *Hiriart v. Ballou*, 9 Pet. 156.

SECT. 567. — See notes, §§ 569, 704. This provision applies only to cases pending in Territorial courts, and does not include cases appropriate to the jurisdiction of State courts. *McNulty v. Batty*, 10 How. 72; *Preston v. Bracken*, Id. 81; *Benner v. Porter*, 9 Id. 235; *Forsyth v. United States*, Id. 571. It includes both civil and criminal cases. *Forsyth v. United States*, 9 How. 571. But if the State was attached to a circuit the transfer was to such circuit court. *Express Co. v. Kountze*, 8 Wall. 350. See also *Hunt v. Palao*, 4 How. 589; *Freeborn v. Smith*, 2 Wall. 160; *Carter v. Bennett*, 15 How. 354; *Baker v. Morton*, 12 Wall. 153; *Beatty v. Ross*, 1 Fla. 198; *United States v. Hart*, 6 Wall. 770; *Lownsdale v. Parrish*, 21 How. 290.

SECT. 569. — See notes, §§ 567, 704. A pending case not of a Federal character cannot be transferred. *McNulty v. Batty*, 10 How. 72; *Ames v. Railroad Co.*, 4 Dillon, 251; *Gaffney v. Gillette*, Id. 264. The subject-matter of the judgment determines whether the court sits as a district or a circuit court. *Southwick v. Postmaster-General*, 2 Pet. 442.

SECT. 571. — Amended by 19 St. 230, c. 41, by inserting after "Arkansas," the words, "the eastern district of Arkansas at Helena;" and repealed by 25 St. 656.

At the time of the Revision it appeared that the circuit court of South Carolina had jurisdiction over the whole State, while the district court, sitting at Greenville, in the western district, had also the powers of a circuit court; that the organization and powers of the courts of the western district of Virginia were not modified when that district became the district of the State of West Virginia, by St. June 11, 1864, c. 120; that after a circuit court for the western district of Virginia was provided by St. March 3, 1837, c. 34, and circuit court powers were taken away from the district court for the district, they were renewed by St. March 28, 1838, c. 46, at which time the circuit court was required to hold only one annual term, although, as it held two terms at the time of the Revision, it seemed unnecessary to continue in the district court the powers of a circuit court; that, in the other districts mentioned, circuit courts were not provided by law, their places being supplied by the district courts. 1 Com. D. 322. As § 8 of St. June 4, 1872, c. 284, inadvertently repealed §§ 9, 10 of St. Aug. 11, 1848, c. 151,— §§ 8, 9 being intended,—the intention is here followed. 1 Com. D. 321.

*District courts having circuit court powers.*—The act of 1870, empowering the district court of the northern district of New York to settle the terms for the use of the suspension bridge at Niagara, conferred judicial power, Congress not having power to confer any but judicial functions. *In re Canada Northern Ry. v. International Bridge Co.*, 7 F. R. 653. A circuit court cannot take jurisdiction of a creditor's bill based on a decree in admiralty rendered in the district court, the parties being residents of the same State. The circuit and district courts are separate and distinct, each having its own sphere of jurisdiction. The theory of ancillary relief presupposes an original action in the same court. The jurisdiction of circuit courts of different districts is scarcely more distinct than that of the circuit and district courts of the same district. *Winter v. Swinburne*, 8 F. R. 49. The district courts do not distinguish in their proceedings whether they sit as a circuit or as a district court, that being determined by the subject-matter of their judgments. A judgment rendered by a district court having circuit court powers, but upon a matter of district court jurisdiction, could not be brought to the supreme court by writ of error, under an act providing for appeals and writs of error from decisions in such court, "when exercising the powers of a circuit court." *Southwick v. Postmaster-General*,



2 Pet. 442. The district court for the middle district of Alabama had circuit court powers prior to St. March 3, 1873, and of all removals from State courts in that district; and a removal from such a State court into the circuit court for the southern district of Alabama was held void. *Ex parte State Ins. Co.*, 18 Wall. 417. In *Kerrison v. Stewart*, 1 Hughes, 67, where the defendant obtained judgment in the district court for the western district of South Carolina, a district court having circuit court powers, and the writ was tested in the name of the Chief Justice of the United States, though it was in a district court, and was made returnable before the clerk of the circuit court at Charleston, which was not within the district, he being also clerk of the district court, and the defendants in such suit appeared, pleaded, and went to trial before a jury of the district court, without a plea to the jurisdiction; it was held that the proceedings were originally without jurisdiction; that neither the chief justice nor the circuit judge can hold or assist in holding a district court; and that there was no authority for removing cases originally brought in the circuit court to the district court, against the consent of the parties, except in certain criminal cases at the instance of the district attorney; but that there having been no plea to the jurisdiction, and the parties having gone to trial in the district court, that court was thus given jurisdiction, and the judgment was valid. *Bronson v. La Crosse R. Co.*, 1 Wall. 405, construes St. March 3, 1863, which was not included in the Revised Statutes, but repealed the circuit court powers given to certain district courts, and conferred power on the district court to issue executions, etc.

## CHAPTER IV.

### DISTRICT COURTS — SESSIONS.

SECT. 572. — *Alabama*. Strike out marginal reference to St. 1874, ch. 463, which relates to Indiana. By 18 St. 195, ch. 401, the terms of the circuit and district courts commence: For the southern district, on the fourth Monday of December and the first Monday of June in each year; for the middle district, on the first Mondays of May and November in each year; and for the northern district, on the first Monday of April and the second Monday of October in each year.

*Arkansas*. Amended by 19 St. 230, ch. 41, by adding, as to the eastern district, the words "and at Helena on the second Monday of March and October," and changing the times named for Fort Smith to "the first Monday in February, May, August, and November." By 24 St. 428, ch. 273, terms of the circuit and district courts for the eastern judicial district are to be held twice in each year at Texarkana, commencing on the second Monday in January and July, to be known as the Texarkana division of said district.

*California and Colorado*. See note, § 531.

*Connecticut*. 21 St. 41, ch. 49, changes the final words "fourth Tuesday in November" to "first Tuesday of December."

*Florida*. 20 St. 280, ch. 43, provides for a term of the district and circuit courts at Tampa in the southern district, commencing on each first Monday in March. St. June 30, 1886, ch. 581 (24 St. 106), changed this to second Monday in February. See note, § 534.

*Georgia*. By St. Jan. 29, 1880, ch. 17, § 3 (see note, § 535), a term of the circuit court and of the district court for the southern district shall be held at Macon, on the first Mondays of May and October. 23 St. 50, ch. 106, provides that the regular terms of both courts in the northern district shall each be held on the first Monday in October in each year.



*Illinois.* See note, § 536. Sect. 1 of St. Aug. 8, 1888 (25 St. 387), provides —

“That hereafter, and until otherwise provided by law, there shall be held annually, on the first Monday in September, a term of the circuit and district courts of the United States for the southern district of Illinois, at the city of Quincy, in said district; said term to be in addition to the terms now required by law to be held at the cities of Springfield and Cairo, in said district.”

*Indiana.* 18 St. 251, ch. 463, changes the terms of the circuit and district courts at Evansville to the first Mondays in April and October. Under 20 St. 266, ch. 269, and 21 St. 511, ch. 154, two terms each of the district and circuit courts are held each year in the city of Fort Wayne, beginning on the second Tuesdays in June and December.

*Iowa.* Under 18 St. 15, the terms were made: At Keokuk, third Tuesday of January and June; at Dubuque and Des Moines, as stated in the text; at Council Bluffs, fourth Mondays of March and September. Under 21 St. 155, § 1, providing that the circuit court should be held at the times and places provided for the district court; 22 St. 172, ch. 312, § 7, dividing the State into two districts, northern and southern, and each district into three divisions; and St. Feb. 23, 1884, ch. 8 (23 St. 3), — the sessions at Keokuk, Des Moines, and Council Bluffs remain as above; and the other sessions of both courts (in the northern district) begin: At Dubuque, first Tuesday in April and third Tuesday in November; at Fort Dodge, third Tuesdays in January and June; and at Sioux City, second Tuesday of May and first Tuesday in October. In *Ex parte Railway Co.* 103 U. S. 794, it was held that, notwithstanding the above act (21 St. 155), an attachment cannot be sued out of the circuit court sitting in Iowa against the defendant's property, in an action where the court has not acquired jurisdiction of the person. St. April 19, 1888 (25 St. 87), provides —

“That hereafter the terms of the circuit and district courts of the United States in and for the northern district of Iowa shall be held as follows: At Sioux City on the first Tuesdays in October and May; at Fort Dodge on the second Tuesday of November and first Tuesday in June; at Dubuque on the fourth Tuesday of November and first Tuesday in April.”

*Georgia.* By 21 St. 62, ch. 17, § 3, a term of the circuit court and of the district court for the southern district (see note § 535) is held at Macon on the first Mondays of May and October.

*Kansas.* By 20 St. 355, ch. 177, circuit and district courts are held at Fort Scott on the second Monday in January, but only by consent of all the parties or order of the court for cause. 22 St. 400, ch. 13 (noted § 531, *supra*), provides for one term of the district court at Wichita on the first Monday of September in each year; and places part of the Indian Territory in the judicial district of Kansas, and part in the northern district of Texas. The Cherokee Outlet, under this act, is within the jurisdiction of the United States district court of Kansas. *United States v. Soule*, 30 F. R. 918. Sect. 1 of St. Aug. 9, 1888 (25 St. 392), provides —

“That there shall be one term of the United States district court for the district of Kansas held in the city of Salina in each year, the term of said court to be held on the second Monday of May from and after the passage of this act. But no cause, action, or proceeding shall be tried or considered in the court herein provided for unless by consent of all the parties thereto or order of the court for cause.”

*Kentucky.* By 21 St. 45, ch. 59, the regular terms of circuit and district courts are held as stated in the text, except, at Frankfort, change “third Monday in May” to “second Monday in June;” at Paducah, change “second Monday” to “first Monday,” and “first Monday” to “third Monday.” See note § 531.

*Louisiana.* By 21 St. 507, ch. 144, dividing the State into two districts, the western and the eastern, semi-annual sessions of the district and circuit courts are to be held: At Opelousas, on the first Mondays of January and June; at Alexandria, on the fourth Mon-



days of the same months; at Shreveport, on the third Mondays of February and July, and at Monroe, on the first Mondays of April and October. See note, § 531.

*Maine.* Change "fourth Tuesday in June" to "first Tuesday." 23 St. 1, ch. 1.

*Michigan.* By 20 St. 175, § 2, dividing the new western district into southern and northern divisions (note, § 538), regular terms of the circuit and district courts are held: in the northern division, at Marquette, on the first Tuesdays of May and September, and in the southern, at Grand Rapids, on the first Tuesdays of March and October; and by § 9, one or more terms of the district court for the eastern district are to be held annually at Port Huron, at such times as the judge may in his discretion appoint. By 24 St. 423, ch. 269, two or more terms of the circuit and district courts for the eastern district are to be held annually at Bay City, at times appointed by the courts.

*Mississippi.* See note, § 539. By 22 St. 101, ch. 218, relating to the division of the State into districts and divisions, the sessions for the eastern division of the northern district, held at Aberdeen, begin on the first Mondays of April and October, and continue 24 judicial days, if the business so long requires; and for the western division of said district, held at Oxford, begin on the first Mondays of June and December.

*Missouri.* By 20 St. 263, ch. 20, dividing the western district into eastern and western divisions, a term of the district and circuit court for said district is to be held at the city of Kansas on the third Mondays in May and October. 24 St. 424, ch. 271, constitutes the city of St. Louis and certain counties the eastern district of this State, which is divided into the northern and eastern divisions, with courts to be held at Hannibal and St. Louis respectively; and it divides the western district into four divisions, the southern, in which it creates a district court, sitting at Springfield; the central, with courts sitting at Jefferson City; the Saint Joseph, with courts sitting at Saint Joseph; the western, with courts sitting at the city of Kansas. Sect. 1 of St. April 19, 1888 (25 St. 88), provides —

"That the sessions of the circuit and district courts of the United States for the northern division of the eastern district of Missouri, at the city of Hannibal, shall begin and be held on the fourth Monday of May and the first Monday of December of each year. All acts and parts of acts inconsistent herewith are hereby repealed."

Sect. 1 of St. Sept. 26, 1888, repealing inconsistent provisions, enacts —

"That the terms of the circuit court of the United States for the Western Division of the Western District of Missouri shall begin and be held at Kansas City in said State on the first Mondays in March and September annually. That the terms of the district court of the United States for the Western Division of the Western District of Missouri shall begin and be held at Kansas City in said State on the first Mondays in May and October annually. That the terms of both the circuit and district courts of the United States for the Saint Joseph Division of the Western District of Missouri, shall begin and be held at Saint Joseph in said State on the first Mondays in April and November annually. That the terms of both the circuit and district courts of the United States for the Central Division of the Western District of Missouri shall begin and be held at Jefferson City in said State on the third Mondays in April and November annually. That the terms of the district court of the United States for the Southern Division of the Western District of Missouri shall be held at Springfield in said State on the third Mondays in May and October annually."

*Nebraska.* Substitute "second Monday in November" for the last eight words in second line. 19 St. 232, ch. 60. By 20 St. 169, ch. 315, a term of the district and circuit courts is to be held at Lincoln on the first Monday of January. Sect. 1 of St. Aug. 14, 1888, provides —

"That hereafter there shall be held annually in the State of Nebraska a term of the circuit and district courts of the United States for the district of Nebraska at the times and places following: At Omaha in said State on the second Monday in May and second Monday in November; in Lincoln on the second Monday in January; in Hastings on the second Monday in March; and in Norfolk on the second Monday in April, and a grand and petit jury may be summoned to serve at each of said terms of court hereby established."



*New Hampshire.* By 21 St. 330, ch. 71, the terms of both courts held at Exeter are thereafter to be held at Concord.

*New Jersey.* St. Aug. 8, 1888 (25 St. 388), provides —

“That at each term of the circuit and district courts of the United States to be holden in and for the district of New Jersey, it shall be lawful for the judge or judges holding such term upon consent of both parties, or application therefor and good cause shown by either party to any civil cause set for trial or hearing at said term, to order such cause to be heard or tried at the city of Newark, in said district, upon a day set for that purpose by said judge: *Provided*, Such application shall be made to such judge, either in vacation or term time, at least one week before the date set for the trial of said cause, and on at least five days' notice to the opposite party, or his or her counsel; and writs of subpoena to compel the attendance of witnesses at said city of Newark may issue, and jurors summoned to attend said term may be ordered by said judge or judges to be in attendance upon said court in the city of Newark.”

*New York.* 22 St. 32, ch. 48, changes the session of the district court at Buffalo to third Tuesday in September, adds Onondago to the counties named in the sixth line, and strikes out the last eighteen words of the paragraph.

*North Carolina.* 20 St. 173 provides for additional terms of the district and circuit courts for the western district at Charlotte, commencing on the second Mondays of June and December. By 24 St. 406 the terms of the circuit court for the eastern district are to be held at Wilmington at the times fixed for holding the district court at that place.

*Ohio.* 20 St. 101, ch. 169, repeals the text as to Toledo, and provides that a term of the circuit and district court for the northern district shall be there held on the first Tuesdays of June and December. St. July 27, 1882, ch. 351 (22 St. 176), contains the same provision, and provides that the other session, in the eastern division of the northern district, in Cleveland, shall begin on the first Tuesday of February, April, and October. By 21 St. 63 a term of both courts for the southern district is to be held at Columbus on the first Tuesdays of June and December. The statutory requirement that suits not of a local nature must be brought in that division of the district where the defendant, if single, resides, does not affect the court's general jurisdiction, but confers a personal privilege upon the defendant which he may waive. *Page v. Chillicothe*, 6 F. R. 599.

*Pennsylvania.* 24 St. 336, ch. 931, provides for two additional terms of the circuit and district courts in the western district, at Scranton, in the county of Lackawanna, commencing the first Mondays of March and September.

*Tennessee.* The appropriation act, 20 St. 206, § 1, par. 17 (see note, *ante*, § 547), provides that terms of the circuit and district courts, to be held in the eastern division of the western district, shall be held at Jackson at least twice a year, at times fixed by the judges respectively, and that the terms in the western division are to be held at the times and places previously prescribed by law. By 21 St. 175, ch. 203, § 2, terms of both courts for the eastern district shall be held at Chattanooga on the first Mondays of April and October.

*Texas.* As to the districts and divisions of this State, see note, § 548. By St. Feb. 24, 1879, ch. 97, § 4; St. Feb. 18, 1881, ch. 62; St. June 3, 1884, ch. 64 (23 St. 35), and St. June 20, 1884, ch. 102 (23 St. 48), the courts in the northern district are to be held twice a year at Waco, Dallas, and at Graham in Young County; the courts in the eastern district twice a year at Galveston, Tyler, and Jefferson; and those in the western district twice a year at Brownsville, San Antonio, El Paso, and Austin; the sessions to be: at Waco, on the second Monday of April and third Monday of November; at Dallas, the second Monday of January and third Monday of May; at Graham, the second Monday of March and third Monday of October; at Galveston, the first Mondays in November and March; at Tyler, the second Mondays in January and May; at Jefferson, the second Mondays of February and September; at Brownsville, the first Mondays in January and July; at San Antonio, the first Mondays in May and November; at El Paso, the first Mon-



days in April and October; at Austin, the first Mondays in February and August. Each district judge was empowered, by 20 St. 318, § 4, to fix adjourned terms at all said places.

*Vermont.* By 18 St. 53, ch. 214, the session at Rutland is changed to first Tuesday of October, and that at Windsor to the third Tuesday in May.

*Virginia.* 21 St. 324, ch. 45, superseding St. June 11, 1878, ch. 182, changes the sessions at Danville to the Tuesdays after the third Mondays in June and November.

*West Virginia.* 20 St. 27, ch. 27, changes the sessions of the district court at Clarksburg, to the first days of April and October; at Wheeling to the first days of March and September; and at Charleston, to the first days of May and November. St. May 17, 1888 (25 St. 151), provides —

“That, in addition to the terms of the circuit and district courts of the United States, now held in the district of West Virginia, there shall be held, in each year, one term of each of said courts, at Martinsburgh, in said district, on the first Tuesday in August.”

*Wisconsin.* 18 St. 75, ch. 286, changes the date of the sessions of the circuit and district courts at Oshkosh to the second Tuesday of July. By 24 St. 337, ch. 932, the regular terms of the circuit and district courts in the western district are to be held at Eau Claire, on the first Tuesday in June, at La Crosse on the third Tuesday in September, and at Madison on the first Tuesday in December in each year; the clerk residing at Madison to attend the terms at Eau Claire as clerk thereof.

SECT. 573. — Generalized from various acts altering the terms of particular courts, the form being taken from 17 St. 135, ch. 176, changing the terms of the circuit courts of the eighth circuit. 1 Com. D. 321.

SECT. 574. — The clause beginning with “and” and ending with “them” in the 1st. and 2d lines was here added. 1 Com. D. 330. The provision that courts of admiralty shall be always open does not relate to the passing or otherwise dealing with final decrees. 15 A. G. Op. 578. With respect to that provision, it is to be observed that while common-law judges properly exercise their authority only when holding a court, and have no power to sit in vacation, yet courts of equity are always open, the chancellor’s authority being personal, as representing the Crown or supreme head of the State, and capable of exercise equally in term time and in vacation. Langdell, Eq. Pl. § 38; Crowley’s Case, 2 Swanst. 1. So far as their powers extend, courts of admiralty act as courts of equity. *Brown v. Lull*, 2 Sumner, 443.

Prior to St. Aug. 23, 1842, ch. 188, § 5 (now Rev. Stats. § 574), it was held under the act appointing stated terms of the district court, and special courts at its discretion, either at the place appointed by law or at other places in the district, that an admiralty order at chambers and not in term time, releasing a vessel, was valid, the district judge alone composing the court, with power to hold special courts. The various *ex parte* orders which admiralty proceedings require, render informal modes of proceeding essential to justice. *United States v. The Little Charles*, 1 Brock. 380.

The power of courts (in this case a court of equity) over its judgments and proceedings expires at the same term. *Union Trust Co. v. Railroad Co.*, 6 Biss. 197; *United States Bank v. Moss*, 6 How. 31; *Doss v. Tyack*, 14 How. 297.

“So far as equity jurisdiction has been conferred upon them.” — The Federal courts can exercise only such equity powers as are expressly conferred by acts of Congress, and those judicial powers possessed by the High Court of Chancery in England as a court of equity in its judicial capacity. The prerogative jurisdiction is not possessed by them, and when a question is properly brought before them involving the validity of a gift to charitable uses, the only question is whether it would be valid in the courts of the State. *Loring v. Marsh*, 2 Cliff. 469, 492; *Trustees v. Executors*, 4 Wheat. 1; *Beatty v. Kurtz*, 2 Pet. 566;



*Fountain v. Ravenel*, 17 How. 369. And even with respect to their admiralty and maritime jurisdiction Federal courts are governed by the legislation of Congress and the general maritime law, and their jurisdiction cannot be enlarged or restricted by State legislation. *The Chusan*, 2 Story, 456.

Apart from their equity powers in admiralty cases, instances in which the district courts have been empowered to exercise jurisdiction in equity are: As courts of bankruptcy (*Ex parte Christy*, 3 How. 312); suits to enforce liens for internal-revenue taxes (Rev. Stats. § 563, cl. 5; § 3207); suits to redress deprivation of civil rights (Rev. Stats. § 563, cl. 12; § 1979); suits under certain statutes to confirm equitable land titles. See *United States v. McCullagh*, 13 How. 216. Sitting in equity, these courts may restrain their decrees in admiralty. *Dutcher v. Woodhull*, 7 Ben. 313. Prior to the act of 1887, a district court had jurisdiction of a bill for a receiver, filed by a national bank of the same district. *Fifth Nat. Bank v. Railroad Co.*, 1 F. R. 190. Such court may also issue a writ of *ne exeat*, even after final decree, and without a prayer therefor in the bill. *Lewis v. Shainwald*, 7 Sawyer, 403.

SECT. 576. — The limitation as to a jury refers to the operative part of the act of 1845, ch. 20, noticed, § 566, note. 1 Com. D. 330.

SECT. 577. — 21 St. 45, ch. 59, changing the terms in Kentucky, repeats this provision, which act declares that § 578 is not to be construed as thereby repealed.

SECT. 579. — In *Mechanics' Bank v. Withers*, 6 Wheat. 106, it was held that a Federal court for the District of Columbia, being invested by statute with the power of holding adjourned sessions exercised by the courts of Maryland, could adjourn to a distant day, the adjourned session being considered the same term. The court may modify its judgment or sentence at an adjourned day of the same term. *Ex parte Casey*, 18 F. R. 86.

SECT. 581. — This is a consolidation of the powers given by § 3 of the judiciary act and acts relating to particular districts. 1 Com. D. 332. The mere act of doing business by the district judge appears to be equivalent to the appointment of a special term, which need not be made in term time. *United States v. The Little Charles*, 1 Brock. 380.

SECTS. 583, 584. — A recent appropriation act (24 St. 541; see also Id. 253) provides —

“That hereafter no part of the appropriations made for the payment of fees for United States marshals or clerks shall be used to pay the fees of United States marshals or clerks upon any writ or bench warrant for the arrest of any person or persons who may be indicted by any United States grand jury, or against whom an information may be filed, where such person or persons is or are under a recognizance taken by or before any United States commissioner, or other officer authorized by law to take such recognizance, requiring the appearance of such person or persons before the court in which such indictment is found or information is filed, and when such recognizance has not been forfeited or said defendant is not in default, unless the court in which such indictment of information is pending orders a warrant to issue; nor shall any part of any money appropriated be used in payment of a per diem compensation to any attorney, clerk, or marshal for attendance in court except for days when the court is open by the judge for business, or business is actually transacted in court, and when they attend under Rev. Stats. §§ 583, 584, 671, 672, 2013, which fact shall be certified in the approval of their accounts.”

SECTS. 587, 588. — Causes which have been certified to the circuit court on account of the disability of the district judge, are to be remanded to the district court on the death of the judge and a new appointment. *Ex parte United States*, 1 Gall. 338.

SECT. 589. — A circuit judge may issue an order to show cause why an injunction should not be granted and a receiver appointed in proceedings in involuntary bankruptcy; and, in the absence of proof, the circuit judge is presumed to have acted according to law in issuing the order. *Wallace v. Loomis*, 97 U. S. 146, 156.

SECT. 590. — 18 St. 316, ch. 80, changes “circuit” to “district,” in the first line.



SECT. 591.—This section does not authorize a circuit judge to designate a district judge to hold court in a district in which the office of judge is vacant. 9 A. G. Op. 131. By the act of 1809 (2 St. 534), in case of the district judge's disability, his duties were to be performed by the justice of the Supreme Court allotted to the circuit; § 2 of the cited act of 1869 conferred the same power upon the circuit judge.

SECT. 592.—A cause may be transferred by act of Congress from one inferior tribunal to another. *Stuart v. Laird*, 1 Cranch, 299.

SECT. 596.—21 St. 435, ch. 133, § 1, repeals so much of this section as forbids the payment of the expenses of district judges while holding court outside of their districts. The appointment, under § 596, should be filed in the office of the clerk of the district court. *National Home v. Butler*, 33 F. R. 374. See *The Alaska*, 35 F. R. 555.

SECT. 601.—The fact that the district judge has been of counsel for one of the parties in a different cause is no ground for challenge; at least, in the absence of a motion to remove. *The Richmond*, 9 F. R. 863. In *Spencer v. Lapsley*, 20 How. 264, an interested judge of the district court was held to have power to make an order of removal to the circuit court.

SECTS. 602, 603.—The act of 1789 related only to a vacancy caused by the death and not the resignation of a judge. The exception at the end of this section is here added, being made necessary by the act of 1861, which forms the basis of § 603. The judiciary act provided only for vacancy by death; the act of 1861 provided for vacancies, by death or resignation, only in States containing two districts, and provided no means of information upon which the judge of one district in a State should proceed to hold a court in the other. 1 Com. D. 343.

## CHAPTER V.

### JUDICIAL CIRCUITS.

SECT. 604.—It was clearly the intention of the act of July 23, 1866, to attach every judicial district to a circuit, but it did not follow that a circuit court was to be held in every district. 1 Com. D. 344. Colorado was attached to the eighth circuit by 19 St. 61, ch. 147, § 1; note, § 530. The judicial districts in Texas, established by 20 St. 318, ch. 97, were made a part of the fifth circuit by 21 St. 10, ch. 18; note, § 548.

## CHAPTER VI.

### CIRCUIT COURTS—ORGANIZATION.

SECT. 606.—Judges of the supreme court may sit as circuit judges without distinct commissions for that purpose, such having been the practice from the organization of the judicial system. *Stuart v. Laird*, 1 Cranch, 299.

SECT. 607.—The salaries are now payable monthly. See note, § 554. 24 St. 492, ch. 347, provides—

“That there shall be appointed for the second circuit, by the President of the United States, by and with the advice and consent of the Senate, in addition to the present circuit judge, another circuit judge, who shall have the same qualifications and shall have the same power and jurisdiction therein that the present circuit judge has, under existing laws, and who shall be entitled to the same compensation as the present circuit judge: *Provided*, That the applications and proceedings therein provided for by Rev. Stats. §§ 2011–2014 shall be made and taken before the senior circuit judge of the second circuit; but in his absence or inability to act under said sections, or any of them, such applications and proceedings may be made and had before the junior circuit judge in said circuit.”



SECT. 608. — St. June 22, 1874, ch. 401 (18 St. 195), established a circuit court for the middle district of Alabama, to be held in Montgomery; a like court for its northern district, to be held in Huntsville, as said districts were then constituted; provided that the circuit court held at Mobile should be designated as the circuit court for the southern district; and repealed the original acts, 5 St. 210, 504; 17 St. 484, relating to Alabama, which were incorporated, in part, in Rev. Stats. §§ 608, 634. See Sup. 88, notes.

SECT. 609. — In 1793 power was given to one justice of the supreme court to hold the circuit court when the district judge was absent or interested, &c. 1 St. 334. In 1802 any judge of the circuit court, being the only one in attendance, was empowered to hold the court. 2 St. 158. The practice has been settled since 1842, as recognized in this section, that the district judge has as full power to hold the circuit court as is possessed by any other judge of that court. Per Lowell, J., in *Goodyear Dental Vulcanite Co. v. Folsom*, 3 F. R. 512; *Robinson v. Satterlee*, 3 Sawyer, 134; *Ex parte Kaine*, 10 N. Y. Leg. Obs. 257. The district judge may hold the circuit court alone, although the justice allotted to the circuit is dead. *Pollard v. Dwight*, 4 Cranch, 421. The rulings of the district judge, while holding the circuit court, are not subject to be reviewed in the same court, either by the circuit judge or the circuit justice, except when the district judge himself requests it. *United States v. Biebusch*, 1 McCrary, 42; *Appleton v. Smith*, 1 Dillon, 202; *Oglesby v. Attrill*, 14 F. R. 214; *Mining Co. v. Water Co.*, 1 Sawyer, 685, 689. It would be error for a district judge, as a judge of a circuit court, to review or set aside the action of the supreme justice assigned to the circuit, except for reasons which, had they been presented to the circuit justice, would probably have changed his decision. *Hussey v. Whitely*, 1 Bond, 407; 2 Fish. 120, 125. Under the bankrupt act of 1841 the district judge could not sit as a member of the circuit court upon questions adjourned to that court, and the conclusion of the circuit justice is conclusive upon the district judge. *Nelson v. Carland*, 1 How. 265. Writs of injunction may be issued by a circuit court, when held by the district judge sitting alone, as fully and freely in all respects as when held by the circuit justice or by two judges. *Goodyear Dental Vulcanite Co. v. Folsom*, 3 F. R. 509. Sentence of death in a criminal case may be pronounced by the district judge, holding circuit court alone, though trial and conviction were had when both judges were sitting. *United States v. Gordon*, 5 Blatch. 18, 29. When, by act of Congress, a district court is invested with circuit court powers, it is not a circuit court, and neither the circuit justice nor the circuit judge can assist in holding such district court. *Kerrison v. Stewart*, 1 Hughes, 67. Where a case is heard by a justice of the supreme court while holding a circuit court, a petition for a rehearing cannot be heard *ex parte* before such justice at Washington. The proper course is to file the petition with clerk of the circuit court and obtain an order to show cause, whereupon answer could be made to the petition. The petition and answer should then be sent to Washington to the justice who heard the cause (in case he will not be present at the next circuit court), and the application can then be taken up and disposed of by him, and his judgment sent to the circuit court and there entered. *Powder Co. v. Powder Co.*, 5 F. R. 197. The act of April 10, 1869 (16 St. 44), by which a circuit judge was appointed to the circuit court for Missouri, did not exclude the district judge for either district of Missouri from sitting in said circuit court. *In re Circuit Court*, 1 Dillon, 1. A district judge in one district sent to hold a district court in an adjoining district, may also hold the circuit court. *Re Nicolas*, 8 Blatch. 102.

SECT. 614. — The cited act of 1867, which gave the power to hear cases, by consent of parties, only when the court is held by the district judge alone, in the absence of the judge for the circuit, and the act of 1802, which governs when he sits with the judge for the circuit, taken together, were regarded as establishing the conclusion stated in this section. 1 Com. D. 347. In an appeal to the circuit court from the district court, the



district judge who rendered the decision cannot give a vote, even where the parties consent, although he may assign his reasons for his decision. The case cannot be brought before the supreme court on a certificate of a division between him and the other judge. *United States v. Emholt*, 105 U. S. 414. Neither the agreement of parties, nor the laws or practice of a State, in regard to the proceedings of its own courts, can authorize a circuit court to revise a judgment of the district court in any other mode of proceeding than that which the law prescribes. *Doty v. Jewett*, 22 Blatch. 65; *Kelsey v. Forsyth*, 21 How. 85; *Merrill v. Petty*, 16 Wall. 338, 347. Although the district judge is on the bench, yet, if he do not sit in the cause, he is absent in contemplation of law. *Bingham v. Cabbot*, 3 Dall. 19, 36. See notes, §§ 650, 693.

SECTS. 615, 616. — See notes, §§ 592, 601. In *Supervisors v. Rogers*, 7 Wall. 175, the act of 1839, cited in the margin, was held not repealed by the act of 1863, providing for the calling of a new judge into the original court; that although two of the disabilities named in the first act were also named in the other, the statutes were cumulative in this respect, and in other respects were intended to meet different states of fact. The "most convenient circuit court" is the nearest in place. *Richardson v. Boston*, 1 Curtis, 250. Sect. 615 is construed as giving all necessary powers to the court in order to carry the litigation between the parties into judgment or decree. *May v. Le Claire*, 18 F. R. 49.

SECT. 617. — The revisers (1 Com. D. 349) considered that a more specific authority was required than that contained in the cited act of 1863 and the act of April 10, 1869, to enable a circuit judge to exercise jurisdiction anywhere but in his circuit.

SECT. 618. — The text makes a substantial alteration in the previous law, the scope and meaning of which, under the various acts cited in the margin of the three preceding sections, appear to have been not free from doubt. 1 Com. D. 350.

SECT. 619. — See note, § 555. Amended by 20 St. 178, ch. 329, to read as follows:—

"All the circuit courts of the United States shall have the appointment of their own clerks, the circuit and district judges concurring; and in case of a disagreement between the judges, the appointment shall be made by the associate justice of the Supreme Court allotted to such circuit, except in cases otherwise specially provided for by law."

By 18 St. 85, ch. 328, § 2, clerks of the circuit and district courts, United States marshals, and district attorneys, are to reside permanently in their respective districts, and to give personal attention to their official duties, otherwise, except in case of sickness, such office to be deemed vacant; provided, that in the southern district of New York such officers may reside within twenty miles of their districts. The revisers (1 Com. D. 351) state that no general provision had been made as to the place where the records of the circuit courts should be kept, the judiciary act making such provision only for those of the district courts.

SECT. 624. — *Fischer v. Hayes*, 22 F. R. 92, and 22 Blatch. 505. See the special statutes cited in note to § 558.

SECT. 626. — The last seventeen words of this section were here added, that being the construction placed upon the original provision by the First Comptroller. 1 Com. D. 352.

SECT. 627. — See notes, §§ 555, 823. 18 St. 253, ch. 469, § 6, authorizes the supreme court of Utah to appoint commissioners of that court, to exercise the duties of United States circuit court commissioners, and to take acknowledgments of bail, and also to have such authority, as examining and committing magistrates, as was then possessed by justices of the peace in that Territory.

The commissioners cannot punish for contempt. *Ex parte Perkins*, 29 F. R. 900. They may be removed by the circuit court which appointed them, upon a rule to show cause, supported by affidavits charging misconduct, and granted on the district attorney's motion after due notice. *Re Eaves*, 30 Id. 21; *Re Gilbert*, 31 Id. 277.



## CHAPTER VII.

## CIRCUIT COURT — JURISDICTION.

By St. March 3, 1887, ch. 359, § 2 (24 St. 505) the circuit courts have concurrent jurisdiction with the Court of Claims as to set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, &c., where the amount of the claim does not exceed \$1000; the cases brought and tried under the act to be tried by the court without a jury. See notes, ch. 21, *post*. As to eminent domain, see p. 40 *ante*.

SECT. 629. — St. March 3, 1875, ch. 137, § 1 (18 St. 470) provided —

“That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different States or a controversy between citizens of the same State claiming lands under grants of different States, or a controversy between citizens of a State and foreign states, citizens, or subjects; And shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except as otherwise provided by law, and concurrent jurisdiction with the district courts of the crimes and offenses cognizable therein.

But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court. And no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceeding, except as hereinafter provided. Nor shall any circuit or district court have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant and bills of exchange. And the circuit courts shall also have appellate jurisdiction from the district courts under the regulations and restrictions prescribed by law.”

St. March 3, 1887, ch. 373, § 1 (24 St. 552), as corrected by St. of Aug. 13, 1888 (25 St. 434), amends this section to read as follows:—

“That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$2000, and arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which controversy the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different States, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, or a controversy between citizens of the same State claiming lands under grants of different States, or a controversy between citizens of a State and foreign states, citizens, or subjects, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, and shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except as otherwise provided by law, and concurrent jurisdiction with the district courts of the crimes and offenses cognizable by them. But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suits shall be brought only in the district of the residence of either the plaintiff or the defendant; nor shall any circuit or district court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made; and the circuit courts shall also have appellate jurisdiction from the district courts under the regulations and restrictions prescribed by law.”



The following decisions relate to § 1 of the act of 1887:—

*“Civil suit.”*—An information in the nature of *quo warranto* against a railroad company for exercising possessory rights over lands without authority of law is a civil action. *Illinois v. Railroad Co.*, 33 F. R. 721.

*“At law or in equity.”*—The equity jurisdiction of the United States courts is not subject to limitation or restraint by the State authorities, and is uniform throughout the United States. *Gamewell Tel. Co. v. Mayor*, 31 F. R. 312. See note, § 913.

*“Exceeds.”*—The amount must *exceed* \$2000, exclusive of interest and costs. *Lazensky v. Knights of Honor*, 32 F. R. 417. And this excludes any interest accruing to the date of the suit. *Moore v. Edgefield*, 32 F. R. 498. The sum may be made up of distinct demands each less than \$2000. *Bernheim v. Birnbaum*, 30 F. R. 885. A declaration containing three counts, one on a promissory note for \$875, one for \$875 for money had and received, and one for \$875 for work and labor, was held on demurrer to set forth a sufficient amount involved. *Armstrong v. Ettlesohn*, 36 F. R. 209. The circuit court has jurisdiction of a suit by representatives of a deceased intestate under the same title and for a common and undivided interest against an administrator, although the amount which on division each would be entitled to is less than \$2000. *Shields v. Thomas*, 17 How. 3; *Prince v. Towns*, 33 F. R. 161. Under the act of 1887, construed in connection with the act of 1875, the circuit court should dismiss an action of tort, when it appears from the plaintiff's own statement or the testimony of his witnesses, that a verdict of \$2000 would be so excessive as to require the court to set it aside and grant a new trial. *Maxwell v. Railroad Co.*, 34 F. R. 286. Where a bill for specific performance of a contract for the sale of land is silent as to its value, except that in the contract its price or value is fixed at \$1000, an amendment alleging that its present value is \$3000 gives jurisdiction. *Johnston v. Trippe*, 33 F. R. 530. An amendment was allowed changing the *ad damnum* from \$1500 to \$2500, in *Davis v. Railroad Co.*, 32 F. R. 863.

*“Cases arising under the Constitution,”* &c.—While the Federal courts have jurisdiction of actions between citizens of the same State where Federal questions are involved, and may in such actions determine issues otherwise triable by the State courts, their jurisdiction cannot be extended to other questions and issues raised by supplemental bill filed after the determination of the original cause (*Omaha Co. v. Cable Co.*, 33 F. R. 689); and where a real Federal question is involved at the outset, its subsequent elimination does not oust the jurisdiction. *Omaha Ry. Co. v. Cable Co.*, 32 Id. 727.

*“Or in which controversy the United States are plaintiffs or petitioners.”*—Under the act of 1875, the circuit courts have no jurisdiction of an action by the United States to recover money or property, where the amount in controversy did not exceed the sum of \$500, exclusive of costs. *United States v. Huffmaster*, 35 F. R. 81. And under the act of 1887 the amount in controversy in such a case must exceed \$2000, exclusive of interest and costs. *United States v. Huffmaster*, 35 Id. 83; *contra*, *Fales v. Railroad Co.*, 32 Id. 673, *arguendo*. But see the last part of section 3, as showing intent of Congress to make a certain amount involved necessary in suits between citizens of the same State claiming lands under grants from different States. And if amount involved is one of the necessary elements in such cases, it would be in cases in which the United States are plaintiffs or petitioners.

*“Controversy between citizens of the same State.”*—The circuit court has no jurisdiction of an action between citizens of the same State for an assignment of letters-patent and damages (*Wren v. Annin*, 34 F. R. 435; *Trading Co. v. Glaenzer*, 30 Id. 387; *Hartell v. Tilghman*, 99 U. S. 547); nor over the probate of wills, while merely administrative, but only when a controversy arises between citizens of different States. *Everhart v. Everhart*, 34 F. R. 82; *Gaines v. Fuentes*, 92 U. S. 18; *Ellis v. Davis*, 109 Id. 485.



Partners, citizens of the same State, sued in a circuit court, cannot by a cross bill of one against the other, litigate their disputes *inter sese*. *Vannerson v. Leverett*, 31 F. R. 376. But as to cross bills, see *First Nat. Bank v. Salem Co.*, 31 Id. 580.

"*Or a controversy between citizens of the same State, claiming lands under grants of different States.*" — As to the element of amount involved, see note *supra*, on controversies in which the United States are plaintiffs or petitioners.

"*And no civil suit,*" &c. — These provisions are not jurisdictional, and may be waived. *Cooley v. M'Arthur*, 35 F. R. 373; *Ex parte Schollenberger*, 96 U. S. 378; *Page v. Chilli-cothe*, 6 F. R. 599. Where a bill shows on its face that the defendant is not an inhabitant of the district where suit is brought, the defendant may assert his objection to being served out of the district of his residence by demurrer as well as by motion to dismiss. *Miller-Magee Co. v. Carpenter*, 34 F. R. 433; *Reinstadler v. Reeves*, 33 Id. 308. Under these provisions, the process of the circuit court will not run throughout the United States, except provided in § 738. *Bourke v. Amison*, 32 F. R. 710. A suit against a corporation for an infringement of a patent can be brought only in the place whereof it is an inhabitant. *Gormully Manuf. Co. v. Pope Manuf. Co.*, 34 F. R. 818. Whether a suit for an infringement of a patent can be brought even by consent, except in the district of which the defendant is a citizen, *quære*. *Reinstadler v. Reeves*, 33 F. R. 308. A corporation can be an inhabitant of the State only where it is incorporated. *Connor v. Vicksburg R. Co.*, 36 F. R. 273. Where the jurisdiction depends upon the existence of a Federal question, the defendant must be sued in the district of his domicile. *Railroad Co. v. Railroad Co.*, 33 F. R. 385; *Reinstadler v. Reeves*, *supra*. A person cannot be sued outside the district of which he is an inhabitant, except when he consents thereto, or waives objection, or when the jurisdiction is founded only on the diverse citizenship of the parties. *Halstead v. Manning*, 34 F. R. 565.

"*But where the jurisdiction is founded only,*" &c. — Where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit may be brought in the district of the residence of either the plaintiff or defendant. *Bank of Winona v. Avery*, 34 F. R. 81. But service of process in a suit against a railroad, a foreign corporation, cannot be made on a passenger agent whose sole duty it is to solicit travel for the defendant road, notwithstanding he may have been employed to effect a compromise of plaintiff's claim. *Maxwell v. Atchison Railroad Co.*, 34 F. R. 286, reviewing the cases on this subject. See *Connor v. Vicksburg R. Co.*, 36 F. R. 273.

"*Nor shall any circuit or district court have cognizance of any suit,*" &c. — A suit to recover damages for a refusal to accept and pay for merchandise purchased under an oral agreement is a suit to recover the contents of a chose in action. *Simons v. Paper Co.*, 33 F. R. 19. The circuit court has no jurisdiction of an action by an assignee on a county warrant payable to the order of a person named therein and passing only by indorsement, in the absence of an averment that the assignor was qualified to sue in such court. *Rollins v. Chaffee County*, 34 F. R. 91. But it has on a county warrant payable to a person therein named, or bearer. *Jerome v. Commissioners*, 18 F. R. 873; *Newgass v. New Orleans*, 33 Id. 196; *Rollins v. Chaffee County*, *supra*.

As the nature and extent of the changes made by the act of March 3, 1887, can best be determined from the decisions under the act of March 3, 1875, such decisions are given below.

Congress is not bound to enlarge the jurisdiction of the Federal courts to every subject in every form which the Constitution warrants. *Turner v. N. A. Bank*, 4 Dallas, 10; *McIntire v. Wood*, 7 Cranch, 506; *Kendall v. United States*, 12 Pet. 616; *Cary v. Curtis*, 3 How. 245; *Sheldon v. Sill*, 8 Id. 449; *United States v. Haynes*, 29 F. R. 691. "Original" does not mean "exclusive," and Congress can bestow jurisdiction on the circuit court in cases in which by the Constitution the supreme court has original juris-



diction. *Texas v. Lewis*, 14 F. R. 65 ; *Börs v. Preston*, 111 U. S. 252 ; *Ames v. Kansas*, 111 Id. 469. The act of 1875 is constitutional (*San Mateo County v. Southern Pacific R. R. Co.*, 7 Sawyer, 517 ; *Sawyer v. Concordia*, 12 F. R. 754), and the evident purpose of Congress was to make the original jurisdiction of the circuit court co-extensive by this act with the grant of judicial power, except in cases in which the supreme court is given exclusive jurisdiction by § 687. *Mutual Life Ins. Co. v. Champlin*, 21 F. R. 85 ; *Ames v. Kansas*, *supra* ; *Lottery Co. v. Fitzpatrick*, 3 Woods, 239 ; *Sawyer v. Concordia*, 12 F. R. 754 ; *Stanley v. Supervisors*, 19 Blatch. 147. One object of the act obviously was to open the circuit court to suitors claiming rights under the Federal Constitution and laws, and to enable such litigants to reach the United States courts without the tedious and oftentimes difficult process of an appeal or writ of error to the supreme court. *Sawyer v. Concordia*, 12 F. R. 754. The circuit court cannot revise or set aside the final decree of a State court having complete jurisdiction of the parties and subject-matter, where the proceeding is merely tantamount to the common-law practice of moving to set aside a judgment for irregularity, or to a writ of error, bill of review, or appeal, although fraud in the State court is charged. *Randall v. Howard*, 2 Black, 585 ; *Nougué v. Clapp*, 101 U. S. 554. But it has jurisdiction if the proceedings are tantamount to a bill in equity to set aside a decree for fraud in obtaining such decree, or upon the ground that it was rendered by a court without jurisdiction. *Gaines v. Fuentes*, 92 Id. 10 ; *Barrow v. Hunton*, 99 Id. 83. The circuit court has no supervisory jurisdiction over the district court, except through its appellate jurisdiction, and has no jurisdiction to review the decree of another circuit court. *Smith v. Jackson*, 1 Paine, 455 ; *Kent v. Roberts*, 2 Story, 598 ; *Clark v. Hackett*, 1 Clif. 272.

A State cannot sue in the circuit court. *Wisconsin v. Duluth*, 4 Chi. Leg. News, 405 ; 11 Am. Law Reg. N. s. 709. A suit against the governor of a State to recover money in the State treasury, and slaves in the possession of the State government, is a suit against the State, and the Federal courts have no jurisdiction ; although in general, where the jurisdiction depends upon a party, it means the party to the record. *Governor of Georgia v. Madrazo*, 1 Pet. 110. Where a State owns all the stock of a bank, the circuit court has jurisdiction of a suit against the bank. *Bank of Kentucky v. Wister*, 2 Id. 323. See *New Jersey v. Babcock*, 4 Wash. 344 ; 11 Myer's Fed. Dec. §§ 688, 694 ; *Chaffraix v. Liquidation Board*, 11 F. R. 638 ; *Ex parte Madrazo*, 7 Pet. 627 ; *North Carolina v. Trustees of University*, 1 Hughes, 133. The circuit court has jurisdiction of suits against the agent or officer of a State, and of suits in which the State is interested, but not a party. *Swasey v. Railroad Co.*, 1 Hughes, 19 ; *Charles River Bridge v. Warren Bridge*, 11 Pet. 572 ; *McComb v. Liquidation Board*, 2 Woods, 54 ; 92 U. S. 531 ; *Preston v. Walsh*, 10 F. R. 325 ; *Davis v. Gray*, 16 Wall. 203 ; *Gray v. Davis*, 1 Woods, 425 ; *Woolsey v. Dodge*, 6 McLean, 145 ; 18 How. 331 ; *United States v. Peters*, 5 Cranch, 115. As to the jurisdiction of the Federal courts over probate matters, see *Fouvergne v. New Orleans*, 18 How. 470 ; *Southworth v. Adams*, 4 F. R. 1 ; *Gaines v. Fuentes*, 92 U. S. 10 ; *Broderick's Will*, 21 Wall. 503 ; *Ellis v. Davis*, 109 U. S. 485. As to proceedings for divorce and alimony, see *Barber v. Barber*, 21 How. 582 ; *Cheever v. Wilson*, 9 Wall. 124 ; *Johnson v. Johnson*, 13 F. R. 193.

St. 1875, § 1, applies to ordinary suits to which similar words in St. 1789, § 11, and Rev. Stats. § 629, cl. 1, 2, 3, by their connection and context were necessarily confined, and does not affect, either affirmatively or negatively, the exclusive jurisdiction of the circuit courts under various statutes, or their concurrent jurisdiction with the district courts in other statutes, or the exclusive jurisdiction of the district courts for penalties and forfeitures. *United States v. Mooney*, 11 F. R. 476 ; 116 U. S. 104.

"*Suit*."—This term, being very comprehensive, applies to any proceeding in a court of justice by which an individual pursues the remedy which the law affords (*Weston v.*



Charleston, 2 Pet. 449); including writs of prohibition, writs of right, of *habeas corpus*, a proceeding to take land for public uses, and a voluntary agreement to submit a case to the court for judgment without any compulsory process against the defendant. *Green v. Lister*, 8 Cranch, 229; *Holmes v. Jennison*, 14 Pet. 564; *Kohl v. United States*, 91 U. S. 375; *Aldrich v. Ætna Co.*, 8 Wall. 491; *United States v. Block*, 3 Biss. 217. The meaning of "suit" is the same in the acts of 1789, 1866, 1867, and 1875. *Pratt v. Allbright*, 9 F. R. 634.

"*Of a civil nature.*"—A statute abolishing the writ of *quo warranto* and information in the nature of *quo warranto*, and substituting therefor a civil action, relieves the old civil remedy of its criminal form, and the action becomes a suit of a civil nature. *Ames v. Kansas*, 111 U. S. 449. A mandamus is not a suit of a civil nature. *Riggs v. Johnson Co.*, 6 Wall. 166; *Green County v. Daniel*, 102 U. S. 195; *Davenport v. Dodge Co.*, 105 Id. 237. See § 716.

"*At common law or in equity.*"—This language includes every form of proceeding except those peculiar to admiralty, ecclesiastical or probate, and military jurisdictions. And even in matters savoring of ecclesiastical process, after an issue has been formed between definite parties, the Federal courts may take jurisdiction, as in *Gaines v. Fuentes*, 21 Wall. 503; *Hess v. Reynolds*, 113 U. S. 73; *Rosenbaum v. Bauer*, 120 Id. 450, 461. But mandamus is not such a suit. *Id.* These remedies in the United States courts are not according to State practice, but according to the principles of common law and equity as defined in England at the time of the adoption of the Constitution. *Robinson v. Campbell*, 3 Wheat. 221; *Fenn v. Holme*, 21 How. 485; *Baker v. Biddle*, Bald. 410; *Cathcart v. Robinson*, 5 Pet. 280; *United States v. Howland*, 4 Wheat. 115; *Neves v. Scott*, 13 How. 271; *Noonan v. Lee*, 2 Black, 500; *Johnston v. Roe*, 1 McCrary, 162; *Strettell v. Ballou*, 3 Id. 46. Jurisdiction is not confined to the very rights and remedies existing at the time the Constitution was adopted, but embraces as well new rights created by State statutes; as for example, actions for loss occasioned to survivors by the wrongful act, neglect, or default of another. *Railway Co. v. Whitton*, 13 Wall. 287; *Dennick v. Railroad Co.*, 103 U. S. 11; *Ellis v. Davis*, 109 Id. 497. It also embraces new forms of remedies to be administered in the United States courts. *Ex parte Boyd*, 105 U. S. 647; *Boom Co. v. Patterson*, 98 Id. 403; *Ellis v. Davis*, *supra*. And these courts may give relief in a case in which a State court could not. *Payne v. Hook*, 7 Wall. 430. The distinction between law and equity is observed in the Federal courts although it never existed, or has been abolished, in the State courts. *McCullum v. Eager*, 2 How. 64. And although the forms of proceedings and practice of the State courts are adopted, yet legal and equitable claims cannot be blended in one suit. *Bennett v. Butterworth*, 11 How. 674; *Parsons v. Bedford*, 3 Pet. 433; *Fenn v. Holme*, 21 How. 486; *Strother v. Lucas*, 6 Pet. 768; 12 Id. 410; *Parish v. Ellis*, 16 Id. 453; *Sheirburn v. De Cordova*, 24 How. 423. Where the State law, common or statutory, declares that to be a legal right which is usually recognized as an equitable one, the Federal courts will allow either a legal or an equitable suit. *Mayer v. Foulkrod*, 4 Wash. 355; *Sims v. Irvine*, 3 Dall. 425; *Robinson v. Campbell*, 3 Wheat. 223.

"*Common law.*"—This has the same meaning as the word "law" in the third article of the Constitution, and refers not merely to suits which the common law recognized among its old and settled proceedings, but to suits in which legal rights are determined as distinguished from suits in equity and admiralty. *Fenn v. Holme*, 21 How. 486; *Parsons v. Bedford*, 3 Pet. 446; *Kohl v. United States*, 91 U. S. 376. An action on the case against a town given by a State statute for damages caused by the insufficiency of a bridge, is an action at common law. *Keith v. Rockingham*, 18 Blatch. 246.

"*Equity.*"—The equity jurisdiction of the Federal courts cannot be limited or restrained by a State, and is uniform throughout the land. *Green v. Creighton*, 23 How.



90; *Robinson v. Campbell*, 3 Wheat. 212; *United States v. Howland*, 4 Id. 108; *Pratt v. Northam*, 5 Mason, 95; *Payne v. Hook*, 7 Wall. 430. And though legal remedies are modified to suit changes in State laws, yet equitable ones are not. *Payne v. Hook*, *supra*. The circuit court as a court of equity has been held to have jurisdiction, in aid of a judgment at law against a bridge company, to cause possession to be taken of the bridge, to appoint a receiver to collect tolls, and pay them into court, for the purpose of discharging the judgment. *Covington Drawbridge Co. v. Shepherd*, 20 How. 227. The legislature of a State cannot enlarge the equitable jurisdiction of the circuit court, but new rights and remedies conferred by a State law may be administered by that court, as well as by the courts of the States. *Broderick's Will*, 21 Wall. 520; *Bernheim v. Birnbaum*, 30 F. R. 885; *Buford v. Holley*, 28 Id. 680; *Aspen Mining Co. v. Rucker*, Id. 220; *Whitehead v. Entwistle*, 27 Id. 778. And a State law may give a substantial right enforceable in the proper Federal court, whether it be a court of equity, admiralty, or common law. *Ex parte McNeil*, 13 Wall. 243. If, for instance, a State law makes a void deed a cloud upon a title, the Federal court will remove such a cloud. *Reynold v. Crawfordsville Bank*, 112 U. S. 410.

The absence of a complete and adequate remedy at law is the only test of equity jurisdiction, and the application of this principle depends upon the character of the particular case as disclosed in the pleadings. The remedy at law must always be plain and adequate, and as practical and as efficient to the ends of justice and its prompt administration, as the remedy in equity. *Watson v. Sutherland*, 5 Wall. 78; *Boyce v. Grundy*, 3 Pet. 210; *Payne v. Hook*, 7 Wall. 430. If a right is new, or originates by local statute or usage, and exists nowhere else, yet if there is no adequate relief at law, and the right comes within the powers of a court of chancery, the Federal court has jurisdiction. *Lorman v. Clarke*, 2 McLean, 572.

"*Matter in dispute.*"—These words in § 12 of the judiciary act, and in Rev. Stats. § 639; St. 1875, ch. 137 § 2, refer simply to the claim presented on the record to the consideration of the courts. What the plaintiff there claims is the matter in dispute, though that claim may be incapable of proof, in whole or in part. The same construction is given to these words in other statutory provisions. Rev. Stats. §§ 629, 691; St. 1875, ch. 137, § 1; and §§ 11, 22 of the judiciary act. *Kanouse v. Martin*, 15 How. 208. This phrase refers to the subject of litigation, the matter for which the suit is brought, and upon which issue is joined, and witnesses are examined. *Lee v. Watson*, 1 Wall. 339; *Culver v. Crawford Co.*, 4 Dill. 241.

"*The sum or value of \$500.*"—The circuit court has no jurisdiction when the amount just equals \$500. *Walker v. United States*, 4 Wall. 163. In a suit to restrain an infringement of a trade mark, the amount in dispute as determining the jurisdiction does not depend on the profits sought to be recovered. *Symonds v. Greene*, 28 F. R. 834. The amount is a jurisdictional fact. *Crawford v. Burnham*, 1 Flippin, 116. Jurisdiction of suits at law, or in equity, in which the matter in dispute exceeds a certain sum, includes no case in which the right of neither party is capable of valuation in money. Hence writs of *habeas corpus* are not removable, and are not within the original jurisdiction of the circuit court under § 1 of St. 1875, the language being the same as in § 2 of that act. *Kurtz v. Moffitt*, 115 U. S. 487. When the jurisdiction of the United States courts has once attached, no subsequent change in the condition of the parties will oust it. *Morgan v. Morgan*, 2 Wheat. 290; *Clarke v. Mathewson*, 12 Pet. 165; *Kanouse v. Martin*, 15 How. 208. So where jurisdiction is given by the plaintiff's demand, it is not ousted because there is a verdict or judgment for less, or because the demand is reduced below the limit by offsets. *McKnight v. Ramsay*, 1 Cranch C. C. 40; *Hulsecamp v. Teel*, 2 Dall. 358; *Crawford v. Burnham*, 1 Flippin, 116; *Murphy v. Howard*, *Hempst.* 206; *Singleton v. Madison*, 1 Bibb, 342. The plaintiff's failure to



recover \$500 does not affect the jurisdiction; but he cannot then recover costs, though they may be taxed against him. *Gordon v. Longest*, 16 Pet. 97, 104. But if the plaintiff admits on the trial that a part of a debt had been paid, leaving less than \$500 unpaid, the case will be dismissed for want of jurisdiction. *Lozano v. Wehmer*, 22 F. R. 755. A bill against an insolvent firm for an injunction and a receiver will not be dismissed after final hearing and decree, on the technical grounds that the claims of the plaintiff were not then due to the amount of \$500. *Johnston v. Straus*, 26 Id. 57.

Amendments are in the discretion of the judge (*Ex parte Bradstreet*, 7 Pet. 647); and may be allowed, permitting the *ad damnum* to be reduced, even though such reduction is made for the purpose of preventing a removal, and though the amendment is made after the filing of a petition for removal, but before the filing of the bond. *Maine v. Gilman*, 11 F. R. 214. Such an amendment could not be allowed after the filing of the bond. *Kanouse v. Martin*, 15 How. 208. And it will not be allowed unless likely to aid the party. *Rae v. Grand Trunk R. Co.*, 14 F. R. 401.

The amount is the total claimed on all counts in the declaration on causes of action rightly joined. *Hammond v. Cleveland*, 23 F. R. 1; *Bernheim v. Birnbaum*, 30 Id. 885; *Judson v. Macon County*, 2 Dill. 213. Where the court has obtained jurisdiction of a suit by a single creditor against a debtor, and the laws of the State allow the claims of other creditors to be there settled, it may adjust the claims of such other creditors although for less than \$500, as subsidiary to the principal suit. *New York Silk Manuf. Co. v. Paterson Bank*, 10 F. R. 204. Where the demand is not for money, and the nature of the action does not require the value of the thing demanded to be stated in the declaration, the value may be given in evidence at or before trial (*Ex parte Bradstreet*, 7 Pet. 647; *Beard v. Federy*, 3 Wall. 494; *The Grace Girdler*, 6 Id. 442; *Green v. Liter*, 8 Cranch, 229; *Hartshorn v. Wright*, Pet. C. C. 64; *Crawford v. Burnham*, 1 Flippin, 116); as in ejectment, or dower. *Course v. Stead*, 4 Dall. 22; *Williamson v. Kincaid*, 4 Id. 20. But affidavits are too late after the case is dismissed for want of jurisdiction. *Richmond v. Milwaukee*, 21 How. 392. Where there is doubt on the face of the record, as on account of different claims in different counts, the court can inquire *dehors* the record. *Ladd v. Tudor*, 3 Wood. & M. 325. But where the value is stated in the pleadings or proceedings below, affidavits have never been received to vary or enhance it, in order to give jurisdiction. So held under Rev. Stats. § 691. *Richmond v. Milwaukee*, 21 How. 392. Until the declaration is filed the *ad damnum* in the writ is the value of the matter in dispute. When the declaration is filed, the sum there claimed, if different from the *ad damnum*, is to govern, because the declaration is supposed to contain the real cause of action, and to set out the real extent of the grievance. *Ladd v. Tudor*, 3 Wood. & M. 329; *Martin v. Taylor*, 1 Wash. 1; *Muns v. Dupont*, 2 Id. 463. The court will look into the whole declaration, petition, or bill of complaint, to determine the amount. *Judson v. Macon County*, 2 Dill. 213; *Culver v. Crawford*, 4 Id. 241.

In actions to recover back illegal taxes, each taxpayer joining in the suit must be owed \$500. *King v. Wilson*, 1 Dill. 568; *Adams v. County Commissioners*, McCahon, 235; *Woodman v. Latimer*, 2 F. R. 842. In ejectment the value of the land is the matter in dispute, and not the damages alleged. *Lanning v. Dolph*, 4 Wash. 627; *Crawford v. Burnham*, 1 Flippin, 116. Tenants claiming different parcels of land by distinct titles cannot be joined in a writ of right. *Green v. Liter*, 8 Cranch, 250. In a suit to abate a nuisance, it is not the damages alleged, but the value of the thing to be abated, which governs. *Mississippi v. Ward*, 2 Black, 492. In an action on a money demand, the matter in dispute is the debt claimed, and the amount, as stated in the body of the declaration, and not merely the damages alleged, or the prayer for judgment at its conclusion, is to be considered in determining the jurisdiction. The damages, or prayer for judgment, must be considered, because the plaintiff may seek a recovery for less than the



sum to which he appears to be entitled by the body of the declaration. *Lee v. Watson*, 1 Wall. 339; *Culver v. Crawford County*, 4 Dill. 241. The circuit court has jurisdiction of a suit brought for a breach of a covenant in which less than \$500 was a penalty, since the covenantee can either sue for the penalty, or for damages for breach of the covenant; and in the latter case he may recover more, except where the sum is compensation for non-performance, and not a penalty. *Martin v. Taylor*, 1 Wash. 1. On a penal bond where no breach is laid, the penalty of the bond governs, but where a breach is laid that governs. *Postmaster-General v. Cross*, 4 Wash. 326; *United States v. McDowell*, 4 Cranch, 316. Until there are further judicial proceedings, showing upon the record that the sum demanded is not the matter in dispute, that sum is the matter in dispute in an action for damages. *Green v. Liler*, 8 Cranch, 229; *Wise v. Col. Turnpike Co.*, 7 Id. 276; *Gordon v. Ogden*, 3 Pet. 33; *Smith v. Honey*, Id. 469; *Den v. Wright*, Pet. C. C. 64; *Muns v. Dupont*, 2 Wash. 463; *Sherman v. Clark*, 3 McLean, 91; *Kanouse v. Martin*, 15 How. 208; *Culver v. Crawford County*, 4 Dill. 241. In an action for the value of a slave which the defendant conveyed out of the State, the matter in dispute was determined by the damages claimed in the writ and declaration. *Gordon v. Longest*, 16 Pet. 104. Where the defendant had tendered money and over \$500 in coupons for his taxes, and the coupons were refused, but money appropriated in payment of certain taxes, and a suit brought to recover remainder, less than \$500, it was held that the amount in controversy was the amount of the coupons. *Green v. Brooks*, 28 F. R. 215. The circuit court has jurisdiction of a suit on a note for over \$500 made by a resident of a State payable to a resident of the same State, and by him indorsed to a third person, a citizen of another State, to secure a debt of less than \$500, on the agreement of such person to account for and pay over the amount collected on the note above the debt due. *Lipsmeier v. Vehslage*, 29 Id. 175.

*"And arising under the Constitution or laws of the United States."* — In cases arising under this clause the citizenship of the parties is immaterial. *King v. Cornell*, 106 U. S. 397; *Wilder v. Union Nat. Bank*, 9 Biss. 182. The acts of Congress for the District of Columbia are United States laws. *Cohens v. Virginia*, 6 Wheat. 264. So are rules established by the supreme court in pursuance of the laws. *Seymour v. Phillips' Co.*, 7 Biss. 460. An allegation in a complaint that a cause of action arises under Federal laws, and necessarily involves the construction of certain acts of Congress, is a conclusion of law not giving jurisdiction unless the facts are also clearly and fully set forth, showing that the suit "really and substantially involves a dispute or controversy" as to a right which depends upon the construction or effect of the Constitution, or some law or treaty of the United States. *Dowell v. Griswold*, 5 Sawyer, 42; *Illinois C. R. Co. v. Chicago R. Co.*, 26 F. R. 478; *Gold Washing Co. v. Keyes*, 96 U. S. 203. It is not sufficient that in the course of the litigation it may become necessary to construe the Federal Constitution or laws, but the decision must depend upon the construction. *Gold Washing Co. v. Keyes*, 96 U. S. 203. It is, however, sufficient if a Federal question forms an ingredient of the original cause, although other questions of law or fact may be involved. *Railroad Co. v. Miss.*, 102 U. S. 141. The question whether a party claims a right under such Constitution and laws is to be ascertained from the legal construction of his own allegations, and not by the effect attributed to those allegations by the adverse party. *N. J. R. Co. v. Mills*, 113 U. S. 257. The jurisdiction of the circuit court under St. 1875, § 1, cannot be ousted by the character of the defence, and is not limited by the denials in the defendant's answer. Even if such answer puts in issue only non-Federal questions, the jurisdiction of the Federal court is not ousted if a Federal question formed an ingredient of the original cause. *Sawyer v. Concordia*, 12 F. R. 754, relying on *Mayor v. Cooper*, 6 Wall. 253; *Gold Washing Co. v. Keyes*, 96 U. S. 203. But see *Ex parte Smith*, 94 U. S. 456, and *Gold Washing Co. v. Keyes*, 96 Id. 203. In such cases it is no objection that the suit is between a



State and one of its citizens. *Virginia Coupon Cases*, 25 F. R. 654. The jurisdiction of all Federal courts, except the supreme, is subject to the absolute control of Congress, and may be changed or taken away at its pleasure (*United States v. Haynes*, 29 F. R. 691), and must appear of record and be derived from Congressional enactments. *Norton v. Brewster*, 23 F. R. 840. In order to give jurisdiction to a Federal court in any case, the Constitution and statute law must concur. It is not sufficient that the jurisdiction may be found in the Constitution or laws. *United States v. Ferry Co.*, 21 F. R. 334. But see *Leonard v. Shreveport*, 28 F. R. 257.

All suits which might have been taken from the highest court of a State on a writ of error can now be brought originally in the circuit court. *Sawyer v. Concordia*, 12 F. R. 754. If from the questions involved,—and by these the character of a case is determined (*Osborn v. Bank*, 9 Wheat. 738, 824; *Starin v. New York*, 115 U. S. 248, 257),—it appears that some title, right, privilege, or immunity, on which the recovery depends, will be defeated by one construction of the Constitution or of a Federal law, or sustained by the opposite construction, the case will involve a Federal question; otherwise not. *Cohens v. Virginia*, 6 Wheat. 264, 379; *Osborn v. Bank*, 9 Id. 738, 824; *Mayor v. Cooper*, 6 Wall. 247, 252; *Gold Washing Co. v. Keyes*, 96 U. S. 199, 201; *Tennessee v. Davis*, 100 Id. 257, 264; *Railroad Co. v. Mississippi*, 102 Id. 135, 140; *Ames v. Kansas*, 111 Id. 449, 462; *Kansas Pacific R. Co. v. Atchison R. Co.*, 112 Id. 414, 416; *Provident Savings Society v. Ford*, 114 Id. 635, 641; *Pacific R. Removal Cases*, 115 Id. 1, 11; *Starin v. New York*, Id. 248, 257. A case in law or equity, as it consists of the right of one party as well as of the other, may properly be said to arise under the Constitution or a law of the United States, whenever its correct decision depends upon the construction of either. Cases arising under these laws are such as grow out of the legislation of Congress, whether they constitute the right, privilege, claim, protection, or defence, in whole or in part of the party by whom they are asserted. *Cohens v. Virginia*, 6 Wheat. 379; *Tennessee v. Davis*, 100 U. S. 264; *Railroad Co. v. Mississippi*, 102 Id. 141.

The following suits arise under the Federal Constitution and laws: All actions brought by or against corporations created under acts of Congress (*Pacific R. Removal Cases*, 115 U. S. 11); a complaint alleging that the plaintiff derived title to the premises sued for through a deed of the United States, and that his claim of title arises under said acts of Congress, and that the validity of said acts and his title thereunder are the only questions in controversy, admitted by demurrer (*Eaton v. Calhoun*, 2 Flippin, 593); a bill brought by a citizen of a State against a State to restrain the construction of a bridge authorized by an act of Congress (*Miller v. New York*, 13 Blatch. 479; *Hughes v. Northern Pacific R. Co.*, 18 F. R. 110; *Hatch v. Wallamet Bridge Co.*, 7 Sawyer, 131; 6 F. R. 326, 780; *Bybee v. Hawkett*, 6 Sawyer, 593; 5 F. R. 1); an action against a United States marshal upon his official bond (*Gwin v. Breedlove*, 2 How. 29; *Gwin v. Barton*, 6 Id. 7; *Feibelman v. Packard*, 109 U. S. 421); a suit brought to determine the validity of a railroad consolidation under an act of Congress (*Ames v. Kansas*, 111 U. S. 449, 462; *Osborn v. United States Bank*, 9 Wheat. 825; *Cohens v. Virginia*, 6 Id. 264, 379; *Gold Washing Co. v. Keyes*, 96 U. S. 201; *Railroad Co. v. Mississippi*, 102 Id. 140); an action on a supersedeas bond under Rev. Stats. §§ 1000, 1007, and S. Ct. Rule 29 (*Seymour v. Phillips*, 7 Biss. 464); a suit arising from a provision of a State Constitution fixing a rate of taxation so low as to necessitate a breach of a previous contract for the payment of money (*Leonard v. Shreveport*, 28 F. R. 257; see *Levy v. Shreveport*, Id. 209); controversies arising on conflicting claims to or under patents under Federal laws (*Celluloid Manuf. Co. v. Goodyear Co.*, 13 Blatch. 388); where the main question is on the construction of respective patents of land (*Hills v. Homton*, 4 Sawyer, 195; *The Frank G. & S. M. Co. v. The Larimer M. & S. Co.*, 8 F. R. 724); a suit to enforce a right given by Congress in regard to the taxation of bank shares (*Stanley v. Supervisors*, 19 Blatch. 147); a suit between two cor-



porations chartered under a State law, holding conflicting grants from a municipality which was also chartered by the legislature (*Saginaw Gas Light Co. v. Saginaw*, 28 F. R. 529; *q. v.*; as to cases on laws impairing the obligations of contracts, see note on this case); a suit by a riparian owner to enjoin the construction of a bridge contiguous and injurious to his property, upon the ground that the defendant is not authorized to build the same by a certain act of Congress, as it pretends and claims. *Hughes v. Northern Pacific R. Co.*, 18 F. R. 106.

The following do not arise under such Constitution and laws:— When a proposition has once been decided by the supreme court, it no longer remains a Federal question. *Kansas v. Bradley*, 26 F. R. 290. A suit on a judgment is not of itself a suit arising under Federal laws; nor is a suit for withholding United States bonds; nor a title under a patent from the United States. *Provident Savings Society v. Ford*, 114 U. S. 635. There is no Federal question involved in a suit on the validity of a State statute authorizing the issue of bonds by a town (*N. Bennington Bank v. Bennington*, 16 Blatch. 54); nor in a bill alleging exorbitant rates of wharfage by the proprietors, although such wharfage is measured by the tonnage of the boat. *Transportation Co. v. Parkersburg*, 107 U. S. 707; see *Starin v. New York*, 115 Id. 248. The question whether a party claims a right under the Federal Constitution or laws is ascertained by the legal construction of his own allegations, and not by the effect attributed thereto by the adverse party; and a bill which alleges that a lease made by a corporation is inconsistent with its charter, illegal, and void, does not impugn expressly or impliedly the validity of any statute of the State for repugnancy to the Federal Constitution or laws. *N. J. C. R. Co. v. Mills*, 113 U. S. 249; *Gold Washing Co. v. Keyes*, 96 Id. 199; *Smith v. Greenhow*, 109 Id. 669. That a State law violates the Constitution of that State is not sufficient. *Gillette v. Denver*, 21 F. R. 822. A question as to the title to land pre-empted by one party under a Federal statute must actually involve the construction of such a statute in order to fall within the jurisdiction of the circuit court. *Theurkauf v. Ireland*, 27 F. R. 769.

*“Or treaties made, or which shall be made, under their authority.”*— In actions under treaties, the amount must be over \$500. *Baker v. Portland*, 5 Sawyer, 571. Where a defendant in ejectment sets up an outstanding title in a party under whom he does not claim, and the validity of such title depends upon the effect of a treaty, a suit does not arise under a treaty. *Owings v. Norwood*, 5 Cranch, 344.

*“Or in which the United States are plaintiffs or petitioners.”*— A circuit court has jurisdiction of an action of assumpsit brought by the United States, as succeeding to the rights of the seceding States on a debt due to one of such States. *United States v. Smith*, 1 Hughes, 354. A proceeding brought by the Secretary of the Treasury for the condemnation of land for Federal uses is one in which the United States is plaintiff or petitioner. *United States v. Block*, 3 Biss. 208. The United States may sue in its own name whenever it appears not only on the face of the instrument, but from all the evidence, that it alone is interested in the subject-matter of the controversy. *Dugan v. United States*, 3 Wheat. 180. It can bring a suit in its own name on all contracts made with it, unless a different mode of bringing it is prescribed by law. *United States v. Barker*, 1 Paine, 160.

*“Or in which there shall be a controversy between citizens of different States.”*— Such controversy arises whenever any property or claim of the parties, capable of pecuniary estimation, is the subject of litigation, and is presented by the pleadings for judicial determination. *Gaines v. Fuentes*, 92 U. S. 20; *Boom Co. v. Patterson*, 98 Id. 403; *Pacific R. Removal Cases*, 115 Id. 1. This right of a citizen of one State to sue a citizen of another in a Federal court cannot be impaired by a State law conferring exclusive jurisdiction on probate courts. *Payne v. Hook*, 7 Wall. 425; *Hess v. Reynolds*,



113 U. S. 73. Under the old law, the pleadings only were looked at, and the right to a removal was determined according to the party's position as plaintiff or defendant. *Coal Co. v. Blatchford*, 11 Wall. 174. Under the new law, the mere form of the pleadings may be put aside, and the parties placed on different sides, according to the facts; and this rule applies to both §§ 1, 2 of St. 1875. Removal Cases, 100 U. S. 469; *Railroad Co. v. Ketchum*, 101 Id. 298. The cases under 1875, § 2, cl. 1, in reference to citizenship, apply to § 1 of the same act, because the language is identical in the two. *Karns v. Atlantic R. Co.*, 10 F. R. 309. The jurisdiction of the circuit court is determined by the citizenship at the commencement of the suit (*Conolly v. Taylor*, 2 Pet. 556); and subsequent change of domicil does not affect it. *Clarke v. Mathewson*, 2 Sumner, 262; *Morgan v. Morgan*, 2 Wheat. 297; *Trigg v. Conway*, Hempst. 712. Under the act of 1875, the circuit court has jurisdiction of all suits of the required amount, between citizens of different States, among all the States; whereas under the act of 1789, ch. 20, § 11, it had jurisdiction only of suits between citizens of the State where the suit was brought, and those of some other among all the States. *Brooks v. Bailey*, 9 F. R. 438; 20 Blatch. 85. It is not now necessary for any party to be a citizen of the State in which suit is brought. *Cooke v. Ford*, 25 Am. Law Reg. 417; *Petterson v. Chapman*, 13 Blatch. 399; *Eureka M. Co. v. Richmond M. Co.*, 2 F. R. 829; 6 Sawyer, 471. But all the parties on one side of the controversy must be citizens of different States from those on the other. *Sewing Machine Co. Case*, 18 Wall. 553; *Vannevar v. Bryant*, 21 Id. 41; *American Bible Society v. Price*, 110 U. S. 61. The circuit court has no jurisdiction where a joint interest is prosecuted, unless each individual is entitled to claim that jurisdiction; and when parties having joint and several causes of action elect to sue jointly, each individual must be entitled to claim that jurisdiction. *Strawbridge v. Curtiss*, 3 Cranch, 267. A citizen of the District of Columbia is not a citizen of a State, and cannot sue in the Federal courts (*Hepburn v. Ellzey*, 2 Cranch, 445; *Barney v. Baltimore*, 6 Wall. 287); nor can a citizen of a Territory. *New Orleans v. Winter*, 1 Wheat. 91; *Barney v. Baltimore*, 6 Wall. 287; *Vasse v. Mifflin*, 4 Wash. 519; *Picquet v. Swan*, 5 Mason, 35; *Prentiss v. Brennan*, 2 Blatch. 162; *Cissel v. McDonald*, 16 Id. 150; *Darst v. Peoria*, 13 F. R. 561. A wife divorced *a mensa et thoro* may have a domicile in a State different from that of her husband, and may then sue her husband in equity by her next friend in the Federal court, to carry into judgment a decree made against him for alimony by a court having jurisdiction of the parties and the subject-matter of divorce. *Barber v. Barber*, 21 How. 588. And so can one divorced from the bond of matrimony. *Bennett v. Bennett*, Deady, 306. In controversies between citizens of different States, the citizenship of the parties to the record governs, except where the parties to the record are mere conduits through which the law affords a remedy to the party aggrieved; as in suits on bonds given for the faithful discharge of a duty, which bonds by statute are made to run to some public officer, in whose name the suit must be brought. *Osborn v. Bank of the United States*, 9 Wheat. 856; *Browne v. Strode*, 5 Cranch, 303; *McNutt v. Bland*, 2 How. 10. The citizenship of the executor or administrator, and not that of the deceased, or beneficiaries under the will, or heirs-at-law, or creditors, determines the jurisdiction of the circuit court. *Chappedelaine v. Dechenaux*, 4 Cranch, 306; *Browne v. Strode*, 5 Id. 303; *Childress's Executors v. Emory*, 8 Wheat. 669; *Osborn v. Bank of the United States*, 9 Id. 856; *McNutt v. Bland*, 2 How. 15; *Irvine v. Lowry*, 14 Pet. 298; *Huff v. Hutchinson*, 14 How. 586; *Coal Co. v. Blatchford*, 11 Wall. 172; *Rice v. Houston*, 13 Id. 66; *Hess v. Reynolds*, 113 U. S. 73. So of the citizenship of a ward as against that of his guardian (*Dodd v. Ghiselin*, 27 F. R. 405; *Lamar v. Micou*, 112 U. S. 452; *Coal Co. v. Blatchford*, 11 Wall. 172); of a trustee as against that of the *cestuis que trust* (*Coal Co. v. Blatchford*, 11 Id. 172); of a receiver (*Rice v. Houston*, 13 Id. 66; *Knapp v. Railroad Co.*, 20 Id. 123; *Davies v. Lathrop*, 12



F. R. 353); of an assignee in bankruptcy (*Gindrat v. Dane*, 4 Cliff. 263), and of infant as against that of its next friend (*Williams v. Ritchey*, 3 Dillon, 406; *Wiggins v. Bethune*, 29 F. R. 51), of the real party in interest in a suit by a marshal on a forthcoming bond. *Wade v. Wortsman*, 29 F. R. 754. An allegation that "said plaintiffs, as such executors, are citizens," etc., is insufficient; since the jurisdiction of the United States courts has reference only to citizenship of persons, and not to official citizenship. *Amory v. Amory*, 95 U. S. 186. A citizen of one State, appointed administrator of the estate of a deceased citizen of the same State, on becoming a citizen of another State, may sue a citizen of the former State in the circuit court, if the State law does not forbid administrators to remove therefrom. *Rice v. Houston*, 13 Wall. 66. The circuit court has jurisdiction of a suit by a mortgagee, a citizen of one State, against the mortgagor, a citizen of another State. *M'Donald v. Smalley*, 1 Pet. 624. Where the parties to a contract granting a license to manufacture under certain patents are citizens of different States, a bill praying a discovery and an account may be maintained in the circuit court (*McKay v. Mace*, 23 F. R. 76); but not when they are citizens of the same State. *McCarty v. Glaenger*, 30 F. R. 387. The circuit court has jurisdiction to determine the validity of foreign claims against a decedent's estate (*Del Valle v. Welsh*, 28 F. R. 342); and to compel a trustee under a will to account at the suit of a beneficiary, a citizen of another State. *Earp v. Coleman*, 28 F. R. 340.

*Averments.* — The record must affirmatively show every fact necessary to give jurisdiction to the United States courts, the presumption being that they have no jurisdiction. *Börs v. Preston*, 111 U. S. 255; *Grace v. American Insurance Co.*, 109 Id. 283; *Robertson v. Cease*, 97 Id. 646. The fact essential to give jurisdiction must appear somewhere in the record, although not necessarily in the pleadings; the "record" including only the portions of the transcript on which final judgment is based, and not papers improperly inserted in the transcript. *Railway Co. v. Ramsey*, 22 Wall. 322; *Briges v. Sperry*, 95 U. S. 401; *Robertson v. Cease*, 97 Id. 648. Objections to the jurisdiction of the circuit court for lack of proper citizenship of the parties, where such proper citizenship appears on the face of the record, can be made only by a plea in abatement in the nature of a plea to the jurisdiction; and a plea to the merits is a waiver of such plea. *Farmington v. Pillsbury*, 114 U. S. 143; *Hartog v. Memory*, 116 Id. 590. But if in the course of a trial the lack of proper parties appears by evidence admissible under the pleadings and pertinent to the issues joined, the court may without plea and without motion dismiss the suit (*Williams v. Nottawa*, 104 U. S. 211; *Hartog v. Memory*, 116 Id. 591); and the court may of its own motion inquire into the question of citizenship, giving to the parties an opportunity to be heard on the question. *Hartog v. Memory*, 116 U. S. 591. An averment that "the plaintiffs are a firm of natural persons, associated together for the purpose of carrying on the banking business in O., and had been for eighteen months engaged in business in said place," is sufficient. *Express Co. v. Kountze*, 8 Wall. 351. So of an averment that a party is citizen of the United States and an inhabitant of a certain State. *Duryee v. Webb*, 16 Conn. 558; *Jones v. Andrews*, 10 Wall. 331. *Jackson v. Ashton*, 8 Pet. 148, holds that the caption of the bill cannot be considered in determining the jurisdiction. See, also *Robertson v. Cease*, 97 U. S. 646, that an allegation of residence is insufficient. The following allegations are not sufficient: Of citizenship in the alternative (*Glover v. Shepperd*, 24 F. R. 576; *Tugman v. Steamship Co.*, 76 N. Y. 207; *Goddard v. Bosson*, 21 Kansas, 139); facts stated on information and belief (*Wolff v. Archibald*, 14 F. R. 369; *Hambleton v. Duham*, 22 Id. 465); "doing business in," "resides in," "of the County of and State of," "district of," "late of district of." *Bingham v. Cabot*, 3 Dall. 382; *Abercrombie v. Dupuis*, 1 Cranch, 343; *Jackson v. Twentyman*, 2 Pet. 136; *Sullivan v. Fulton S. Co.*, 6 Wheat. 450; *Hornthall v. Collector*, 9 Wall. 560; *Brown v. Keene*, 8 Pet. 112; *Robertson v. Cease*, 97 U. S. 646; *Wood v. Wagon*, 2 Cranch, 9;



*Jackson v. Ashton*, 8 Pet. 148; *Grace v. American Ins. Co.*, 109 U. S. 284; *Hodgson v. Bowerbank*, 5 Cranch, 303. An allegation of residence is not sufficient even since the Fourteenth Amendment. *Robertson v. Cease*, 97 U. S. 648.

*Parties.* — Joining those who have no interest does not oust the jurisdiction of the court as to those properly before the court. *Boon v. Chiles*, 8 Pet. 532. The question always is, when objection is taken to the jurisdiction on the ground of citizenship, whether they are indispensable parties to a decree authorized by the facts presented; for if their interests are severable, and a decree without prejudice to their rights can be made, the jurisdiction of the court should be retained and the suit dismissed as to them. *Horn v. Lockhart*, 17 Wall. 570; *Breedlove v. Nicolet*, 7 Pet. 431; *Vattier v. Hinde*, Id. 252; *Heriot v. Davis*, 2 Wood. & M. 230; *Nesmith v. Calvert*, 1 Id. 37; *Morrison v. Bennet*, 1 McLean, 330; *Doremas v. Bennet*, 4 Id. 224.

The following are indispensable parties: The corporation, to a bill filed by its stockholders, on behalf of themselves and other stockholders similarly situated, to set aside a lease made by that corporation, of its railroad and other property, in excess of its corporate powers, and in fraud of the rights of the plaintiffs. *Hawes v. Oakland*, 104 U. S. 450, 460; *Atwool v. Merryweather*, L. R. 5 Eq. 464, note; *Menier v. Hooper's Telegraph Works*, L. R. 9 Ch. 350; *Mason v. Harris*, 11 Ch. D. 97. Where in such a bill affirmative relief is sought against the directors for one and the same illegal and fraudulent act, the single matter in controversy is the validity of that act, and there is no separate controversy with each of the directors. *N. J. C. R. Co. v. Mills*, 113 U. S. 249. To a suit to compel a corporation to transfer to the complainant stock standing on its books in the name of the other defendant, both defendants are necessary parties. *St. Louis R. Co. v. Wilson*, 114 U. S. 60. To a suit brought for the foreclosure of a mortgage executed by three persons to secure a joint debt, and a personal money decree for the balance due after the security was exhausted, one of the mortgagors who has sold his interest in the mortgaged property to one of the two remaining joint debtors, the vendee having assumed the mortgage debt as part of the consideration, such vendor is a necessary party. *Ayres v. Wiswall*, 112 U. S. 187.

As to real parties in interest in a suit to restrain from infringement of a trade mark, see *Frazer Lubricator Co. v. Frazer*, 23 F. R. 305; in a suit by heirs against an administrator, see *Bland v. Fleeman*, 29 Id. 669; in a suit by partners forming two distinct houses, see *Poole v. West Point Ass'n*, 30 Id. 516. To a suit to dissolve a partnership brought by one partner against the other partner, a creditor of the firm, and certain purchasers from a receiver of the estate of the defendant partner, appointed in a suit against such partner by a judgment creditor of said partner individually, in which said judgment creditor and said receiver intervene, and in which all the defendants except the partner and the firm creditor deny the existence of the partnership, the receiver, the purchaser from him, and the partner, are all necessary parties. *Shainwald v. Lewis*, 108 U. S. 158. To a suit brought by a daughter to set aside the will of her father, which gave a sum to the executors in trust, the income of which was to be paid to the daughter during her life, and at her death was to go to her children, the executors are necessary parties, as they represent the children; otherwise, perhaps, if the children had united with their mother in contesting the case. *American Bible Society v. Price*, 110 U. S. 61. If a will gives to the executors money to be held by them in trust for specific purposes, the executors are indispensable parties to a suit to set aside the will. *Price v. Foreman*, 11 Biss. 328. To a suit brought by a person to enjoin a sale by a trustee of certain property conveyed to him by the complainant as security for the payment of certain notes executed by the complainant to a corporation, which was afterwards dissolved and placed in the hands of the Superintendent of Insurance of the State, the trustee is an indispensable party. *Thayer v. Life Association*, 112 U. S. 717. To a suit



brought by a person who claims property sought to be sold under a trust-deed, and who seeks to enjoin such sale, the trustees under the trust-deed are indispensable parties. *Mitchell v. Tillotson*, 11 Biss. 325. Where the validity of a trustee's sale under a deed of trust is attacked, and leave asked to redeem the premises, the trustee is a necessary party. *Ribon v. Railroad Co.*, 16 Wall. 446; *Evans v. Faxon*, 11 Biss. 175. To obtain a judgment against a person, requiring him to perform a duty devolving upon him merely because he has assumed under the law to perform the duties of another, it is necessary to obtain a judgment against the latter, to declare and determine with conclusive force the existence and limits of the duty to be enforced against his guarantor and substitute. Therefore to such a suit the person whose liabilities are assumed is a necessary party. *Chicago R. Co. v. Crane*, 113 U. S. 424.

The following are nominal parties: A widow renouncing the provisions of a will, to a suit to set aside the will (*Price v. Foreman*, 11 Biss. 328); an executor joined merely for the purpose of performing a ministerial act (*Walden v. Skinner*, 101 U. S. 589); garnishees (*Bacon v. Rives*, 106 Id. 104; *Deford v. Mehaffy*, 14 F. R. 181); a trustee refusing to act under a trust (*Hack v. Chicago R. Co.*, 23 Id. 356); the grantor of a trust deed, in a suit seeking to enjoin the trustee from selling (*Mitchell v. Tillotson*, 11 Biss. 325); State and county officers merely authorized to levy, collect, and disburse taxes required to pay certain bonds, to a suit on the validity of such bonds (*Aroma v. Auditor*, 2 F. R. 33); public officers in whose name or against whom suits must be brought, but who have no interest in the controversy. *McNutt v. Bland*, 2 How. 10; *Coal Co. v. Blatchford*, 11 Wall. 176; *Maryland v. Baldwin*, 112 U. S. 490. To a suit brought by individual stockholders in a corporation, of which there are no president and directors, against a person who had made conveyances of the corporate property, the corporation is only a formal party. *Hazard v. Robinson*, 21 F. R. 193. In suits for injunctions against corporations, the residence of the president or directors, co-defendants, is immaterial. *Pond v. Sibley*, 7 F. R. 129; *Hatch v. Chicago R. Co.*, 6 Blatch. 114; *New York v. N. J. S. T. Co.*, 24 F. R. 818. In the discharge of a mortgage of shares of stock in a corporation, neither the corporation nor any of the other stockholders have any interest. *Hazard v. Robinson*, 21 Id. 193. A tenant in possession sued in trespass to try the title to land, and who disclaims title, may have her landlord, the real party in interest, substituted as defendant. In such a case she is but a nominal party on the record, whose presence could not defeat the right of the real parties in interest to have the cause determined in the Federal court. *Texas v. Lewis*, 12 Id. 1; *Greene v. Klinger*, 10 Id. 689. But see *Ex parte Turner*, 3 Wall. Jr. 261. In ejectment the grantor of the tenant is a nominal party (*Calloway v. Ore Knob Co.*, 74 N. C. 200); and so is the landlord of the tenant, if the tenant is not the owner, but the tenant is a necessary party. *Ex parte Turner*, 3 Wall. Jr. 261. On the question of the priority of two mortgages made by one person, the grantor is not an indispensable party. *Capital City Bank v. Hodgin*, 22 F. R. 209. The citizenship of merely formal parties will not prevent a removal of the cause to the Federal court. *Edgerton v. Gilpin*, 3 Woods, 272; *Deford v. Mehaffy*, 14 F. R. 181; *Stewart v. Dunham*, 115 U. S. 61.

*Corporations.*—A corporation is regarded as a citizen of the State creating it, within the meaning of the clause in the Constitution (art. 3, § 2) extending the judicial power to controversies between citizens of different States (*Paul v. Virginia*, 8 Wall. 177; *Railway Co. v. Whitton*, 13 Id. 283); although all its business is transacted elsewhere, and all its offices and places of business are elsewhere. *Pacific R. Co. v. Missouri P. R. Co.*, 23 F. R. 566. This applies to municipal corporations such as counties, cities, and towns (*Cowles v. Mercer County*, 7 Wall. 118; *Barclay v. Levee Comm'rs*, 1 Woods, 254; *Tunstall v. Madison*, 30 La. An. 471; *McCoy v. Washington County*, 3 Wall. Jr. 381; *Marion County v. McIntyre*, 2 McCrary, 143; *Lyell v. Lapeer County*, 6 McLean,



446); but not to a State. *Georgia v. Brailsford*, 3 Dall. 1; *State v. Babcock*, 4 Wash. 344; *Wisconsin v. Duluth*, 2 Dillon, 406. A corporation organized under United States laws, and having a lawful place of business in a State, and nowhere else, is a citizen of such State. *Park Bank v. Nichols*, 4 Biss. 315. The Union Pacific railroad can sue in the Federal courts without reference to citizenship. *Bauman v. U. P. R. Co.*, 3 Dillon, 367; *Smith v. U. P. R. Co.*, 2 Id. 278.

The question whether one corporation has been formed is one of legislative intent, and not of legislative power. Several States may, by competent legislation, unite in creating the same corporation, or in combining several pre-existing corporations into a single one. One State may make a corporation of another State a corporation of its own, as to any property within its territorial jurisdiction. A State may, by an enabling act, authorize a corporation created in another State to build and use a railroad within its own limits, without creating a new corporation. *Railroad Co. v. Harris*, 12 Wall. 82; *Copeland v. Memphis R. Co.*, 3 Woods, 658; restraining language in *Ohio & Miss. R. Co. v. Wheeler*, 1 Black, 297. If the effect of the legislation be to license a foreign corporation to do business in the State, it does not become a corporation of that State, but is suable there as any other non-resident "found within the district;" but if the effect be to create a corporation by adopting one chartered in another State, its *status* is the same as if it had been originally and solely incorporated by the State adopting it. *Railroad Co. v. Harris*, 12 Wall. 65; *Railroad Co. v. Wheeler*, 1 Black, 286; *Railway Co. v. Whitton*, 13 Wall. 270; *Muller v. Dows*, 94 U. S. 444; *Ex parte Schollenberger*, 96 Id. 369; *Railroad Co. v. Vance*, Id. 450; *Williams v. M. K. & T. R. Co.*, 3 Dill. 267; *Wilson P. Co. v. Hunter*, 11 Ch. Leg. News, 207; *Uphoff v. Chicago R. Co.*, 5 F. R. 547. A corporation, chartered under the laws of one State, does not become a citizen of another State merely by leasing or purchasing in that other State. *Wilkinson v. D., L., & W. R. Co.*, 22 Id. 353; *William v. M., K., & T. R. Co.*, 3 Dillon, 267; *Callahan v. L. & N. R. Co.*, 11 F. R. 536; *Railroad Co. v. Koontz*, 104 U. S. 5; *Chicago R. Co. v. Dakota Co.*, 28 F. R. 219. The jurisdictional effect of the existence of a consolidated corporation is the same as that of a co-partnership of individual citizens residing in different States. *Railroad Co. v. Harris*, 12 Wall. 82. A corporation organized under the laws of two States is a citizen of both States. *Union Trust Co. v. Rochester R. Co.*, 29 F. R. 609; *Chicago R. Co. v. Lake Shore R. Co.*, 10 Biss. 122; 5 F. R. 19; *Colglazier v. Louisville R. Co.*, 22 Id. 568. Corporations created by several States are separate for the purpose of jurisdiction, and each State may exercise control over the charters which it grants and over the acts of the corporations within its own limits; but the corporations are so far identical that they represent each other in suits by or against either of them, and the judgments or decrees will bind the whole corporation. *Horne v. B. & M. R. Co.*, 18 Id. 50; *N. & L. R. Co. v. B. & L. R. Co.*, 19 Id. 804. And the acts and neglects of such a corporation are done by it as a whole. *Horne v. B. & M. R. Co.*, 18 Id. 52.

Where the action is a transitory one, the State in which the cause of action arises is immaterial in considering the question of jurisdiction. *Horne v. B. & M. R. Co.*, 18 F. R. 52; *Burger v. Grand Rapids R. Co.*, 22 Id. 561. A corporation created under the laws of several States may elect under which act of incorporation it will sue, and the defendant, unless a citizen of the State in which suit is brought, cannot set up its incorporation in a State different from that of which it sues as a citizen, in order to defeat jurisdiction. *N. & L. R. Co. v. B. & L. R. Co.*, 8 F. R. 458; *Chicago & N. W. R. Co. v. Chicago & P. R. Co.*, 6 Biss. 219; *C. & W. I. R. Co. v. L. S. & M. S. Ry. Co.*, 5 F. R. 22; *Horne v. B. & M. R. Co.* 18 Id. 51; *Memphis R. Co. v. Alabama*, 107 U. S. 585. But in all suits by or against it in any one of the States creating it, it is to be regarded as a citizen of such State. *Ohio & Miss. R. Co. v. Wheeler*, 1 Black, 286; *Railway Co. v. Whitton*, 13 Wall. 283; *Memphis R. Co. v. Alabama*, 107 U. S. 585; *Uphoff v.*



Chicago R. Co., 5 F. R. 548. *Contra*, N. & L. R. Co. v. B. & L. R. Co., 8 F. R. 458; 19 Id. 806.

A person suing a corporation incorporated under the laws of several States may elect of which State to treat it as a citizen. In the absence of any declaration of intention, the suit will be presumed to be against the corporation chartered under the laws of the State in which suit is brought. *Uphoff v. Chicago R. Co.*, 5 F. R. 550. But in suits by a person against such a corporation in one of the States in which it is incorporated, it can set up that it is incorporated in such State, although sued as a corporation of another State. *Burger v. Grand Rapids R. Co.*, 22 F. R. 563. The apparent inconsistency between this and cases in which such a corporation sues is due to the common-law doctrine, that a corporation is exempt from suit in a State other than that of its creation. *Id.* It cannot, however, set up that it is incorporated in a State other than that in which it is sued, in order to defeat jurisdiction. *Railway Co. v. Whitton*, 13 Wall. 270; *St. Louis R. Co. v. Indianapolis R. Co.*, 9 Biss. 154. And one member of a consolidated corporation can sue another in equity, if created by different States. *St. Louis R. Co. v. Indianapolis R. Co.*, 9 Biss. 155; *Chicago R. Co. v. Lake Shore R. Co.*, 5 F. R. 21. When a citizen of one State brings a bill in equity against two corporations composed of the same individuals, but incorporated, one in the State in which the plaintiff lives, the other in a different State, the bill must be dismissed as to the former for lack of jurisdiction, but may be retained against the latter. *Vose v. Reed*, 1 Woods, 649. It is not enough to allege that a corporation is a "citizen" of such a State, but it must be alleged that it was incorporated by some State other than that of which the adverse party is a citizen (*Muller v. Dows*, 94 U. S. 444); but it is not necessary to allege that it does business in such State. *Express Co. v. Kountze*, 8 Wall. 342. An averment that a corporation is a "body politic by the law of, and doing business in" a State, is not an averment of citizenship. *Penna. v. Quicksilver Co.*, 10 Wall. 553. And an averment that the defendant is a corporation created under the laws of New York, located in Mississippi and doing business there under the laws of the State, is not an averment that it is a citizen of the latter State. *Ins. Co. v. Francis*, 11 Wall. 210. An allegation in a replication that the defendant is a corporation created under the laws of a State, cures the defect of alleging in the declaration that it is a citizen of the State. *Lafayette Ins. Co. v. French*, 18 How. 404; *Railroad Co. v. Harris*, 12 Wall. 86.

*Ancillary proceedings.*—In ancillary proceedings, the citizenship of the parties is immaterial. But the proceedings, to be sustained irrespective of citizenship, must be: (1) In the same court as the original proceedings, *Winter v. Swinburne*, 8 F. R. 49; *Freeman v. Howe*, 24 How. 450; *Railroad Co. v. Chamberlain*, 6 Wall. 748; *Jones v. Andrews*, 10 Id. 327; *Dunn v. Clarke*, 8 Pet. 1; *Hatch v. Dorr*, 4 McLean, 112; *Hatfield v. Bushnell*, 1 Blatch. 393; *In re Sabin*, 18 N. B. R. 151; (2) In reference to the same subject-matter as the original proceedings, *Conwell v. Canal Co.*, 4 Biss. 195; *Dunn v. Clarke*, 8 Pet. 1; *Myers v. Dorr*, 13 Blatch. 22; *Wickliffe v. Eve*, 17 How. 468; *Christmas v. Russell*, 14 Wall. 69; *Hubbard v. Bellew*, 3 F. R. 447; (3) And, as a general rule, between the same parties as in the original proceedings; cases cited *supra*. But in a cause in which a national court has acquired jurisdiction solely by reason of the parties' citizenship, if the rights and interests of third persons should become complicated with the litigation, either as to the original judgment, or any property in the custody of the court, or any abuse or misapplication of its process, and if no State court has power to guard and determine those rights without a conflict of authority with the national court, the latter court will from the necessity of the case, and to prevent a failure of justice, give such third persons a hearing, irrespective of their citizenship, so far as to protect their rights and interests relating to such judgment or property, and to correct any abuse or misapplication of its process, and no further. *Conwell v. Canal Co.*, 4 Biss. 195; *In re*



Sabin, 18 N. B. R. 160; *Ohio & M. R. Co. v. Fitch*, 20 Ind. 499; *Freeman v. Howe*, 24 How. 450; *Minnesota Co. v. St. Paul Co.*, 2 Wall. 609; *Buck v. Colbath*, 3 Id. 334; *Hagan v. Lucas*, 10 Pet. 400; *Van Norden v. Morton*, 99 U. S. 378; *Bank v. Turnbull*, 16 Wall. 190; *Krippendorf v. Hyde*, 110 U. S. 276; *Howard v. Selden*, 5 F. R. 465; *Barth v. Makeever*, 4 Biss. 212. The question is not whether a suit is supplementary and ancillary, or is independent and original, in the sense of the rules of equity pleading, but in the sense in which the Supreme Court has sanctioned, with reference to the line dividing the jurisdiction of the Federal courts from the State courts. *Minnesota Co. v. St. Paul Co.*, 2 Wall. 633.

The following are ancillary suits: Garnishee proceedings (*Poole v. Thatcherdeft*, 19 F. R. 49; *Pratt v. Albright*, 9 Id. 634, and 10 Biss. 511, doubting *Tunstall v. Worthington*, Hempst. 662; *Weeks v. Billings*, 55 N. H. 371; *Chapman v. Barger*, 4 Dillon, 557; *Bank v. Turnbull*, 16 Wall. 190; *Barrow v. Hunton*, 99 U. S. 80; *Buford v. Strother*, 10 F. R. 406); proceedings to revive a judgment (*Penn v. Klyne*, Pet. C. C. 446); to enforce a judgment (*Railroad Co. v. Chamberlain*, 6 Wall. 748; *Riggs v. Johnson County*, 6 Id. 184; *Dunn v. Clarke*, 8 Pet. 1); to restrain or regulate judgments, or suits at law (*Krippendorf v. Hyde*, 110 U. S. 281; *Freeman v. Howe*, 24 How. 450; *Cortes Co. v. Thannhauser*, 9 F. R. 226; *Chittenden v. State*, Id. 226; *Logan v. Patrick*, 5 Cranch, 288; *Dunlap v. Stetson*, 4 Mason, 349; *Dunn v. Clarke*, 8 Pet. 3; *St. Luke's Hospital v. Barclay*, 3 Blatch. 262; *Jones v. Andrews*, 10 Wall. 333; *Simms v. Guthrie*, 9 Cranch, 19; *Thompson v. McReynolds*, 29 F. R. 657); to set aside a judgment or decree (*Barrow v. Hunton*, 99 U. S. 80; *Pacific R. Co. v. Mo. Ry. Co.*, 111 Id. 522; *Krippendorf v. Hyde*, 110 Id. 276; *Minnesota Co. v. St. Paul Co.*, 2 Wall. 633; *O'Brien County v. Brown*, 1 Dillon, 588; *Osborn v. Michigan Air Line R. Co.*, 2 Flippin, 504); bills of revivor (*Hone v. Dillon*, 29 F. R. 465; *Clarke v. Mathewson*, 12 Pet. 171; *Whyte v. Gibbes*, 20 How. 541; *Hemingway v. Stansell*, 106 U. S. 399; *Hatfield v. Bushnell*, 1 Blatch. 393); cross-bills, or original bills as defences to suits at law, provided such bills are necessary to the defence of the party filing them, and are against parties already before the court, either as plaintiffs or defendants in the original suits (*Dunn v. Clarke*, 8 Pet. 1; *Clarke v. Mathewson*, 12 Id. 164; *Cross v. DeValle*, 1 Wall. 1; *Peay v. Schenck*, Woolw. 183); a supplemental bill by the vendee of an assignee in bankruptcy (*Millers v. Rogers*, 29 F. R. 401; *Bank v. Turnbull*, 16 Wall. 190; *Osborne v. Barge*, 30 F. R. 805; *Krippendorf v. Hyde*, 110 U. S. 276; *Phelps v. Oaks*, 117 Id. 236); proceedings against a marshal (*Wetmore v. Rice*, 1 Biss. 239); on bond releasing attachment (*Reilly v. Golding*, 10 Wall. 56); motion for an execution against a stockholder, when execution against the corporation has been returned *nulla bona*. *Webber v. Humphries*, 8 Rep. 66.

The following are not ancillary: Where new parties are made and different interests are involved in the suit (*Conwell v. Canal Co.*, 4 Biss. 195; *Dunn v. Clarke*, 8 Pet. 1; *Myers v. Dorr*, 13 Blatch. 22; *Wickliffe v. Eve*, 17 How. 468; *Christmas v. Russell*, 14 Wall. 69; *Hubbard v. Bellew*, 3 F. R. 447); a suit brought by one neither party nor privy to a judgment to restrain the plaintiff from enforcing it (*Williams v. Byrne*, Hempst. 474); or by a party alleging an attempt to be made a party to previous suit, and praying same be set aside for fraud. *Wickliffe v. Eve*, 17 How. 468.

"Or a controversy between citizens of a State and foreign states, citizens, or subjects." — The word "alien" has the same meaning as "foreign citizen or subject" in the Constitution. *Picquet v. Swan*, 5 Mason, 35. The alien may be either plaintiff or defendant (*Hinckley v. Byrne*, Deady, 224); and his residence, whether in the same State as that of the other party or in another State or abroad, is immaterial. *Breedlove v. Nicolet*, 7 Pet. 413; *Bonaparte v. Camden R. Co.*, Bald. 205. An alien who has merely taken the preparatory oath, or one who has merely filed a declaration of intention to become a citizen, is still an alien. *Baird v. Byrne*, 3 Wall. Jr. 13. A corporation organized under the laws of a foreign



state is an alien, and is conclusively presumed to be a citizen of such state. *Society for Propagating the Gospel v. New Haven*, 8 Wheat. 491; *Steamship Co. v. Tugman*, 106 U. S. 121, following *Ohio & Miss. R. Co. v. Wheeler*, 1 Black, 286; *Marshall v. B. & O. R. Co.*, 16 How. 314; *Covington Drawbridge Co. v. Shepherd*, 20 Id. 227; *Ins. Co. v. Ritchie*, 5 Wall. 541; *Paul v. Virginia*, 8 Id. 168; *Railroad Co. v. Harris*, 12 Id. 65. One party, plaintiff or defendant, must be a citizen of the United States, and this must appear on the record. *Jackson v. Twentyman*, 2 Peters, 136; *Prentiss v. Brennan*, 2 Blatch. 164; *Rateau v. Bernard*, 3 Id. 248; *Mossman v. Higginson*, 4 Dallas, 12. But all on one side need not be aliens. *Hinckley v. Byrne*, Deady, 224. The circuit court has jurisdiction of a suit by a foreign state against a citizen (*King v. Oliver*, 2 Wash. 430; *The Sapphire*, 11 Wall. 164); by a citizen against a consul who is an alien (*St. Luke's Hospital v. Barclay*, 3 Blatch. 265; *Börs v. Preston*, 111 U. S. 261), — but the alienage of a person must affirmatively appear, and will not be presumed because such person is the consul of a foreign government (*Brown v. Keene*, 8 Pet. 115; *Bingham v. Cabbot*, 3 Dall. 19, 382; *Capron v. Van Noorden*, 2 Cranch, 126; *Robertson v. Cease*, 97 U. S. 646; *Börs v. Preston*, 111 Id. 263); of a suit by an alien executor of a citizen against a citizen who is an executor of a citizen, although both testators were citizens of the same State (*Chappedelaine v. Dechenaux*, 4 Cranch, 306); of a suit on an executor's bond brought by a citizen of a State against the executors, who were citizens of the same State, to recover a debt due a foreign subject, on the ground that the plaintiff was only a nominal party suing for the use of the alien. *Browne v. Strode*, 5 Cranch, 303. An allegation that a party is an alien will not give jurisdiction (*Wilson v. City Bank*, 3 Sumner, 422), and will not prevent jurisdiction upon a plea in abatement. *Hinckley v. Byrne*, Deady, 224. The allegation should give the name of the particular foreign state of which the party is a citizen or subject. *Hinckley v. Byrne*, *supra*. It will not be inferred from facts stated, nor will the fact that the party is a subject of a foreign power. *Rateau v. Bernard*, 3 Blatch. 248. It is not sufficient to allege that one party is a "citizen of the United States," even in suits against an alien. *Picquet v. Swan*, 5 Mason, 35. But there is no jurisdiction of a suit by or against an Indian tribe or nation within the United States, because they are not foreign states. *Cherokee Nation v. Georgia*, 5 Pet. 19; *Worcester v. Georgia*, 6 Id. 515. An Indian is neither a foreign citizen nor a subject. *Karrahoo v. Adams*, 1 Dill. 346. The circuit court has no jurisdiction of a suit brought by a person described as an alien against a person whose citizenship is not alleged (*Jackson v. Twentyman*, 2 Pet. 136), nor where both plaintiff and defendant are aliens. *Montalet v. Murray*, 4 Cranch, 46; *Mossman v. Higginson*, 4 Dall. 12; *Piquignot v. Penn. R. Co.*, 16 How. 104; *Hinckley v. Byrne*, Deady, 224. A fixed and permanent residence or domicile in a State is essential to the character of citizenship, bringing the case within the jurisdiction of the United States courts; and a citizen of New York, by having a residence and domicile thirty years in Canada, ceases to be a citizen of the State, although he may still be regarded as a citizen of the United States. *Prentiss v. Brennan*, 2 Blatch. 164, citing *Hepburn v. Ellzey*, 2 Cranch, 445; *New Orleans v. Winter*, 1 Wheat. 91; *Gassies v. Ballou*, 6 Pet. 761; *Brown v. Keene*, 8 Id. 112; *Picquet v. Swan*, 5 Mason, 35; *Case v. Clarke*, Id. 70; *Wilson v. City Bank*, 3 Sumner, 422; *Catlett v. Pacific Ins. Co.*, 1 Paine, 594; *Cooper v. Galbraith*, 3 Wash. 546.

*Extra-Territorial Jurisdiction.* — A suit might have been brought under former statutes in the district where the defendant was found, to set aside a conveyance of land lying in another district, or to have some trust established concerning such land. *Massie v. Watts*, 6 Cranch, 158. See *Cherokee Nation v. Georgia*, 5 Pet. 78; *Railroad Co. v. Railroad Co.*, 15 How. 243; *Cheever v. Wilson*, 9 Wall. 121; *Ager v. Murray*, 105 Id. 131; *Hart v. Sansom*, 110 Id. 155; *Clark v. Hammett*, 27 F. R. 340; *Phelps v. McDonald*, 2 McArthur, 400; *Moore v. Jaeger*, Id. 471; *Kanawha Coal Co. v. K. & O.*



Coal Co., 7 Blatch. 391. The use of a patent without the district will not be restrained. *Goodyear v. Chaffee*, 3 Blatch. 270. Judgment in a suit against a resident is valid although he is not personally served, if service was made according to law. *Moch v. Insurance Co.*, 4 Hughes, 61; 11 Myer's Fed. Dec., § 504. Service upon a non-resident beyond the territorial jurisdiction is utterly void. *Wilson v. Graham*, 4 Wash. 53; *Ex parte Graham*, Id. 211; 11 Myer's Fed. Dec., §§ 1630-1637. In order to give jurisdiction of a suit against a non-resident, it is well settled that there must either be a service on him within the district, or the suit must be against some property within the district. *Pennoyer v. Neff*, 95 U. S. 720. The court has power to finally decide upon its own jurisdiction. *Moch v. Insurance Co.*, *supra*. The circuit court has no jurisdiction of trespass to lands in another district. Otherwise, as to trespass to personalty, the action being transitory. *Livingston v. Jefferson*, 1 Brock. 203; 4 Hughes, 606; 11 Myer's Fed. Dec., §§ 1695-98; *McKenna v. Fisk*, 1 How. 246. An action for the wrongful diversion of water must be brought in the district where the cause of action arises. If land is damaged thereby, the cause of action arises where such land is situated. An injury to a mill in Massachusetts by a diversion in Connecticut, may be brought in Connecticut. *Foot v. Edwards*, 3 Blatch. 310; 11 Myer's Fed. Dec., § 1699. An injunction against diverting a stream from the complainant's mill, situated in Connecticut on one side of a river forming a State boundary, by a canal built in Rhode Island on the opposite side of the river, is properly brought in the latter State. The injury to the mill in Connecticut may be brought there. *Stillman v. Manuf. Co.*, 3 Wood. & M. 538. If a canal in one State inflicts consequential damage on land in another, suit may be brought in the former. *Rundle v. Canal Co.*, 14 How. 80; 1 Wall. Jr. 288. Where noxious vapors are generated without, but make a nuisance within, the territorial jurisdiction, *quære* whether the court has jurisdiction. *Keyser v. Coe*, 9 Blatch. 33.

*Process.* — The Federal courts cannot acquire jurisdiction by the attachment of property merely, but there must be a personal service of the writ or process, or a voluntary appearance. *Pennoyer v. Neff*, 95 U. S. 714; *Ex parte Railway Co.*, 103 Id. 794; *Nazro v. Cragin*, 3 Dillon, 474; *Parsons v. Howard*, 2 Woods, 1; *Anderson v. Shaffer*, 10 F. R. 266; *Mohr Distilling Co. v. Insurance Cos.*, 12 Id. 474; *Saddler v. Hudson*, 2 Curtis, 7; *Boston Electric Co. v. Electric G. L. Co.*, 23 F. R. 838; *Ex parte Schollenberger*, 96 U. S. 369, overruling *Day v. India Rubber Co.*, 1 Blatch. 628; *Pomeroy v. N. Y. & N. H. R. Co.*, 4 Id. 120, and *Stillwell v. Empire Ins. Co.*, 4 Cent. L. J. 463. A corporation is "found," in a State when it exercises powers by express consent of the legislature of such State (*Railroad Co. v. Harris*, 12 Wall. 65); or when it is required by a general law of the State to appoint an agent for service of process as a condition precedent to the transaction of business within the State (*Lafayette Ins. Co. v. French*, 18 How. 404; *Ex parte Schollenberger*, 96 U. S. 369; *Provident Savings Society v. Ford*, 114 Id. 635); or when under a general law foreign corporations are made liable to a suit without the appointment of an agent for that particular purpose. *Williams v. Empire Trans. Co.* 14 O. G. 523; *Wilson Packing Co. v. Hunter*, 7 Rep. 455; *St. Clair v. Cox*, 106 U. S. 350. But this is only true when there is some law general or special to that effect, although it carries on business where suit is brought. *Boston Electric Co. v. Electric G. L. Co.*, 23 F. R. 840; *contra*, *Hayden v. Androscoggin Mills*, 1 Id. 93. It is not "found" under such a law, where an officer is merely passing through a State, but only where it has an office for the transaction of business. *Block v. Atchison R. Co.*, 21 F. R. 530. See *United States v. Telephone Co.*, 29 F. R. 17.

It is well settled that the resident of another district waives by a general appearance his privilege not to be sued out of the district where he resides or is found. *Irvine v. Lowry*, 14 Pet. 293; *Levy v. Fitzpatrick*, 15 Id. 167; *Flanders v. Ætna Ins. Co.*, 3 Mason, 158; *Kitchen v. Strawbridge*, 4 Wash. 84; *Knott v. Southern Life Ins. Co.*, 2



Woods, 481; Provident Savings Society *v.* Ford, 114 U. S. 635; Turner *v.* Indianapolis Ry. Co., 8 Biss., 380; Segee *v.* Thomas, 3 Blatch. 14. An appearance merely by a solicitor must be shown to be authorized. Harrison *v.* Rowan, Pet. C. C. 490. A subpoena or notice issued on filing an ancillary bill is not "original process," and may be allowed to be served on an attorney or on a plaintiff out of the district. Cortes Co. *v.* Thannhauser, 9 F. R. 226; Logan *v.* Patrick, 5 Cranch, 288; Read *v.* Consequa, 4 Wash. 174; Ward *v.* Seabry, Id. 426; Dunlap *v.* Stetson, 4 Mason, 360; Dunn *v.* Clarke, 8 Pet. 1; Bates *v.* Delavan, 5 Paige, 299; Doe *v.* Johnston, 2 McLean, 323; Sawyer *v.* Gill, 3 Wood. & M. 97; Segee *v.* Thomas, 3 Blatch. 15; Kamm *v.* Stark, 1 Sawyer, 550; Lowenstein *v.* Glidewell, 5 Dillon, 325. It is not necessary that either party should be a citizen of the State in which suit is brought, provided the defendant is found in the State where the suit is brought. Brooks *v.* Bailey, 9 F. R. 438. The circuit court has jurisdiction of a suit brought against a person in the district of which he is an inhabitant, although an inhabitant of another district is a co-defendant, provided such co-defendant voluntarily appears. Russell *v.* Clark, 7 Cranch, 69; Pond *v.* Vermont Valley R. Co., 12 Blatch. 280.

Attachment merely will not give jurisdiction (Toland *v.* Sprague, 12 Pet. 329; *Ex parte* Railway Co., 103 U. S. 796; Boston Electric Co. *v.* Electric G. L. Co., 23 F. R. 838); nor will service on non-residents out of the district (Van Antwerp *v.* Hulburt, 7 Blatch. 432); nor service on a general guardian, or a guardian *ad litem*, of a non-resident infant (Insurance Co. *v.* Bangs, 103 U. S. 435; Pennoyer *v.* Neff, 95 U. S. 714); nor service on an agent, or attorney (Picquet *v.* Swan, 5 Mason, 47); nor on a non-resident brought into a district by false representations, or detained there by improper contrivance, or illegal arrest (Union Sugar Refinery *v.* Mathiesson, 2 Cliff. 304); nor service on a person temporarily visiting within the district. Smith *v.* Tuttle, 5 Biss. 159. It is not necessary to aver on the record that the defendant is an inhabitant of the district, or found there, because he may voluntarily appear. Gracie *v.* Palmer, 8 Wheat. 699; *contra*, Allen *v.* Blunt, 1 Blatch. 480.

*Sect. 1, cl. 3.*—This clause is constitutional. Sheldon *v.* Sill, 8 How. 441; Brainard *v.* Williams, 4 McLean, 122. Under it the citizenship of the parties at the time the suit is brought, determines the jurisdiction. Thaxter *v.* Hatch, 6 McLean, 71; Morgan *v.* Morgan, 2 Wheat. 290; Mollan *v.* Torrance, 9 Id. 537; Dunn *v.* Clarke, 8 Pet. 1; Clark *v.* Matthewson, 12 Id. 171; Chamberlain *v.* Eckert, 2 Biss. 1261; White *v.* Leahy, 3 Dillon, 378; *contra*, Rogers *v.* Linn, 2 McLean, 126; Fry *v.* Rousseau, 3 Id. 106; Small *v.* King, 5 Id. 147. For its object see Bushnell *v.* Kennedy, 9 Wall. 392; and United States Bank *v.* Planters' Bank, 9 Wheat. 904. The contents of a contract is the obligation or promise contained in the contract in a suit to enforce such obligation. Corbin *v.* Black Hawk County, 105 U. S. 666. The term "choses in action" is very comprehensive, including the infinite variety of contracts, covenants, and promises, which confer on one party the right to recover by action a personal chattel, or a sum of money from another, (Sheldon *v.* Sill, 8 How. 441); also all debts, and all claims for damages for breach of contract, or for torts connected with contracts (Bushnell *v.* Kennedy, 9 Wall. 387); and such choses in action as are founded on tort. Northern Ins. Co. *v.* St. Louis Ry. Co., 15 F. R. 840. The words "in favor of an assignee" are used to distinguish, not between the plaintiff and defendant in a suit, but between the assignee and his assignor, so as not to permit a suit by the former, which was not permitted the latter. Clafin *v.* Insurance Co., 110 U. S. 89. The meaning of "assignee" and "assignment" is the same in the act of 1789, in Rev. Stats. § 629, and in the act of 1875, § 1, cl. 5. Thompson *v.* Perrine, 106 U. S. 592; Chickaming *v.* Carpenter, Id. 666. This clause does not refer to the amount in dispute, and an action may be maintained on a claim by an assignee for less than \$500, provided it be united with other claims held by the assignee in which the whole amount exceeds \$500. Hammond *v.* Cleaveland, 23 F. R. 1.



The following cases are within the prohibition of this clause: Suits by virtue of equitable assignments as well as suits by virtue of legal assignments, *e. g.*, by the assignee of open accounts of a merchant (*Sere v. Pitot*, 6 Cranch, 332; *Corbin v. Black Hawk County*, 105 U. S. 665); by the assignee of the right to account for the proceeds of the sale of mortgaged property (*Wilkinson v. Wilkinson*, 2 Curtis, 582); by the assignee of a debt secured by a bond and mortgage. *Sheldon v. Sill*, 8 How. 449. But if the debt is evidenced by a promissory note negotiable by the law merchant, the prohibition does not extend to it. *Treadway v. Sanger*, 107 U. S. 323; *Mersman v. Werges*, 112 Id. 143. A suit for specific performance is within the prohibition (*Corbin v. Black Hawk County*, 105 U. S. 659; *Shoecraft v. Bloxham*, 124 Id. 730); so is an action to recover taxes illegally assessed (*Stanley v. Supervisors*, 5 F. R. 254); or on county and city warrants (*Mayor v. Ray*, 19 Wall. 477; *Wall v. Munroe County*, 103 U. S. 74); or on a promissory note signed by a corporation by its president, and sealed with its corporate seal, payable to the order of the person who signs for the corporation, and by him indorsed in blank (*Coe v. Cayuga Lake R. Co.*, 19 Blatch. 522; but see *Ackley School District v. Hall*, 113 U. S. 140; and *Porter v. Janesville*, 3 F. R. 617); and suits on non-negotiable notes. *Shuford v. Cain*, 1 Abb. C. C. 307; *Stanton v. Shipley*, 27 F. R. 498. It includes assignees by operation of law, *e. g.*, receivers of corporations, assignees in bankruptcy and insolvency (*Bradford v. Jenks*, 2 McLean, 130; *Sere v. Pitot*, 6 Cranch, 336; *Re Duryea*, 17 Bank. Reg. 495); but not executors or administrators. *Chappedelaine v. Dechenaux*, 4 Cranch, 306; *Sere v. Pitot*, 6 Id. 336; *Childress v. Emory*, 8 Wheat. 642. Checks are within the prohibition. *Levy v. Laclede Bank*, 18 F. R. 193; *Mayer v. Foulkrod*, 4 Wash. 349. The holder of a promissory note may become so by virtue of an assignment. *Thompson v. Perrine*, 106 U. S. 592. In all cases falling within the prohibition of this section it must affirmatively appear on the record that neither the person suing, nor any one of the other assignees through whom title is derived, nor the original assignor, was at the time suit was brought a citizen of the same State as the person sued. *Stanton v. Shipley*, 22 F. R. 498; *Turner v. N. A. Bank*, 4 Dall. 8; *Montalet v. Murray*, 4 Cranch, 46; *Mollan v. Torrance*, 9 Wheat. 537; *Gibson v. Chew*, 16 Pet. 315; *Morgan v. Gay*, 19 Wall. 82; *Bradley v. Rhines*, 8 Id. 396. But see *Wilson v. Fisher*, Bald. 133; and *Milledollar v. Bell*, 2 Wall. Jr. 334, that only the citizenships of the person suing, the original assignor, and the person sued are to be considered. Under Rev. Stats. § 629, cl. 1, the circuit court has no jurisdiction of a suit brought against a remote indorser, where the plaintiff does not show in his declaration that the intermediate indorser could have maintained an action against such defendant. *Turner v. N. A. Bank*, 4 Dall. 8; *Mollan v. Torrance* 9 Wheat. 539.

In all cases falling within this exception, a *bona fide* transfer will give jurisdiction, provided the requisite citizenship exists between the owner and the other party, although such transfer was made for the purpose of giving the circuit court jurisdiction (*D'Wolf v. Rabaud*, 1 Pet. 498; *Evans v. Gee*, 11 Id. 83; *Sims v. Hundley*, 6 How. 5; *Smith v. Kernochan*, 7 Id. 216; *Jones v. League*, 18 Id. 81; *De Sobry v. Nicholson*, 3 Wall. 423; *Farmington v. Pillsbury*, 114 U. S. 143; *M'Donald v. Smalley*, 1 Pet. 620; *Barney v. Baltimore*, 6 Wall. 288; *Manhattan Ins. Co. v. Broughton*, 109 U. S. 125); but a merely colorable transfer, the assignor remaining in whole or in part the real party in interest, will be dismissed under 1875, § 5, where such assignor could not have maintained the suit. *Maxwell v. Levy*, 2 Dall. 381; *Smith v. Kernochan*, 7 How. 216; *Barney v. Baltimore*, 6 Wall. 288; *Williams v. Nottawa*, 104 U. S. 211; *Hawes v. Oakland*, Id. 459; *Hayden v. Manning*, 106 Id. 586; *Bernards Township v. Stebbins*, 109 Id. 341; *Farmington v. Pillsbury*, 114 Id. 143; *Hurst v. McNeil*, 1 Wash. 70; *Briggs v. French*, 2 Sumner, 257; *Welles v. Newberry*, 4 McLean, 226; *Starling v. Hawks*, 5 Id. 318; *Marion v. Ellis*, 10 F. R. 410; *Coffin v. Haggin*, 7 Sawyer, 509; *Greenwalt v. Tucker*, 10 F. R. 884. A



promissory note payable to order or bearer is negotiable as long as it remains unpaid *Allen v. O'Donald*, 28 F. R. 17. The object of the exception is to benefit commerce, by enabling such notes to circulate through the States with entire freedom (*Ferry v. Merri-mack*, 18 F. R. 663); and in cases within the exception the citizenship of the parties determines the jurisdiction. *Tredway v. Sanger*, 107 U. S. 523. The phrase "law merchant" refers to a recognized standard, and the statutes of the States which have varied the law in this particular are not adopted. *Whiting v. Wellington*, 10 F. R. 815. These are notes which, in the hands of a *bona fide* purchaser for value before maturity, are subject to no equities in favor of the maker. *Gregg v. Weston*, 7 Biss. 360.

In the following cases a suit may be maintained in the circuit court if the person suing and the person sued are citizens of different States: mere rights of action to recover damages for a delinquency, as *e. g.*, an action against a bank for failure to give notice of protest (*Barney v. Globe Bank*, 2 Am. L. Reg. N. S. 221); real actions (*McDonald v. Smalley*, 1 Pet. 624; *Briggs v. French*, 2 Sumner, 257; *contra*, *Maxwell v. Levy*, 2 Dall. 381; *Hurst v. M'Neil*, 1 Wash. 70); suits by an assignee against his immediate assignor (*Coffee v. Planters' Bank*, 13 How. 188; *Young v. Bryan*, 6 Wheat. 146; *Mollan v. Torrance*, 9 Id. 538; *Whiting v. Wellington*, 10 F. R. 815); suits to recover possession of the specific thing, or damages for its wrongful caption or detention (*Deshler v. Dodge*, 16 How. 631; *Bushnell v. Kennedy*, 9 Wall. 391); suits on a bail bond (*Bobyshall v. Oppenheimer*, 4 Wash. 482); or on an obligation, including bonds and their coupons, payable to bearer, or to an individual or bearer (*Kentucky Bank v. Wister*, 2 Pet. 318; *Thomson v. Lee County*, 3 Wall. 327; *Bushnell v. Kennedy*, 9 Id. 387; *Lexington v. Butler*, 14 Id. 282; *Bullard v. Bell*, 1 Mason, 243; *Cooper v. Thompson*, 13 Blatch. 434; *Coe v. Cayuga Lake R. Co.*, 19 Id. 522; *Thompson v. Perrine*, 106 U. S. 593), although under seal (*Langston v. South Carolina R. Co.*, 2 S. C. 248; *Bank v. Railroad Co.*, 5 Id. 156; *Bond Debt Cases*, 12 Id. 250; *Manuf. Co. v. Bradley*, 105 U. S. 180; *Farr v. Lyons*, 21 Blatch. 116); and suits on bonds issued by a corporation with the payee's name blank (*White v. Vermont R. Co.*, 21 How. 575; *Lexington v. Butler*, 14 Wall. 282); or on a municipal bond payable to "said company or its assignees." *Porter v. Janesville*, 3 F. R. 617.

A bond originally payable to a person, but on maturity, in consideration of forbearance to sue, made payable to bearer, then becomes a negotiable promissory note, and is not within 1875, § 1, cl. 5. *Manuf. Co. v. Bradley*, 105 U. S. 180. Municipal bonds, issued under the authority of law, and made payable to a person, or order, and by him indorsed in blank, are "promissory notes" within the meaning of the act of 1875, § 1, cl. 5. *Ackley School District v. Hall*, 113 U. S. 140; but see *Coe v. Cayuga Lake R. Co.*, 19 Blatch. 522. So, also, foreclosure suits by indorsees of negotiable promissory notes secured by mortgage are not within the prohibition. *Sheldon v. Sill*, 8 How. 450; *Tredway v. Sanger*, 107 U. S. 323; *Mersman v. Werges*, 112 Id. 143; *Seckel v. Backhaus*, 7 Biss. 354; *Dundas v. Bowler*, 3 McLean, 204; *Whiting v. Wellington*, 10 F. R. 815; see *Hill v. Winne*, 1 Biss. 277. Neither is a suit by a judgment creditor against his debtor and others to set aside conveyances in fraud of creditors, although the foundation of the judgment was within the prohibition (*Bean v. Smith*, 2 Mason, 252; *s. p.* *Dexter v. Smith*, Id. 303); nor are suits by an executor or administrator (*Chappedelaine v. Dechenaux*, 4 Cranch, 306; *Childress v. Emory*, 8 Wheat. 642; *Mayer v. Foulkrod*, 4 Wash. 349); nor a suit by the purchaser of a partner's interest at an execution sale against the remaining partner. *McNichol v. Phelps*, 16 F. R. 8. See also note, § 639.

Cl. 2, 3. These clauses are merged in the above act of March 3, 1875, § 1. See § 4 of 24 St. 552, ch. 373, stated in note, p. 126, *post*. *Postmaster-General v. Early*, 12 Wheat. 136, held that § 3 of the act of March 3, 1815, ch. 101, extended to the circuit courts jurisdiction of suits at common law by the United States or its authorized officers, with-



out regard to amount, leaving undisturbed the limitation as to suits by the United States in equity. See note, p. 68 *ante*.

Cl. 4. The act of 1833, on which this clause is founded, known as the "Force Bill," was passed to meet threatened nullification of the Federal revenue laws. *Larkin v. Saffarans*, 15 F. R. 147. Although the language of clause 4 of § 629 seems broad enough to cover any case remotely connected with the revenue laws, yet § 643 seems to indicate the classes of cases thought to come within the designation of cases arising under the revenue laws. Suits *in rem* for forfeitures for breach of the internal revenue laws are within the circuit court's jurisdiction. *Coffey v. United States*, 116 U. S. 427, 436. An action of ejectment to recover possession of lands sold under St. June 8, 1872, does not fall under § 629, cl. 4; but, if containing the proper allegations, it falls within St. 1875, § 1 (*Eaton v. Calhoun*, 15 F. R. 155; 2 *Flippin*, 593); and a suit by a person claiming title under the revenue laws, which title is admitted, does not fall under § 629, cl. 4. *Ex parte Smith*, 94 U. S. 456. The district court still has exclusive jurisdiction of actions for penalties and forfeitures, even since the act of 1875. *United States v. Mooney*, 116 U. S. 106. The jurisdiction of suits between citizens of the same State in internal revenue cases, bestowed by acts of March 2, 1833 (4 St. 632), and June 30, 1864 (13 St. 241), was taken away by the act of July 13, 1866 (14 St. 172). *Ins. Co. v. Ritchie*, 5 Wall. 541; *Hornthall v. Collector*, 9 Id. 560. And the circuit court has jurisdiction of a suit between citizens of the same State to recover money paid as duties alleged to be illegally exacted (*Schneider v. Barney*, 13 Blatch. 37), and of a suit on a bond to recover money collected by a postmaster and not accounted for. *Postmaster-General v. Early*, 12 Wheat. 136; *Dox v. Postmaster-General*, 1 Pet. 318. Owners of property seized cannot maintain an action for the property pending proceedings *in rem* to enforce the forfeiture. *Gelston v. Hoyt*, 3 Wheat. 246; *Averill v. Smith*, 17 Wall. 93. A certificate that there was probable cause for the seizure is a good bar to an action by the owner of the property seized; and a decree of acquittal, denying such certificate, conclusively proves the seizure to be tortious, and the owner is entitled to damages for his injury. *Shattuck v. Maley*, 1 Wash. 249; *United States v. Gay*, 2 Gall. 360; *The Friendship*, 1 Id. 112; *United States v. One Sorrel Horse*, 22 Vt. 656; *La Manche*, 25 Law Rep. 585; *Wilkins v. Despard*, 5 T. R. 117; *The Ship Recorder*, 2 Blatch. 120; *The Malaga*, 2 Am. Law J. 105; *La Jeune Eugenie*, 2 Mason, 436; *Averill v. Smith*, 17 Wall. 93. See Rev. Stats. § 563, cl. 3, 5, 6, 7.

Cl. 5. Of penalties and forfeitures under the custom laws, the district courts have exclusive jurisdiction even since the act of 1875. *United States v. Mooney*, *supra*; see notes, §§ 563, cl. 3, and 4270.

Cl. 6. See note on cl. 8, 9 of § 563, and on § 4618. In *Union Ins. Co. v. United States*, 6 Wall. 759, § 2 of the act of 1861, providing that "such prizes and captures shall be condemned in the district or circuit court of the United States having jurisdiction of the amount, or in admiralty," was construed to mean that both courts have jurisdiction according to the amount and in admiralty. It appears that maritime captures from an insurrectionary enemy are originally cognizable in the circuit courts, while such captures from other enemies are not within either the original or appellate jurisdiction of those courts. 1 Com. D. 357.

Under clause 6, "prize" includes seizures either on land or water of all descriptions of property, real or personal. The circuit court has jurisdiction of captures made on land and on waters not navigable, where the amount is sufficient, and original jurisdiction in admiralty, in proper cases, under Rev. Stats. §§ 5308, 5309. The proceedings, where the seizure is not made on navigable water, are in form and modes analogous to those used in admiralty; but such suits are at common law, either party may demand a trial by jury, and no appeal lies to the supreme court. In seizures made on navigable waters, the proceedings are in admiralty. *Union Ins. Co. v. United States*,



6 Wall. 764. The Federal court has no power to decree confiscation of property and direct its sale, except as Congress bestows such power upon it. *Conrad v. Waples*, 96 U. S. 279. The proceedings for confiscation are at common law, and not in admiralty or equity, and require a jury for the trial of issues of fact, and a writ of error to revise a judgment; but interventions of third parties may be in equity, and therefore may require no trial by jury, and an appeal will lie. *Armstrong's Foundry*, 6 Wall. 766; *Garnett v. United States*, 11 Id. 256; *McVeigh v. United States*, Id. 259; *Miller v. United States*, Id. 268; *The Confiscation Cases*, 1 Woods, 225.

Cl. 9. See § 711, cl. 5. By 18 St. 315, c. 77, § 2, the circuit court may submit questions of fact in patent causes in equity to a jury of not less than five or more than twelve persons, subject to rules to be made by the supreme court, the verdict to be treated as in the case of chancery issues sent to a court of law and returned with findings. Such verdict is merely advisory. *Watt v. Starke*, 101 U. S. 247. An action for an infringement of a patent must be brought in the name of the real and beneficial party in interest. *Goldsmith v. American Paper Collar Co.*, 2 F. R. 239; *Lorillard v. Standard Oil Co.*, Id. 902. A suit in equity for an accounting may be maintained without demanding an injunction. *Atwood v. Portland Co.*, 10 F. R. 284. This clause in conjunction with § 711, cl. 5, does not deprive the Court of Claims of jurisdiction of suits against the government for enforcing contracts founded on patents. *Morse Arms Manuf. Co. v. United States*, 16 Ct. Cl. 296. A suit in equity to have sold defendant's interest in a patent does not arise under the patent laws. *Ryan v. Lee*, 10 F. R. 917.

State courts cannot enjoin the unlawful use of patented articles. *Continental S. S. Co. v. Clark*, 100 N. Y. 365; *Kayser v. Arnold*, 41 Hun, 275. But they may decree specific performance of a contract to assign a patent. *Somerby v. Buntin*, 118 Mass. 279; *Binney v. Annan*, 107 Mass. 94; *Fuller & Johnson Manuf. Co. v. Bartlett*, 68 Wis. 73. They are the only proper tribunals, even when they decline jurisdiction, to determine questions relating solely to the construction of contracts for the use of the privileges acquired under letters-patent. *McCarty & H. T. Co. v. Glaenger*, 30 F. R. 387. A State court may also determine a question involving the validity of a patent which arises incidentally in a suit before it. *Brown v. Texas C. H. Co.*, 64 Texas, 396. See also *Dale Manuf. Co. v. Hyatt*, 125 U. S. 51; note § 693.

Cl. 10. See notes, §§ 563, cl. 15, 5133; 24 St. 552, §§ 2, 3, 4, *post*, p. 125. See cl. 3, *supra*. The jurisdiction here conferred in suits by national banks has been held to be taken away by 22 St. 163, § 4 (see note, § 5133), and such a bank cannot now maintain a suit against residents of its own judicial district. *Jefferson Bank v. Fore*, 25 F. R. 209; *Union Bank v. Miller*, 15 Id. 703; *Price v. Abbott*, 17 Id. 506. See also *Hendee v. Railroad Co.*, 23 Blatch. 453; *Foss v. Nat. Bank*, 3 F. R. 185. This section was not repealed by the act of March 3, 1875. *Third Nat. Bank v. Harrison*, 8 F. R. 721.

Cl. 11. 18 St. 316, c. 80, strikes out "or against" in first line. See § 5237, *post*, on pars. 10, 11; and § 4 of St. 1887, printed *post*, p. 126.

Cl. 12. Generalized from the acts cited in the margin, the principle of the provision being that every person should be afforded a remedy for injury to his person or property on account of his compliance with the laws of the United States. By 18 St. 374, c. 130, § 8, actions against officers of Congress for official acts are to be defended, upon request, by the district attorney for the district within which the action is brought, under the Attorney-General's supervision and direction. The circuit court has jurisdiction of a suit by a collector of internal revenue against the sureties of a deputy, to recover for the damages to the collector arising from the deputy's failure to turn over taxes collected by him. *Crawford v. Johnson*, Deady, 457. See Rev. Stats. §§ 563, cl. 11, 12; 629, cl. 15; 2009.

Cl. 13. The Federal courts have no jurisdiction over contested elections for State officers, except where the sole title to the office arises out of the denial of the right to



vote on account of race, color, or previous condition of servitude. *Harrison v. Hadley*, 2 Dill 229. This provision extends from the first act required to be done in the matter of an election down to and including the final canvass of the votes, but does not apply to restore a successful party to an office from which he has been ousted. *Johnson v. Jumel*, 3 Woods, 74.

Cl. 14. *Re Yancey*, 28 F. R. 451; Rev. Stats. § 563, cl. 14.

Cl. 16. See notes, §§ 563, cl. 12; 1977. A requirement that white and colored children shall attend separate schools does not deprive either class of their equal rights. *Bertonneau v. Directors*, 3 Woods, 182. But a requirement that the tax collected from white persons should be applied to the support of the white schools, and the tax collected from colored persons should be applied to the support of colored schools, is within the prohibition and is void. *Claybrook v. Owensboro*, 16 F. R. 297. This section applies to all persons within the jurisdiction of the United States, irrespective of nationality, race, or color. *Ah Kow v. Nunan*, 5 Sawyer, 562; *Re Parrott*, 1 F. R. 481. But see *Slaughter House Cases*, 16 Wall. 81. Under it a suit cannot be removed from a State court into a Federal court. *Illinois v. C. & A. R. Co.*, 6 Biss. 110.

Art. 4, § 2, of the Constitution, declaring that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States," secured protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject to such restraints as the government may prescribe for the general good. It left each State free to declare what the privileges and immunities of its citizens should be, except so far as restrictions were placed on the States by other clauses of the Constitution; but declared that citizens of other States while within such State should be entitled to the same privileges and immunities. *Corfield v. Coryell*, 4 Wash. 371; *Ward v. Maryland*, 12 Wall. 430; *Paul v. Virginia*, 8 Id. 180; *Slaughter House Cases*, 16 Id. 75. The right to be secure in one's house is not a right secured by the Constitution. *United States v. Crosby*, 1 Hughes, 457.

The phrase "equal rights" applies only to rights belonging to a citizen of the United States, as distinguished from a citizen of a State. *United States v. Reese*, 92 U. S. 214; *Slaughter House Cases*, 16 Wall. 74; *Cully v. B. & O. R. Co.*, 1 Hughes, 539; *Re Parrott*, 1 F. R. 504. See note § 1977. Congress has only a corrective power under the Fourteenth Amendment; and its laws, if passed in advance to meet the exigency when it arises, must be adapted to State laws, or State action of some kind, adverse to the rights of the citizen secured by the Amendment. *Civil Rights Cases*, 109 U. S. 13. It is doubtful whether any State action not directed by way of discrimination against the negroes as a class falls within the clause of the Fourteenth Amendment, in denying to any person within its jurisdiction the equal protection of the laws. *Slaughter House Cases*, 16 Wall. 81. This guaranty is not against individual action or encroachment, but against action by the State. *Virginia v. Rives*, 100 U. S. 313; *United States v. Harris*, 106 Id. 629; *LeGrand v. United States*, 12 F. R. 577; *Claybrook v. Owensboro*, 16 Id. 301. While there must be equality of benefits as well as equality of burdens, this does not mean absolute equality in distributing the benefits of taxation, but only secures a fair and equal classification or basis. *Claybrook v. Owensboro*, 16 F. R. 302. See also *Virginia v. Rives*, 100 U. S. 313; *Ex parte Virginia*, Id. 339; *Strouder v. West Virginia*, Id. 303; *Neal v. Delaware*, 103 Id. 370; *Bertonneau v. Directors*, 3 Woods, 177; *United States v. Buntin*, 10 F. R. 730; *Cooley on Torts*, 289; *Ward v. Flood*, 48 Cal. 36; *Smith v. Directors*, 40 Iowa, 518; *Roberts v. Boston*, 5 Cush. 198; *State v. McCann*, 21 Ohio St. 198; *Cory v. Carter*, 48 Ind. 362; *Ah Kow v. Nunan*, 5 Sawyer, 555; *Parrott's Chinese Case*, 6 Id. 376; *Bradwell v. The State*, 16 Wall. 130; *Bartemeyer v. Iowa*, 18 Id. 129; *Minor v. Happersett*, 21 Id. 162; *Walker v. Sauvinet*, 92 U. S. 90; *Munn v. Illinois*, 94 Id. 113; *Chicago R. Co. v. Brown*, 17 Wall. 445; *Hall v. DeCuir*, 95 U. S. 485; *Missouri v. Lewis*,



101 Id. 22; *Pace v. Alabama*, 106 Id. 583; *United States v. Crosby*, 1 Hughes, 448; *Carter v. Greenhow*, 114 U. S. 317; *Pleasants v. Greenhow*, Id. 323.

CL. 17. See note, § 563, cl. 11. Under the Civil Rights Bill of April 9, 1866 (14 St. 27), giving to the circuit court jurisdiction of civil and criminal causes "affecting" persons deprived of such rights, a criminal prosecution does not affect mere witnesses in the case, or any person not in existence. *Blyew v. United States*, 13 Wall. 581.

CL. 20. See note, § 563, cl. 1, and St. 1887, § 1, printed p. 94 *ante*. Robbery on land, or an assault on land, is not a crime against the United States. *United States v. Terrel*, Hempst. 411, 422. The criminal jurisdiction of the circuit court embraces acts made crimes subsequent to the judiciary act; and whenever jurisdiction of a crime is bestowed upon the district court, the circuit court has jurisdiction by virtue of this section. *United States v. Holliday*, 3 Wall. 415. See also *Sharon v. Hill*, 24 F. R. 726; *United States v. Clark*, 31 Id. 710; *United States v. McBratney*, 104 U. S. 621.

SECT. 630.—The jurisdiction under this provision depended upon the limitations in Rev. Stats. § 4979. *Schott v. Hudson*, 109 U. S. 476.

SECT. 631.—The words in the 1st and 2d lines, "equity or of" and "except prize causes," were added by the Revision. 1 Com. D. 363. As to final decrees and amount involved, see note, § 692. Although it was held in *United States v. Wonson*, 1 Gall. 5, that the appeal provided by the act of 1803 related only to admiralty causes, yet, as its language was general, it was construed in the Revision as including all decrees which the district courts came to have power to render, as *e. g.*, decrees in equity. 1 Com. D. 363. Proceedings in equity cannot be brought up by writ of error. *Doty v. Jewett*, 19 F. R. 337.

St. Feb. 16, 1875, ch. 77, § 1 (18 St. 315), provides (compare § 700 and note) —

"That the circuit courts of the United States, in deciding causes of admiralty and maritime jurisdiction on the instance-side of the court, shall find the facts and the conclusions of law upon which it renders its judgments or decrees, and shall state the facts and the conclusions of law separately. And in finding the facts, as before provided, said court may, upon the consent of the parties who shall have appeared and put any matter of fact in issue, and subject to such general rules in the premises as shall be made and provided from time to time, impanel a jury of not less than five and not more than twelve persons, to whom shall be submitted the issues of fact in such cause, under the direction of the court, as in cases at common law. And the finding of such jury, unless set aside for lawful cause, shall be entered of record, and stand as the finding of the court, upon which judgment shall be entered according to law. The review of the judgments and decrees entered upon such findings by the Supreme Court, upon appeal, shall be limited to a determination of the questions of law arising upon the record, and to such rulings of the circuit court, excepted to at the time, as may be presented by a bill of exceptions, prepared as in actions at law."

Where a decree was made a few days before this act, and after it took effect there was a reference to a master as to damages, the action of the circuit court thereon as to facts was held not reviewable by the Supreme Court. *The Richmond*, 103 U. S. 540.

Under this act the finding of facts by the circuit court is conclusive, and only rulings upon questions of law are reviewable by bill of exceptions. *The Abbotsford*, 98 U. S. 440; *The Benefactor*, 102 Id. 214; *The Havre*, 18 Blatch. 319. The findings of fact are in the nature of a special verdict, and constitute a part of the record. The law arising thereon will be determined in the Supreme Court, although no exception thereto was taken; but a bill of exceptions is required to reserve for review the rulings below upon questions of law during the progress of the trial. *The S. C. Tryon*, 105 U. S. 267. An appeal is not allowed in prize causes from the district to the circuit court, but is allowed from the district court to the Supreme Court by Rev. Stats. § 695. The appeal allowed to the next circuit court must be to the term of that court held next after the term of the district court; otherwise the right of appeal is lost. Such appeals are properly entered at the circuit court term begun next after the entry of the decree of the district court, although such term of the district court had not ended when the term of the circuit court



began. *The Oriental*, 2 Flippin, 37; *United States v. Hogsheads*, 1 Curtis, 276; *Montgomery v. Henry*, 1 Dall. 50; *United States v. Haynes*, 2 McLean, 155; *Gloucester Ins. Co. v. Younger*, 2 Curtis, 322; *United States v. The Glamorgan*, Id. 236; *United States v. Specie*, 1 Woods, 14. If the appellant does not prosecute it to the next term he will be deemed to have abandoned it. *The Betsey*, 1 Gall. 416; *United States v. Haynes*, 2 McLean, 155. And the circuit court will, at the instance of the respondent, affirm the decree. *Folger v. Shaw*, 2 Wood. & M. 531; *The Josephine*, Abb. Adm. 481. Sect. 631 is not affected by § 635. *The Oriental*, *supra*. The appeal is taken in open court (*The Enterprise*, 3 Wall. Jr. 58), usually *viva voce*, but sometimes in writing (*Folger v. Shaw*, 2 Wood. & M. 531), immediately after the decree and before an adjournment for the term, in the absence of any rule of court (*Norton v. Rich*, 3 Mason, 443); or within such time as the court may stipulate by a general or special order. *The S. S. Osborne*, 105 U. S. 450; *The New England*, 3 Sumner, 495. But there may be an appeal after a court has adjourned without day, if there is no such general or special order. *The New England*, *supra*. The requirement as to time of taking an appeal is jurisdictional, but all else is mere matter of procedure. *The S. S. Osborne*, *supra*. When the appeal is entered it takes effect in the same manner by relation back, as if entered in open court upon the record when the sentence was pronounced. *The New England*, *supra*. The district court cannot direct a formal decree to be entered in vacation as of the preceding term without notice to the party; and if the appeal is prayed for and allowed, and a bond filed, it is sufficient, although not entered on the minutes of the district court. Id. If the district court unlawfully refuses to allow an appeal, the circuit court on motion will allow the appeal to be entered. *The Enterprise*, 2 Curtis, 317.

The provisions regarding a trial by jury in the Seventh Amendment apply only to common-law juries, and on an appeal from the district court when the trial was by jury, the case stands for trial precisely as if tried by the court. *Boyd v. Clark*, 13 F. R. 908. See 18 St. 315, stated *supra*. Separate findings of fact and law are required in an admiralty suit in the circuit court in all cases where the amount in controversy, on appeal, is sufficient to give the Supreme Court jurisdiction to re-examine the decree rendered in the former court; but where the sum or value in dispute does not exceed the sum or value of \$5000, a more general finding of those matters will in the opinion of the circuit court be sufficient. 1265 *Vitrified Pipes*, 14 Blatch. 279; *Richards v. Hansen*, 1 F. R. 67. An appeal in admiralty supersedes and vacates the decree appealed from. An entirely new trial, with other pleadings and other testimony, if necessary or asked for, is contemplated; and an amendment may be allowed in the circuit court. *Weaver v. Thomson*, 1 Wall. Jr. 343; *The C. H. Foster*, 1 F. R. 733; *The Morning Star*, 14 Id. 866; *The Ethel*, 31 Id. 576; *The Oder*, 21 Blatch. 26; *Phenix Ins. Co. v. Liverpool Steamship Co.*, 22 Id. 372; *The Charles Morgan*, 115 U. S. 75. The circuit court has no appellate jurisdiction over a proceeding on a bond for the appraised value of the thing, or on awarding execution on the same, for these are but incidents to the final decree. *The Hollen*, 1 Mason, 431; *McLellan v. United States*, 1 Gall. 230. The action of the district court in refusing to consider damage to a cargo from coal dust, because not properly pleaded, can be reviewed by the circuit court. *The Melville*, 34 F. R. 350. The decree must be final. *Mordecai v. Lindsay*, 19 How. 199; *The Seneca*, Gilpin, 34; *Norton v. Hood*, 12 F. R. 763. Final decrees refer to cases of equity and admiralty or maritime jurisdiction exclusively all others being reviewed by writ of error (*United States v. Nourse*, 6 Pet. 470; *United States v. Haynes*, 2 McLean, 155; *United States v. Wonson*, 1 Gall. 5; *United States v. 37 Barrels*, 1 Woods, 19); and a writ of error is not the proper process. *McLellan v. United States*, 1 Gall. 227; *Norton v. Hood*, 12 F. R. 767. The following cases cannot be carried up by appeal: A judgment on an official bond (*United States v. Haynes*, 2 McLean, 156); a judgment on a seizure on land. *United States v. 37*



Barrels, 1 Woods, 19. In the following cases an appeal is the proper process: From judgment on a stipulation in admiralty (*McLellan v. United States*, 1 Gall. 227); from a decree upon a petition filed by an informer to obtain a share of a fund in court (*Westcot v. Bradford*, 4 Wash. 492); from a decree on an information *in rem* to enforce a forfeiture where the seizure was on navigable waters. *United States v. La Vengeance*, 3 Dall. 297.

The following are not final decrees: A *pro forma* decree entered without a hearing (*The Wellington*, 21 Int. Rev. Rec. 14); a provisional decree (*The Yuba*, 4 Blatch. 314); an interlocutory decree (*The New England*, 3 Sumner, 495); an application to the conscience or discretion of the court (*The Enterprise*, 3 Wall. Jr. 58; *Taylor v. Woods*, 3 Woods, 146); a decree dismissing a libel for want of prosecution (*The Merchant*, 4 Blatch. 105); a mere order of affirmance before entry of a formal decree (*Harris v. Wheeler*, 8 Blatch. 81); a decree granting or refusing an injunction (*Norton v. Hood*, 12 F. R. 763); or quashing an execution (*The Elmira*, 16 F. R. 133, reviewing cases); or refusing to quash an execution (*The Hiram Wood*, 6 Chi. Leg. News, 135); or a decree on application for a stay of execution (*The Hollen*, 1 Mason, 431); or on an application for a rehearing (*The Enterprise*, 3 Wall. Jr. 58); or a decree allowing or disallowing a bill of review (*The New England*, *supra*); or a decree on application to allow an appeal *nunc pro tunc* (*The Enterprise*, *supra*); or a decree dismissing a libel for want of evidence. *The Delaware*, 33 F. R. 589. See, also, note § 692.

*Matter in Dispute.*—The amount in dispute must exceed the value of \$50, exclusive of costs. *The Seneca*, Gilpin, 34; *The Roarer*, 1 Blatch. 1. When the controversy relates merely to the amount of money, the amount in dispute must appear in the pleadings. *Agnew v. Dorman*, Taney, 386. If the decree is for the libellant for less than \$50, there is no appeal by the respondent although a larger sum was claimed. *Greigg v. Reade*, Crabbe, 64; *Shirley v. Titus*, 1 Sumner, 447. But in such a case the libellant could appeal. *McGinnis v. Carlton*, Abb. Adm. 570. But see *Hilton v. Dickinson*, 108 U. S. 165. If the claim with interest exceeds \$50, an appeal will lie. *Godfrey v. Gilmartin*, 2 Blatch. 340. Interest cannot be computed unless specially claimed. *Olney v. The Falcon*, 17 How. 19. In a suit *in rem* for wages, the amount of the wages governs when the appellant appears and contests the claim, and he may appeal from a decree for more than \$50, although the proceeds of sale are less. *The Enterprise*, 2 Curtis, 317. See *The Jessie Williamson, Jr.*, 108 U. S. 311. An appeal taken against only one libellant will be dismissed as to the others, and as to all, if the amount in dispute as against the one appealed against is less than \$50. *Mason v. Ervine*, 27 F. R. 240; *The City of Lincoln*, 19 Id. 460. See note, § 692.

SECT. 632.—The cited act of 1853 was thought applicable as well to appeals from the district to the circuit courts as from the latter to the Supreme Court, and, when applied to the latter, to be necessarily construed in connection with St. March 3, 1803, c. 40, § 2 (2 St. 244), regulating equity and admiralty appeals to the Supreme Court, and requiring a transcript of the libel, "depositions," &c., to be sent up. 1 Com. D. 365.

SECT. 633.—The appellate jurisdiction of the circuit courts in civil actions at common law can be exercised only by writ of error, and not by appeal. *United States v. Wonson*, 1 Gall. 5. Under this section the circuit court cannot review any question raised in a bill of exceptions taken in a case tried in the district court without a jury. *Doty v. Jewett*, 19 F. R. 337. The following are civil actions at common law which can be reviewed only by a writ of error, and not by appeal: Proceedings on a seizure on land (*United States v. 15 Hogsheads*, 5 Blatch. 106); proceedings under the confiscation laws (*United States v. Six Lots*, 1 Woods, 234); proceedings on forfeitures under the internal revenue laws (*Wheaton v. United States*, 8 Blatch. 474; *Westcot v. Bradford*, 4 Wash. 492; *United States v. Emholt*, 105 U. S. 414); proceedings on a *scire facias* (*Stearns v. Barrett*, 1 Mason, 153); an action of debt for a penalty. *Jacob v. United States*, 1 Brock. 520. But errors of law



only, and not errors of fact, can be reviewed. *United States v. Brillants*, 10 Blatch. 221; *United States v. Cook*, 2 Mason, 22. If no bill of exceptions is taken, a judgment cannot be revised unless the error appears on the record. *United States v. 15 Hogsheads*, 5 Blatch. 106; *Blair v. Allen*, 3 Dillon, 101. The judgments of a district judge holding the circuit court cannot be reviewed either by the circuit judge or circuit justice. *United States v. Biebusch*, 1 McCrary, 42; *Appleton v. Smith*, 1 Dillon, 202. If the declaration in an action on an official bond contains no breach, the penalty of the bond is the matter in dispute; but if the verdict is for less than \$50 no writ of error lies. *Postmaster-General v. Cross*, 4 Wash. 326. See, also, note § 691.

The circuit court cannot issue a mandamus to the district court to compel it to expunge amendments improperly made in the record returned to the circuit court on a writ of error. It may issue mandamus only where necessary to the exercise of its jurisdiction. *Smith v. Allyn*, 1 Paine, 453. The circuit court has no power to issue a certiorari or other compulsory process to the district court for the removal of a cause from that court before a final judgment or decree. But if the defendant appears in the circuit court, undertakes the defence, and pleads to the issue, it is too late to object to the irregular proceedings, and the suit will be regarded as an original one. *Patterson v. United States*, 2 Wheat. 226.

In connection with § 633, St. March 3, 1879, ch. 176 (20 St. 354), provides, as to writs of error in criminal cases —

“SEC. 1. The circuit court for each judicial district shall have jurisdiction of writs of error in all criminal cases tried before the district court where the sentence is imprisonment or fine and imprisonment, or where, if a fine only, the fine shall exceed the sum of three hundred dollars; and in such case a respondent, feeling himself aggrieved by a decision of a district court, may except to the opinion of the court, and tender his bill of exceptions, which shall be settled and allowed according to the truth, and signed by the judge, and it shall be a part of the record of the case.

“SEC. 2. Within one year next after the end of the term at which such sentence shall be pronounced, and not after, the respondent may petition for a writ of error from the judgment of the district court in the cases named in the preceding section, which petition shall be presented to the circuit judge or circuit justice in term or vacation, who, on consideration of the importance and difficulty of the questions presented in the record, may allow such writ of error, and may order that such writ shall operate as a stay of proceedings under the sentence; but the allowance of such writ shall not so operate without such order. The judge or justice allowing such writ of error shall take a bond with sufficient sureties that the same shall be prosecuted to effect, and that the respondent shall abide the judgment of the circuit court thereon. And if the writ shall be allowed to operate as a stay of proceedings under the sentence, bail may in like manner be taken for the appearance of the respondent at the term of the circuit court to which such writ of error shall be returnable, and that he will not depart without leave of court.

“SEC. 3. Such writ of error so allowed shall be returnable to the next regular term of the circuit court for the district, and shall be served on the district attorney of the United States for such district. The circuit court may advance all such writs of error on its docket in order that speedy justice may be done. And in case of an affirmance of the judgment of the district court, the circuit court shall proceed to pronounce final sentence and to award execution thereon; but if such judgment shall be reversed, the circuit court may proceed with the trial of said cause *de novo*, or remand the same to the district court for further proceedings.”

This statute of 1879 has not taken away the appellate jurisdiction of the Supreme Court. *Ex parte Virginia*, 100 U. S. 342. Under it the only questions reviewable in the circuit court are those which appear by the record to have been decided and duly excepted to in the lower court. *Brand v. United States*, 18 Blatch. 384; 4 F. R. 394. The circuit court is not obliged to award the same sentence on affirmance, but may award execution in accordance with its own opinion as to the degree of punishment warranted by the facts apparent on the record. *Bates v. United States*, 11 Biss. 70. Under this act the writ of error is not a writ of right, but is to be allowed in the



discretion of the circuit judge; and if he allows it, it is in his discretion whether he will stay the sentence. In case of doubt as to the correctness of the rulings below, the writ should be allowed and proceedings stayed. *United States v. Whittier*, 11 Biss. 356; 13 F. R. 534; *Mackin v. United States*, 23 Id. 334. Where no error is found, the judgment of the district court must be affirmed. *Macheca v. United States*, 26 F. R. 845. An indictment found in the circuit court cannot be remitted to the district court unless the district attorney deems it necessary. Rev. Stats. §§ 1037, 1038; *United States v. Bennett*, 16 Blatch. 338. See also *United States v. Haynes*, 29 F. R. 691; *Nelson v. United States*, 30 Id. 112.

SECT. 634. — See 18 St. 195, stated in note, § 608.

SECT. 635. — This does not affect § 631. Judgments and orders apply to § 633. The decrees are decrees other than those in admiralty and equity. *The Oriental*, 2 Flippin, 47. Rev. Stats. § 914, does not apply to the time within which exceptions must be allowed, and § 953 is the only statute regulating bills of exceptions. They may be allowed at any time during the term at which the verdict was rendered. *Muller v. Ehlers*, 91 U. S. 249; *Hunnicut v. Peyton*, 102 Id. 333; *United States v. Train*, 12 F. R. 854. The manner and time of taking a case from one Federal court to another by writ of error, bill of exceptions, or appeal, are regulated exclusively by acts of Congress; or, when those are silent, by rules derived from the common law, from ancient English statutes, or from the practice of the United States courts. *United States v. Train*, 12 F. R. 853.

SECT. 636. — The provision of § 24 of the judiciary act, which is peremptory, being apparently superseded by St. June 1, 1872, giving ample discretionary power, was omitted in the Revision. 1 Com. D. 336.

This section applies to admiralty appeals. *The Benefactor*, 103 U. S. 248. The circuit court may try every appeal case *de novo*. It may allow amendments of substance as well as of form, under § 954, which embraces causes of appellate as well as of original jurisdiction. *Kennedy v. State Bank*, 8 How. 610; *Anon.*, 1 Gall. 22; *Warren v. Moody*, 9 F. R. 673. The power of the circuit court to amend all processes returnable to it is vested in it as fully as is the power of the Supreme Court to amend all processes returnable to it. *Semmes v. United States*, 91 U. S. 24. When the judgment of the district court is affirmed, the judgment becomes that of the circuit court, and is to be enforced by the circuit court and not by the district court. *United States v. Reid*, 17 F. R. 497. A decree of the circuit court reversing a second decree of the district court, and adjudging that the first decree should stand and remain in full force and effect, would be sufficient without an order confirming a sale made by the marshal; a decree of the circuit court confirming the sale would be an act of supererogation, and would not render invalid what would have been valid without it. If a confirmation of the sale was necessary, the circuit court had power to make it. *Semmes v. United States*, 91 U. S. 26. The circuit court has power to remand the case to the district court with directions, but in ordinary cases it may not be advisable to remand where the circuit court can as well dispose of the whole case. *The Benefactor*, 103 U. S. 248. On a reversal of a judgment of the district court, the circuit court may award a *venire facias de novo* triable before the circuit court. *United States v. Sawyer*, 1 Gall. 86.

SECT. 637. — 19 St. 240, c. 69, inserts "court" after "circuit" in the ninth line.

SECT. 638. — 18 St. 333, c. 95, § 4, regulating fees and costs, &c., authorizes the circuit court to award the writ of mandamus according to the course of the common law, upon motion of the Attorney-General or the district attorney of the United States, to any officer thereof, to compel him to make the returns and perform the duties required in that act.

SECT. 639. — By the act of 1789 the petitioner was to offer surety for entering in the circuit court "copies of said process against him," while the cited act of 1866 required



surety for entering also copies of "all pleadings, depositions, testimony, and other proceedings in said cause," &c.

St. March 3, 1875, c. 137, §§ 2-7 (§ 1 of this act being printed in note to § 629) provides:—

"SEC. 2. That any suit of a civil nature, at law or in equity, now pending or hereafter brought in any State court where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which the United States shall be plaintiff or petitioner, or in which there shall be a controversy between citizens of different States, or a controversy between citizens of the same State claiming lands under grants of different States, or a controversy between citizens of a State and foreign states, citizens, or subjects, either party may remove said suit into the circuit court of the United States for the proper district. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove such suit into the circuit court of the United States for the proper district.

"SEC. 3. That whenever either party, or any one or more of the plaintiffs or defendants entitled to remove any suit mentioned in the next preceding section shall desire to remove such suit from a State court to the circuit court of the United States, he or they may make and file a petition in such suit in such State court before or at the term at which said cause could be first tried and before the trial thereof for the removal of such suit into the circuit court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his and their entering in such circuit court, on the first day of its then next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said circuit court, if said court shall hold that such suit was wrongfully or improperly removed thereto, and also for there appearing and entering special bail in such suit, if special bail was originally requisite therein, it shall then be the duty of the State court to accept said petition and bond, and proceed no further in such suit, and any bail that may have been originally taken shall be discharged; and the said copy being entered as aforesaid in said circuit court of the United States, the cause shall then proceed in the same manner as if it had been originally commenced in the said circuit court; and if in any action commenced in a State court the title of land be concerned, and the parties are citizens of the same State, and the matter in dispute exceed the sum or value of five hundred dollars, exclusive of costs, the sum or value being made to appear, one or more of the plaintiffs or defendants, before the trial, may state to the court, and make affidavit, if the court require it, that he or they claim and shall rely upon a right or title to the land under a grant from a State, and produce the original grant, or an exemplification of it, except where the loss of public records shall put it out of his or their power, and shall move that any one or more of the adverse party inform the court whether he or they claim a right or title to the land under a grant from some other State, the party or parties so required shall give such information, or otherwise not be allowed to plead such grant, or give it in evidence upon the trial; and if he or they inform that he or they do claim under such grant, any one or more of the party moving for such information may then, on petition and bond as hereinbefore mentioned in this act, remove the cause for trial to the circuit court of the United States next to be holden in such district. And any one of either party removing the cause shall not be allowed to plead or give evidence of any other title than that by him or them stated as aforesaid as the ground of his or their claim; and the trial of issues of fact in the circuit courts shall, in all suits except those of equity and of admiralty and maritime jurisdiction, be by jury.

"SEC. 4. That when any suit shall be removed from a State court to a circuit court of the United States, any attachment or sequestration of the goods or estate of the defendant had in such suit in the State court shall hold the goods or estate so attached or sequestered to answer the final judgment or decree in the same manner as by law they would have been held to answer final judgment or decree had it been rendered by the court in which such suit was commenced; and all bonds, undertakings, or security given by either party in such suit prior to its removal shall remain valid and effectual, notwithstanding said removal; and all injunctions, orders, and other proceedings had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the court to which such suit shall be removed.

"SEC. 5. That if, in any suit commenced in a circuit court, or removed from a State court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no further



therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just; [but the order of said circuit court dismissing or remanding said cause to the State court shall be reviewable by the Supreme Court on writ of error or appeal, as the case may be.]” The sentence in parenthesis was repealed by § 6 of St. 1887, stated *post*, p. 127.

“SEC. 6. That the circuit court of the United States shall, in all suits removed under the provisions of this act, proceed therein as if the suit had been originally commenced in said circuit court, and the same proceedings had been taken in such suit in said circuit court as shall have been had therein in said State court prior to its removal.

“SEC. 7. That in all causes removable under this act, if the term of the circuit court to which the same is removable, then next to be holden, shall commence within twenty days after filing the petition and bond in the State court for its removal, then he or they who apply to remove the same shall have twenty days from such application to file said copy of record in said circuit court and enter appearance therein; and if done within said twenty days, such filing and appearance shall be taken to satisfy the said bond in that behalf; that if the clerk of the State court in which any such cause shall be pending, shall refuse to any one or more of the parties or persons applying to remove the same, a copy of the record therein, after tender of legal fees for such copy, said clerk so offending shall be deemed guilty of a misdemeanor, and, on conviction thereof in the circuit court of the United States to which said action or proceeding was removed, shall be punished by imprisonment not more than one year, or by fine not exceeding one thousand dollars, or both in the discretion of the court. And the circuit court to which any cause shall be removable under this act shall have power to issue a writ of certiorari to said State court, commanding said State court to make return of the record in any such cause removed as aforesaid, or in which any one or more of the plaintiffs or defendants have complied with the provisions of this act for the removal of the same, and enforce said writ according to law; And if it shall be impossible for the parties or persons removing any cause under this act, or complying with the provisions for the removal thereof, to obtain such copy, for the reason that the clerk of said State court refuses to furnish a copy, on payment of legal fees, or for any other reason, the circuit court shall make an order requiring the prosecutor in any such action or proceeding to enforce forfeiture or recover penalty as aforesaid, to file a copy of the paper or proceeding by which the same was commenced, within such time as the court may determine; and in default thereof the court shall dismiss the said action or proceeding; But if said order shall be complied with, then said circuit court shall require the other party to plead, and said action or proceeding shall proceed to final judgment; and the said circuit court may make an order requiring the parties thereto to plead *de novo*; and the bond given, conditioned as aforesaid, shall be discharged so far as it requires copy of the record to be filed as aforesaid.”

St. March 3, 1887, ch. 373 (24 St. 552), as corrected and re-enacted by St. Aug. 13, 1888 (§ 1 of this act being stated in note to § 629, and § 7 in note to § 555), provides —

“That the second section of said act (of 1875) be, and the same is hereby, amended so as to read as follows: —

“SEC. 2. That any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the circuit courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought, in any State court, may be removed by the defendant or defendants therein to the circuit court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the circuit courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any State court, may be removed into the circuit court of the United States for the proper district by the defendant or defendants therein, being non-residents of that State. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district. And where a suit is now pending, or may be hereafter brought, in any State court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, any defendant, being such citizen of another State, may remove such suit into the circuit court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said circuit court that from prejudice or local influence he will not be able to obtain justice in such State court, or in any other State court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause: *Provided*, That if it further appear that said suit can be fully and justly determined as to the other defendants in the State



court, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said circuit court may direct the suit to be remanded, so far as relates to such other defendants, to the State court, to be proceeded with therein. At any time before the trial of any suit which is now pending in any circuit court or may hereafter be entered therein, and which has been removed to said court from a State court on the affidavit of any party plaintiff that he had reason to believe and did believe that, from prejudice or local influence, he was unable to obtain justice in said State court, the circuit court shall, on application of the other party, examine into the truth of said affidavit and the grounds thereof, and, unless it shall appear to the satisfaction of said court that said party will not be able to obtain justice in such State court, it shall cause the same to be remanded thereto. Whenever any cause shall be removed from any State court into any circuit court of the United States, and the circuit court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed.'

"That section three of said act be, and the same is hereby, amended so as to read as follows:—

"SEC. 3. That whenever any party entitled to remove any suit mentioned in the next preceding section, except in such cases as are provided for in the last clause of said section, may desire to remove such suit from a State court to the circuit court of the United States, he may make and file a petition in such suit in such State court at the time, or any time before the defendant is required by the laws of the State or the rule of the State court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the circuit court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such circuit court, on the first day of its then next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said circuit court if said court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein. It shall then be the duty of the State court to accept said petition and bond, and proceed no further in such suit; and the said copy being entered as aforesaid in said circuit court of the United States, the cause shall then proceed in the same manner as if it had been originally commenced in the said circuit court; and if in any action commenced in a State court the title of land be concerned, and the parties are citizens of the same State, and the matter in dispute exceed the sum or value of \$2000, exclusive of interest and costs, the sum or value being made to appear, one or more of the plaintiffs or defendants, before the trial, may state to the court, and make affidavit if the court require it, that he or they claim and shall rely upon a right or title to the land under a grant from a State, and produce the original grant, or an exemplification of it, except where the loss of public records shall put it out of his or their power, and shall move that any one or more of the adverse party inform the court whether he or they claim a right or title to the land under a grant from some other State, the party or parties so required shall give such information, or otherwise not be allowed to plead such grant or give it in evidence upon the trial; and if he or they inform that he or they do claim under such grant, any one or more of the party moving for such information may then, on petition and bond, as hereinbefore mentioned in this act, remove the cause for trial to the circuit court of the United States next to be holden in such district; and any one of either party removing the cause shall not be allowed to plead or give evidence of any other title than that by him or them stated as aforesaid as the ground of his or their claim.'

"SEC. 2. That whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the State in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who shall wilfully violate the provisions of this section shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be punished by a fine not exceeding \$3000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"SEC. 3. That every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice.

"SEC. 4. That all national banking associations established under the laws of the United States shall, for the purposes of all actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located; and in such cases the circuit and district courts shall not have jurisdiction other than such as they would have in cases



between individual citizens of the same State. The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank.

“SEC. 5. That nothing in this act shall be held, deemed, or construed to repeal or affect any jurisdiction or right mentioned either in Rev. Stats. § 641, or in § 642, or in § 643, or in § 722, or in title 24, or mentioned in § 8 of the act of Congress of which this act is an amendment, or in the act of Congress approved March 1, 1875, entitled ‘An act to protect all citizens in their civil and legal rights.’

“SEC. 6. That the last paragraph of § 5 of the act of Congress approved March 3, 1875, entitled ‘An act to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from State courts, and for other purposes,’ and § 640 of the Revised Statutes, and all laws and parts of laws in conflict with the provisions of this act, be, and the same are hereby repealed: *Provided*, That this act shall not affect the jurisdiction over or disposition of any suit removed from the court of any State, or suit commenced in any court of the United States, before the passage hereof except as otherwise expressly provided in this act.”

The first clause of § 639 was repealed by the act of 1875. *King v. Cornell*, 106 U. S. 398; *B. & O. R. Co. v. Bates*, 119 Id. 467; *Hyde v. Ruble*, 104 Id. 407; *Holland v. Chambers*, 110 Id. 59; *Ayres v. Watson*, 113 Id. 80; but see *Texas v. Lewis*, 14 F. R. 65. The second clause of § 639 was also repealed by St. 1875. *Id.*; *Hollister v. Bell*, 8 Sawyer, 349; 17 F. R. 705; *Kelly v. Houghton*, 9 Sawyer, 19; 23 F. R. 417; *Mairer v. Olmstead*, 24 Id. 193; *Western Union Tel. Co. v. Brown*, 32 Id. 337. The third clause of § 639 is constitutional. *Railway Co. v. Whitten*, 13 Wall. 270. It was apparently repealed by § 2, cl. 4, and § 6 of St. 1887 (*Whelan v. New York R. Co.*, 35 F. R. 849; but see *Hills v. Railroad Co.*, 33 Id. 83); but was not repealed by St. 1875. *American Bible Soc. v. Grove*, 101 U. S. 610; *Hess v. Reynolds*, 113 Id. 73; *B. & O. R. Co. v. Bates*, 119 Id. 467; *Miller v. C. B. & Q. R. Co.*, 3 McCrary, 460; 17 F. R. 97; *Clark v. Chicago R. Co.*, 3 McCrary, 591; 11 F. R. 355; *Johnson v. Johnson*, 13 Id. 193; *Melendy v. Currier*, 22 Blatch. 503; 22 F. R. 129; *Sutherland v. Jersey City R. Co.*, 22 Id. 356. In *Whittenton Manuf. Co. v. Memphis Packet Co.*, 19 F. R. 273, 279, it was held that the last clause of § 639, beginning “the copies of the pleadings shall have the same force,” &c., was repealed by the act of 1875. The last two paragraphs of § 639, following subd. 3, were probably not repealed by the act of 1887. *Whelan v. New York Railroad Co.*, 35 F. R. 849; *Fisk v. Henarie*, Id. 230.

The topic of Removals is so special, is so fully treated in the recent works of Dillon, Speer, and Works, and is so materially affected by the acts of 1875 and 1887, that it has been thought advisable to present here only the decisions (on §§ 639–648) upon the act of 1887.

The two paragraphs of § 639 following cl. 3 are not repealed, and furnish the means of making the prejudice appear to the circuit court. *Fisk v. Henarie*, 32 F. R. 417; *Whelan v. New York Railroad Co.*, 35 Id. 861. If not so, the court is to make its own rules. *Whelan v. New York Railroad Co.*, *supra*; *Short v. Railway Co.*, 34 F. R. 225. Congress may grant or withhold altogether jurisdiction in removal cases. *Manley v. Olney*, 32 F. R. 708. A State statute subjecting a foreign corporation to certain penalties if it applies for a removal of suits brought against it, is unconstitutional and void. *Chicago R. Co. v. Becker*, 32 F. R. 849. A proceeding merely ancillary is not removable. *Buford v. Strother*, 3 McCrary, 253; *Webber v. Humphreys*, 5 Dillon, 225; *Wolcott v. Aspen Co.*, 34 F. R. 821. The circuit court gains immediate jurisdiction on the filing of the required petition and bond in the State courts where action is pending, the case being removable; and no act of the State court is necessary to, or can prevent the jurisdiction of the circuit court, which upon the filing of a copy of the record can proceed as if the case had been originally entered there. *Wilson v. Telegraph Co.*, 34 F. R. 561. A State court may, at a subsequent term, if all the parties are present and no objection is made, set aside an order to remove a suit not legally removable. *Larson v. Cox*, 39 Kansas, 631. As to jurisdic-



tion of the State court over suits improperly removed, see *Larson v. Cox*, *supra*; *Seeligson v. Texas Trans. Co.*, 7 S. W. Rep. 708. A plaintiff may be enjoined from pressing a trial of a cause in the State court when proper petition and bond have been filed for its removal, and judgment rendered in the Federal court. *B. & O. R. Co. v. Ford*, 35 F. R. 170. A plea in abatement to a petition to remove a cause will not be tested by technical rules, but it is sufficient if it sets out fairly and with sufficient certainty matters of fact, which, if true, negative the jurisdiction of the Federal court. *Johnson v. Insurance Co.*, 35 F. R. 374, in which case the plaintiff claimed to be an alien. As to waiver of objections, see *B. & O. R. Co. v. Ford*, 35 F. R. 170. A suit to contest the validity of a will was held not removable, in *Reed v. Reed*, 31 F. R. 49. Parties may be arranged according to their real interests to see if the controversy is between citizens of different States. *Woodrum v. Clay*, 33 F. R. 897; *Covert v. Waldron*, *Id.* 311. See *Judah v. Iowa Barb-Wire Co.*, 32 F. R. 561.

To give the circuit court jurisdiction by removal of a case on the ground that it arises under the Constitution, etc., it must appear clearly and unmistakably from the record that a Federal question must necessarily be decided. *Iowa v. Railroad Co.*, 33 F. R. 391. An allegation that a defence is claimed under the Constitution, etc., will not of itself give jurisdiction, but the court will consider all points of law and fact which inhere in the jurisdictional question. *Id.* In cases arising under the Constitution, laws, or treaties of the United States, the record, in order to give jurisdiction, must show that some provision thereof must be met and decided before the issues in the case can be finally disposed of. *Id.* For cases arising under the Constitution, &c., see *Illinois v. Railroad Co.*, 33 F. R. 721; *Booth v. Lloyd*, *Id.* 593; *Omaha R. Co. v. Cable Co.*, 32 *Id.* 727; *Richards v. Rock Rapids*, 31 *Id.* 505. Such suits, whatever the amount involved, may be removed by a non-resident defendant. *Shiras, J., arguendo*, in *Fales v. Railroad Co.*, 32 F. R. 673. On an appeal from a justice of the peace to a State circuit court where a set-off of \$3000 was claimed, but where in the case there could not be a recovery of more than \$500, there is no right of removal. *New York I. & P. Co. v. Milburn Co.*, 35 F. R. 225. The statutes of a State regulating the right of set-off may be effective to determine the sum or value of the matter in dispute, and yet not operate as restrictions imposed by State legislation on the jurisdiction of the Federal courts. *Id.* As to removing a suit for divorce, and amount involved, see *Bowman v. Bowman*, 30 F. R. 849.

A suit brought in a State court by a citizen of that State against a citizen of another State may be removed by the latter. *Pitkin Mining Co. v. Markell*, 33 F. R. 386; *Fales v. Railroad Co.*, 32 *Id.* 673; *Loomis v. Coal Co.*, 33 *Id.* 353; *Short v. Railway Co.*, 34 *Id.* 225; *Gavin v. Vance*, 33 *Id.* 84; *Swayne v. Insurance Co.*, 35 *Id.* 1; *Wilson v. Telegraph Co.*, 34 *Id.* 561, overruling its own decision in *Yuba County v. Mining Co.*, 32 *Id.* 183; *Tiffany v. Wilce*, 34 *Id.* 230. A suit brought against a person in his own State court cannot be removed. *Gavin v. Vance*, 33 F. R. 84, *arguendo*. But see the clause of St. 1887 (p. 125, *ante*): "And when in any suit mentioned in this section there shall be a controversy," &c. In an action of ejectment, a lessee under a perpetual lease of the property in controversy has only such rights of removal as the lessor had. *Richmond R. Co. v. Findley*, 32 F. R. 641. A corporation can be a resident only of the State where it was incorporated. *Fales v. Railroad Co.*, 32 F. R. 679. In *Harold v. Iron Co.*, 33 F. R. 529, it was held that a non-resident could not remove a suit begun in a State court by an alien, on the ground that a suit by an alien against a citizen could be brought originally in the circuit court only in the district of which the citizen was an inhabitant; holding evidently that a suit could not be removed under § 2 which could not have been brought originally. But see *Wilson v. Telegraph Co.*, 34 F. R. 561, *contra*. The circuit court has jurisdiction, by removal, of a suit begun in a State court by a resident citizen against a non-resident alien. *Cooley v. McArthur*, 35 F. R. 372.



The phrase beginning, "*and when in any suit*" in § 1 of the act of 1887 amending St. 1875, § 2, applies only to cases in which there are two or more controversies involved in the same suit, and under it a case involving but a single controversy cannot be removed. *Western Union Tel. Co. v. Brown*, 32 F. R. 337; *Weller v. Tobacco Co.*, Id. 860. But see *contra*, *Speer on Removals*, §§ 28, 29, 30; *Mutual Life Ins. Co. v. Champlin*, 21 F. R. 85. A suit by different judgment creditors, whose judgments are not disputed, to set aside an assignment when the only issue is as to the validity of the assignment, contains no separable controversy. *Reineman v. Ball*, 33 F. R. 692. As to what is not a separable controversy, see *Anderson v. Appleton*, 32 F. R. 855, and cases cited; *Western Union Tel. Co. v. Brown*, 32 F. R. 337; *Richmond & D. R. Co. v. Findley*, Id. 641; *Reed v. Reed*, 31 Id. 49; *Hax v. Casper*, Id. 499; *Yearian v. Horner*, 36 Id. 130. An action on a partnership obligation is not separable so as to entitle one partner to remove it on the ground of citizenship. *Woodrum v. Clay*, 33 F. R. 897. A suit brought in a State court by a non-resident against a citizen of the State where suit is brought and a citizen of a third State may be removed by the last when there is a separable controversy. *Vinal v. Continental Co.*, 34 F. R. 228. An alien cannot remove a separable controversy either under the act of 1875 or that of 1887. *King v. Cornell*, 106 U. S. 395; *Woodrum v. Clay*, 33 F. R. 899. For examples of separable controversies, see *Vinal v. Continental Co.*, 34 F. R. 228; *Boyd v. Gill*, 21 Blatch. 543; 19 F. R. 145.

"*And where a suit is now pending*," &c. — The circuit court may be given jurisdiction by removal of cases of which it is not given original cognizance. *Gaines v. Fuentes*, 92 U. S. 10; *Whelan v. Railroad Co.*, 35 F. R. 857. These provisions of the act of 1887 are constitutional, although, as the whole case is removed, the circuit court may obtain jurisdiction of a controversy between citizens of the same State. *Whelan v. Railroad Co.*, 35 F. R. 849; *Fisk v. Henarie*, 32 Id. 425. There need be no separable controversy. *Jefferson v. Driver*, 117 U. S. 272; *Iron Co. v. Ashburn*, 118 Id. 54; *Whelan v. Railroad Co.*, 35 F. R. 857. All the defendants need not unite, as the right is given to any defendant. *Whelan v. Railroad Co.*, 35 F. R. 855. Although the general intent of the act of 1887 was to restrict Federal jurisdiction, yet as to defendants there was an enlargement of Federal jurisdiction over removal for prejudice and local influence. Id. The matter in dispute must exceed \$2000. *Malone v. Railroad Co.*, 35 F. R. 625, *Harlan, J.*; *contra*, *Fales v. Railroad*, 32 Id. 673, *arguendo*. It is the duty of the circuit court to examine into the truth of the facts alleged to support a motion for removal. A simple affidavit stating in general terms the existence of prejudice and its effect in the language of the statute, with no opportunity to the other side to controvert such statement, is not sufficient. *Malone v. Railroad Co.*, 35 F. R. 625; *Short v. Railroad Co.*, 34 Id. 225; *contra*, *Fisk v. Henarie*, 32 Id. 417; 35 Id. 230; *Hills v. Railroad Co.*, 33 Id. 81; *Whelan v. Railroad Co.*, 35 Id. 849. The clause "or may hereafter be entered therein" is merely temporary, and applies only to suits where proceedings to remove have been instituted before the act of 1887, but the clerical work of entering a copy of the record has not been completed. *Fisk v. Henarie*, 32 F. R. 417; *contra*, *Hills v. Railroad Co.*, 33 Id. 81. A plea simply denying defendant's belief in the existence of such prejudice or local influence is insufficient, and raises no issue on that question, as the plea should affirm that it does not exist. *County Court v. Railroad Co.*, 35 F. R. 161. The plaintiff can still remove under § 639, cl. 3, by affidavit, subject to an examination by the circuit court, under § 1 of St. 1887, amending St. 1875, § 2, as to the sufficiency of the grounds for removal. *Hills v. Railroad Co.*, 33 F. R. 83. The affidavit should be made by the party in person, if a natural person, and a removal cannot be had upon an affidavit made by his attorney, agent, or other person in his behalf. *Duff v. Duff*, 31 F. R. 772. The reason why the truth of the plaintiff's affidavit of removal may be inquired into, and not the defendant's, is apparent; the plaintiff in a case in a State court has gone there voluntarily, whereas the defendant has been taken there



against his will, certainly without his consent. *Hills v. Railroad Co.*, 33 F. R. 83. The prejudice and local influence may be shown by the *ex parte* affidavit of the party, and no notice need be given to the opposite party, who cannot controvert such affidavit. *Whelan v. Railroad Co.*, 35 F. R. 849. On a removal on the ground of prejudice the affidavit may be filed in the State court, and a certified copy of it in the circuit court. *Short v. Railroad Co.*, 34 F. R. 225.

"*At any time before the trial thereof.*" — The trial is the final trial. *Whelan v. Railroad Co.*, 35 F. R. 858. But see *Jones v. Foster*, 61 Wis. 25. And a defendant may remove after a hearing on his demurrer to the plaintiff's petition. *Whelan v. Railroad Co.*, 35 F. R. 858; *Fisk v. Henarie*, 32 Id. 425, reviewing authorities; *contra*, *Lookout Mountain R. Co. v. Houston*, 32 F. R. 711; *Alley v. Nott*, 111 U. S. 472; *Scharff v. Levy*, 112 Id. 711; *Gregory v. Hartley*, 113 Id. 742; *Laidly v. Huntington*, 121 Id. 179.

Under § 1 of St. 1887, amending St. 1875, § 3, the time when the defendant actually pleads or answers is immaterial, as he can remove at any time before he would be required by the laws of the State, or the rule of the State court, to plead or answer. *Gavin v. Vance*, 33 F. R. 84. The petition must be filed within the time for filing an original plea or answer, and not an amended answer. *Woolf v. Chisolm*, 30 F. R. 881. Where a rule of a State court allows the time of filing an answer to be extended by stipulation, a petition in such a case may be filed at any time before the expiration of the stipulated time. *Simonson v. Jordon*, 30 F. R. 721. Under the act of 1875 the fact that the non-resident removing party has procured an order of the State court dismissing the case set aside, and has noted the suit for trial, does not make the application too late. *Kalamazoo Wagon Co. v. Snavelly*, 34 F. R. 823.

SECT. 4. As to the appointment of receivers over railroads running through several States, see *Atkins v. Railroad Co.*, 29 F. R. 161.

SECT. 6 of St. 1887 does not apply to cases not then in the United States courts; and where, in a case begun under the act of 1875, a petition for removal was filed after the passage of the act of 1887, and after the filing of the defendant's pleading, but before the case could be tried and before its trial, it was held that the right of removal was gone. *Manley v. Olney*, 32 F. R. 708; *Lazensky v. Knights of Honors*, 32 Id. 417.

SECT. 640. — Repealed by § 6 of St. 1887 (cited in note, p. 127, *ante*), of which act § 5 declares §§ 641–643, 722, not affected thereby.

SECT. 641. — The words "or of all persons within the jurisdiction of the United States," in the sixth line, were added by the Revision, and "other," in the eighth line, was thereby substituted for "alleged" in the original act. 1 Com. D. 369.

SECT. 644. — This appears to be merely a description of a particular case. 1 Com. D. 373. By the act of 1875, ch. 137, § 2, a civil suit exceeding \$500 in value, exclusive of costs, between citizens of a State and foreign states, citizens, or subjects, &c., are removable. See p. 124, *ante*.

SECTS. 643, 645, 646. — See note, § 629, par. 12; § 639, *supra*; and § 5 of St. 1887, printed p. 127, *ante*.

SECT. 645. — By § 7 of 18 St. 472, ch. 137, stated in note, p. 125, *ante*, the clerk of a State court who refuses a copy of the record to any party applying for removal, is punishable in the circuit court by imprisonment for not more than one year, or by fine not exceeding \$1000, or both.

SECT. 646. — Amended by § 7 of the act of 1875. For the sake of uniformity and simplicity of practice, the rule applied to particular cases in the acts cited in the margin is here made applicable to all cases of removal. 1 Com. D. 375. See note, § 914. By St. 1875, ch. 137, § 4, previous attachments, bonds, security, injunctions, orders, and other proceedings in removed causes are to remain valid. See p. 124, *ante*. Thus, an



order of the State court in contempt proceedings will be recognized and enforced in the Federal court after removal. *Williams Mower & Reaper Co. v. Raynor*, 7 Biss. 245.

SECT. 647.—Amended by § 3 of the act of 1875. St. 1875, ch. 137, §§ 2, 3 (p. 124, *ante*), further provide for the removal of suits concerning real estate. In the early case of *Pawlet v. Clark*, 9 Cranch, 292, the Supreme Court was held to have jurisdiction where one party claimed land under a grant from the State of New Hampshire and the other from Vermont, although at the time of the first grant Vermont was part of New Hampshire.

SECT. 648.—See note, § 649. The exceptions in § 648 do not exclude a trial by jury in cases of equity and admiralty. *Fitton v. Phoenix Co.*, 23 F. R. 3. A person accused of contempt of court is not entitled to a trial by jury. *King v. Railway Co.*, 7 Biss. 529. A jury must consist of twelve men. *United States v. Insurgents*, 2 Dall. 335; *Bonaparte v. C. & A. R. Co.*, Bald. 205. And this is not affected by Rev. Stats. § 800. *United States v. Dow*, Taney, 34. Questions of law are for the court, and questions of fact are for the jury. *Georgia v. Brailsford*, 3 Dall. 1; *Roberts v. Cooper*, 20 How. 467. Mixed questions of law and fact are for the jury. *Cooley v. O'Connor*, 12 Wall. 391; *Wiggins v. Burkham*, 10 Id. 129. A verdict repugnant or uncertain in a material point is void. *Stearns v. Barrett*, 1 Mason, 153. But it need be certain only to a common intent. *Liter v. Green*, 2 Wheat. 306. It is void if it contradicts a fact admitted by the pleadings (*M'Ferran v. Taylor*, 3 Cranch, 270); but the court may allow a plaintiff to remit an excess of interest found in a verdict, and may then affirm the verdict. *Paige v. Loring*, 1 Holmes, 275. Where a jury has disagreed, a second jury cannot be had from the residue of the panel. *Wilson v. Barnum*, 1 Wall. Jr. 347. A verdict cures a defective statement of a title or cause of action. *Lincoln v. Iron Co.*, 103 U. S. 412. Where the evidence is all on one side, the question is for the court (*Dows v. Nat. Exchange Bank*, 91 U. S. 634; *Mutual Life Ins. Co. v. Snyder*, 93 Id. 395); or even where there is a *scintilla* of evidence on the other side, since the court must decide whether there is evidence sufficient to support a verdict for the party producing it; and if there is not sufficient evidence it may direct a verdict for one side. *Giblin v. McMullen*, L. R. 2 P. C. 335; *Improvement Co. v. Munson*, 14 Wall. 448; *Pleasants v. Fant*, 22 Id. 120; *Parks v. Ross*, 11 How. 373; *Merchants' Bank v. State Bank*, 10 Wall. 617; *Hickman v. Jones*, 9 Id. 201; *Comm'rs v. Clark*, 94 U. S. 284; *contra*, *Barney v. Schmeider*, 9 Wall. 248. But if there is enough disputed testimony to warrant a verdict for either side, the court cannot direct a verdict for one side. *United States v. Tillotson*, 12 Wheat. 180; *Pence v. Langdon*, 99 U. S. 578; *Moulou v. Ins. Co.* 101 Id. 708; *Richardson v. Boston*, 19 How. 263; *Railroad Co. v. Stout*, 17 Wall. 657; *M'Niel v. Holbrook*, 12 Pet. 84; *Drakely v. Gregg*, 8 Wall. 242; *Michigan Bank v. Eldred*, 9 Id. 544; *Bevans v. United States*, 13 Id. 56; *Grand Chute v. Winegar*, 15 Id. 355; *Hendrick v. Lindsay*, 93 U. S. 143; *Macon County v. Shores*, Id. 272; *Herbert v. Butler*, 97 Id. 319; *Orleans v. Platt*, 99 Id. 676; *Manning v. Ins. Co.*, 100 Id. 693; *Oscanyan v. Arms Co.*, 103 Id. 261; *National Bank v. Ins. Co.*, Id. 783; *Coolidge v. McCone*, 2 Sawyer, 571; *Kielley v. Belcher Mining Co.*, 3 Id. 501. As to a jury in equity patent cases, see note, p. 117, *ante*.

Seizures on land are subject to the common law, and are to be tried by a jury. *Armstrong's Foundry*, 6 Wall. 769. The jury are to determine the order and manner in which they will consider the evidence. *Crane v. Morris*, 6 Pet. 610. Immaterial evidence should be kept from the jury. *Lucas v. Brooks*, 18 Wall. 436. The court cannot enter a peremptory nonsuit against the plaintiff's will. *Elmore v. Grymes*, 1 Pet. 469; *D'Wolf v. Rabaud*, Id. 476; *Crane v. Morris*, 6 Id. 609; *Silsby v. Foote*, 14 How. 218; *Castle v. Bullard*, 23 Id. 172; *Schuchardt v. Allens*, 1 Wall. 359; *Boucicault v. Fox*, 5 Blatch. 87; *Merchants' Bank v. State Bank*, 3 Cliff. 205. Before the opening of the trial a party may become nonsuit on payment of costs, but after the trial is opened he cannot, without



the consent of the other side, unless the judge grants leave. *The Robert G. Shaw*, 2 Wood. & M. 531. A cause cannot be sent to a referee without the consent of both parties. *Howe Machine Co. v. Edwards*, 15 Blatch. 402; *United States v. Rathbone*, 2 Paine, 578. The circuit court cannot appoint commissioners under a State statute to value the improvements of a defendant, that being for a jury. *Hamilton Bank v. Dudley*, 2 Pet. 492. The court cannot submit a part of the facts, and itself determine the rest, where there has been no waiver by the parties (*Hodges v. Easton*, 106 U. S. 408); nor can it order a verdict for a plaintiff, subject to the opinion of the court whether, on the evidence, the defendant is liable, and then render judgment for the defendant on its opinion. *Baylis v. Travellers' Ins. Co.*, 113 U. S. 316.

The court is bound to give an opinion, if required, on any point relevant to the issue (*Douglass v. M'Allister*, 3 Cranch, 298); but it need not charge on immaterial points (*Klein v. Russell*, 19 Wall. 434; *Gardner v. Collins*, 3 Mason, 398); nor when a charge is asked in aggregate which contains anything exceptionable in any part of it. *Indianapolis R. Co. v. Horst*, 93 U. S. 291; *Worthington v. Mason*, 101 Id. 149; *United States v. Hough*, 103 Id. 71. It is error to charge where there is no evidence, or to charge on hypotheses or assumptions. *M'Niel v. Holbrook*, 12 Pet. 84; *Michigan Bank v. Eldred*, 9 Wall. 544; *Irvine v. Irvine*, Id. 617; *New Jersey Mut. Life Ins. Co. v. Baker*, 94 U. S. 610; *Railroad Co. v. Houston*, 95 Id. 697; *Jones v. Van Benthuyssen*, 103 Id. 87. But a mere expression of opinion by a judge on a question of fact, is not ground of error (*Trans. Line v. Hope*, 95 U. S. 297); nor are comments of the judge on points not in issue, which could not have prejudiced the party. *Walker v. Johnson*, 96 U. S. 424. The court need lay down a proposition of law in but one form (*Kelly v. Jackson*, 6 Pet. 622); and that form need not be that asked for by either party, provided so much thereof is given as is applicable to the evidence and the merits of the case. *Clymer v. Dawkins*, 3 How. 674; *Law v. Cross*, 1 Black, 533; *Tome v. Dubois*, 6 Wall. 548; *Laber v. Cooper*, 7 Id. 565; *Chicopee Bank v. Phila. Bank*, 8 Id. 641; *Railway Co. v. Whitton*, 13 Id. 270; *Klein v. Russell*, 19 Id. 433; *Indianapolis R. R. Co. v. Horst*, 93 U. S. 291; *Pitts v. Whitman*, 2 Story, 609. An exception to an entire charge will be overruled if any part of the charge is sustained; and this applies to a general exception taken to the report of a referee. *Boogher v. Insurance Co.*, 103 U. S. 90. A special verdict must find the facts on which the court is to pronounce judgment, and not merely state the evidence of the facts. *Suydam v. Williamson*, 20 How. 427. A special verdict for a plaintiff in ejectment, the judgment on which has been set aside with directions to enter judgment for the defendant, cannot be used by the plaintiff in a second suit in ejectment to establish a fact found thereby. *Smith v. McCool*, 16 Wall. 560. A verdict for the defendants, subject to the court's opinion on the points reserved, does not authorize an absolute judgment for the defendants, unless the points reserved and the opinion of the court thereon are stated on the record. *Smith v. Delaware Ins. Co.*, 7 Cranch, 434.

SECT. 649. — St. March. 3, 1875, c. 137, § 3, provides, in part, that

"the trial of issues of fact in the circuit courts shall, in all suits except those of equity and of admiralty and maritime jurisdiction, be by jury."

This act does not affect the right to waive a jury under Rev. Stats. § 649. *Phillips v. Moore*, 100 U. S. 208; *Lyons v. Lyons Nat. Bank*, 19 Blatch. 282. There must be a reasonably strict conformity by the parties to the regulation of the act in order to save the rights and privileges belonging to the parties in trials by jury. *Flanders v. Tweed*, 9 Wall. 425. Under § 954 the court may allow an amendment after a jury is waived under § 649, provided that neither the nature of the case, nor the real issue is changed, and the opposing party cannot demand a trial by jury. *Bamberger v. Terry*, 103 U. S. 40. This section does not apply to trials in the district court (*Blair v. Allen*, 3 Dillon, 101; *Wear v. Mayer*,



6 F. R. 658; *Lyons v. Lyons Nat. Bank*, *supra*; *Howard v. Crompton*, 14 Blatch. 333; and does not conflict with § 914. *Wear v. Mayer*, *supra*. The circuit court is not bound to make a special finding; and such a finding cannot be added to, or substituted for a general finding, after the lapse of a term. *Marye v. Strouse*, 5 F. R. 494; *Insurance Co. v. Folsom*, 18 Wall. 240. Before this statute the parties could waive a trial by jury and submit the case to the court on the evidence, but the Supreme Court could not revise its opinion upon the admission or rejection of testimony, or upon any other question of law growing out of the evidence, except upon the process, pleadings, or judgment. To give the Supreme Court jurisdiction on error, the facts must be found by a jury by a general or special verdict, or be admitted by the parties upon a case stated in the nature of a special verdict, setting forth the facts and referring the questions of law to the court. *Guild v. Frontin*, 18 How. 135; *Kelsey v. Forsyth*, 21 Id. 85; *Campbell v. Boyreau*, Id. 223; *Bond v. Dustin*, 112 U. S. 606; *Supervisors v. Kennicott*, 103 Id. 554; *United States v. Eliason*, 16 Pet. 291; *Burr v. Des Moines Co.*, 1 Wall. 99. The act of March 3, 1865 (Rev. Stats. §§ 649, 700), was passed, to allow parties to have the rulings of the judge reviewed. *Lyons v. Lyons Nat. Bank*, 8 F. R. 371; *Kearney v. Case*, 12 Wall. 280.

Since this statute the Supreme Court cannot revise the correctness of the circuit judge's rulings in a trial without a jury, unless the record shows a waiver by stipulation in writing, signed by the parties, or their attorneys, and filed with the clerk. *Flanders v. Tweed*, 9 Wall. 425; *Kearney v. Case*, 12 Id. 275; *Gilman v. Illinois Tel. Co.*, 91 U. S. 614; *Madison County v. Warren*, 106 Id. 622; *Alexander County v. Kimball*, 106 Id. 623, note; *Bond v. Dustin*, 112 Id. 607. But the court cannot order a reference without the consent of a party. *Howe S. M. Co. v. Edwards*, 15 Blatch. 405. A stipulation signed by the parties, or their attorneys, and filed with the clerk of the circuit court, submitting a civil cause for trial on an agreed statement of facts, is a stipulation in writing waiving a jury (*Supervisors v. Kennicott*, 103 U. S. 554); and so is a stipulation that the cause be tried by the court. *Bamberger v. Terry*, 103 U. S. 43. The stipulation cannot be filed after the trial. *Kearney v. Case*, 12 Wall. 275. Filing the stipulation with the clerk enables parties to make agreements in vacation, and is to be in writing to prevent either party demanding a jury unexpectedly at the trial. It does not prevent parties from submitting a cause to the court as before the act, but enables all wishing a review by the Supreme Court of any ruling during the trial, to file the stipulation in writing, and then ask the court's finding of facts deemed essential to the review, and its ruling on points to which exception is taken. If this is not done, the parties waiving a jury are concluded, since the statute as well as before it, by the judgment of the court on all matters submitted to it. *Flanders v. Tweed*, 9 Wall. 425; *Kearney v. Case*, 12 Id. 283. The general or special findings of the court are in perfect analogy to the findings by a jury; the general finding is equivalent to a general verdict, and a special finding to a special verdict. *Norris v. Jackson*, 9 Wall. 127; *Copelin v. Insurance Co.*, Id. 467. The special finding is not a mere report of the evidence, but a statement of the ultimate facts on which the rights of the parties must be determined by the law; it is a finding of the propositions of fact which the evidence establishes, and not the evidence on which those ultimate facts are supposed to rest. *Burr v. Des Moines Co.*, 1 Wall. 99; *Graham v. Bayne*, 18 How. 62; *Norris v. Jackson*, 9 Wall. 127. There must be a finding, either general or special, to authorize a judgment, and that finding must appear on the record. The court can at a subsequent term amend the record by incorporating into it, *nunc pro tunc*, a special finding of facts on which judgment has been rendered; but it cannot allow and sign at a subsequent term a bill of exceptions not noted at a trial. *Insurance Co. v. Boon*, 95 U. S. 124. See also notes, §§ 648, 700.

SECT. 650. — Under § 652 the points of disagreement are to be certified and entered of record under the direction of the judges. When this has been done, the judgment or



decree may, under § 693, be carried to the Supreme Court by writ of error or appeal. Proceedings upon *habeas corpus* are civil proceedings, and are governed by §§ 650, 652, and 693. *Ex parte* Tom Tong, 108 U. S. 559. And under § 691, as amended by the act of Feb. 16, 1875 (18 St. 316), the final judgment or decree can be re-examined in the Supreme Court on a certificate of division, without reference to the amount in controversy. *Dow v. Johnson*, 100 U. S. 163. A district judge, under Rev. Stats. § 614, cannot vote in the circuit court on a writ of error from his own decision, and the cause cannot in such case be certified up to the Supreme Court. *United States v. Lancaster*, 5 Wheat. 434; *Nelson v. Carland*, 1 How. 265; *United States v. Emholt*, 105 U. S. 414.

SECTS. 651, 652. — As the last clause of § 1 of the act of June 1, 1872, ch. 255, as to *supersedeas*, indicates that the whole section relates only to civil causes, the right of the presiding judge to decide is limited in § 652 to such causes, and the provision in the act of 1802 for a certificate of division, to be made during the trial, is retained as to criminal causes. 1 Com. D. 376. The words, in the 1st and 2d lines of § 651, "on the trial or hearing of any criminal proceeding," and the last eight words of § 652 were added by the Revision. *Id.*

SECT. 657. — In *Wheeler v. McCormick*, 8 Blatch. 267, it was held that the provision of the original act of 1818, whereby the jurisdiction of the circuit court of the southern district "shall be confined to causes arising within the said district, and shall not be construed to extend to causes of action arising within the northern district," excluded only actions arising in the northern district, and did not affect causes arising elsewhere outside of the southern district; and this section was framed according to that construction. 1 Com. D. 378.

## CHAPTER VIII.

### CIRCUIT COURTS. — SESSIONS.

SECT. 658. — The changes in legislation with respect to the larger portion of the States and districts named in this section are stated in note to § 572, in connection with the changes affecting the district courts. The other changes are:—

*California, Oregon, Nevada.* By 19 St. 4, ch. 11, superseding 18 St. 76, ch. 287, and taking effect March 1, 1876, terms of the circuit court for these districts are held: for California, the first Monday of February, second Monday of July, and fourth Monday of November; for Oregon, the second Monday of April and first Monday of October; for Nevada, the third Monday of March and first Monday of November. As to California, see also note, § 531.

*Colorado.* See note § 530.

*Kansas.* By the acts of 1861 and 1863 the sessions are to be held "at the seat of government of the said State," and as this would remove the courts whenever the seat of government is removed, the name of the place is here stated. The time of holding the circuit court was changed from May to June by St. May 8, 1872, and although the later act of June 8, 1872, provided that the May term should be held at Leavenworth, the June term, being undoubtedly intended, is here named. 1 Com. D. 381.

*Louisiana.* See note, § 531.

*Mississippi.* See note, § 539.

*Nevada.* See California, above.

*New York.* By 22 St. 33, ch. 48, § 2, the circuit court in the northern district is held, at Canandaigua, the third Tuesday in June; at Syracuse, the third Tuesday in November; at Albany, the third Tuesday in January; and the term appointed for Albany,



when adjourned, is to be adjourned to meet in Utica on the third Tuesday in March, the adjourned term to be for civil business only.

*Oregon.* See California, above.

*Texas.* The acts of 1881, of 1884, &c., noticed in note to § 572, supersede St. June 11, 1879, ch. 18, § 4 (21 St. 10).

*West Virginia.* By St. Dec. 21, 1878, c. 9 (20 St. 259), the circuit court is to be held at Parkersburg on the tenth days of January and June; and on the following Monday when either of these dates falls on Sunday. See note, § 572.

SECT. 660. — Generalized from acts altering the terms of particular courts, as *e. g.*, 17 St. 135, c. 176, altering the terms of the circuit courts of the eighth circuit.

SECT. 661. — This power, like others in the judiciary act, was extended to courts subsequently established by the acts admitting new States and establishing new circuit courts.

SECT. 662. — The special and exclusive criminal terms differ, in not affecting the holding of any other term at the same time, from the regular terms of the court, each of which supersedes the preceding term. *Bright v. Milwaukee R. Co.*, 14 Blatch. 214; *United States v. Cornell*, 2 Mason, 98. They are not sessions of the court with respect to the removal of causes. *Ibid.*; *Jones v. Oceanic Nav. Co.*, 11 Blatch. 406.

SECT. 663. — The adjourned term is an extension of the preceding session. *Anon.*, 1 Cranch, 159; *Mechanics' Bank v. Withers*, 6 Wheat. 106.

SECT. 664. — See note, § 658.

SECT. 669. — As the cited act of 1840 simply conferred upon the presiding judge the power to appoint a special term, without prescribing the method or any notice of the fact, these matters appear to be left to his discretion. 1 Com. D. 387.

SECT. 670. — The general act of 1840 did not prescribe any form of appointment or of publication of a special term of the circuit court, and while some of the subsequent acts relating to particular States gave specific directions as to these matters, others did not. As to adjourned terms in Texas, see p. 88 *ante*.

SECTS. 671, 672. — See note, § 583. The cited acts of 1839 and 1840 both intended an adjournment to a time before the next regular term, but differed as to the officer (clerk or marshal, here given in the alternative) who is to make the adjournment. The original act contained also the words "regular, adjourned or special" after "any" in the second line of § 671. 1 Com. D. 389.

SECT. 672. — In the second line "or" was twice added, and the word "special" was also added by the Revision. 1 Com. D. 389.

## CHAPTER IX.

### SUPREME COURT. — ORGANIZATION.

SECT. 676. — See note, § 554.

SECT. 677. — St. March 3, 1877, ch. 105 (19 St. 344) provides that

"there shall be taxed against the losing party in each and every cause pending in the Supreme Court of the United States or in the Court of Claims of the United States, the cost of printing the record in such case, which shall be collected, except when the judgment is against the United States, by the clerks of said courts respectively, and paid into the treasury of the United States; but this shall only apply to records printed after the first of October next."

Prior to this act the printing was done by the government, without charge to the litigants. 4 St. 695; *Railroad Co. v. Collector*, 96 U. S. 594. By the appropriation act of Aug. 5, 1882 (22 St. 254), the reporter of decisions is to receive an annual salary of

\$4500, when his report constitutes one volume, and an additional sum of \$1200 when by the direction of the court he causes to be printed and published in any year a second volume; he is also allowed clerk hire and expenses, and the volumes of decisions thereafter pronounced are to be furnished to the public at a sum not exceeding \$2 per volume. This act also provides (see also 24 St. 254) for a stenographic clerk for the chief-justice and for each associate justice of the Supreme Court at not exceeding \$1600 each. 23 St. 224, ch. 332, provides —

“That the clerk of the Supreme Court of the United States shall, on the first day of January next, or within thirty days thereafter, and annually thereafter, make to the Secretary of the Treasury a return of all costs collected by him in cases disposed of at the preceding term or terms of said Supreme Court; and, after deducting his compensation as provided by law, and the incidental expenses of his office, including clerk-hire, said expenses to be certified by the Chief Justice or a justice of said court, shall pay any surplus that may remain into the Treasury of the United States at the time of making said return.”

SECT. 678. — The cited act of 1872 authorized the appointment of a deputy or deputies “of *any* court of the United States.”

## CHAPTER X.

### SUPREME COURT. — SESSIONS.

SECT. 684. — The annual term in October is here first provided for. The direction of St. June 17, 1844, ch. 96, that the annual term should commence on the first Monday of December was deemed superseded by the cited act of 1866. 1 Com. D. 395.

SECT. 686. — The power of less than a quorum to make orders preparatory to a hearing was conferred in 1802 by 2 St. 156, ch. 31, § 1, and was to be exercised during the first ten days of a term, while awaiting the assembling of a quorum,—a period which was extended in 1829 to twenty days by 4 St. 332, ch. 12, § 1.

## CHAPTER XI.

### SUPREME COURT — JURISDICTION.

SECT. 687. — See note, § 4063. Congress has the right to prescribe the process and mode of proceeding in cases of which the Supreme Court is given original jurisdiction by the Constitution, but the Supreme Court can exercise such original jurisdiction without any act of Congress conferring it, and can make its own rules regulating the exercise of such jurisdiction. *Chisholm v. Georgia*, 2 Dall. 419; *Kentucky v. Dennison*, 24 How. 98; *Florida v. Georgia*, 17 Id. 478; *New Jersey v. New York*, 5 Pet. 284. But this is only within the limits prescribed by the Constitution, and any act beyond such limits is *coram non judice* and void. *Rhode Island v. Massachusetts*, 12 Pet. 657; 15 Id. 233. This principle does not abridge the power of the court over its own officers, or to protect itself and its members from being disturbed in the exercise of its functions (*Ex parte Bollman*, 4 Cranch, 75); and Congress cannot enlarge the original jurisdiction of the Supreme Court. *Marbury v. Madison*, 1 Cranch, 137; *New Jersey v. New York*, 5 Pet. 284; *Kendall v. United States*, 12 Id. 637; *Cohens v. Virginia*, 6 Wheat. 264; *Ex parte Vallandigham*, 1 Wall. 252. It may have appellate jurisdiction of cases in which it has also original jurisdiction. See *Gittings v. Crawford*, Taney, 9; *Börs v. Preston*, 111



U. S. 260; *contra*, *Osborn v. U. S. Bank*, 9 Wheat. 738. This original jurisdiction embraces suits both at law and in equity. *Pennsylvania v. Wheeling Bridge Co.*, 18 How. 462. Art. 3, § 2, cl. 2, of the Constitution does not bestow jurisdiction in any case, but declares that of the cases to which the judicial power of the United States is extended by art. 3, § 2, cl. 1, the Supreme Court shall have original jurisdiction in the cases there enumerated. *Cherokee Nation v. Georgia*, 5 Pet. 15; *Pennsylvania v. Quicksilver Co.*, 10 Wall. 553. The Supreme Court has not original jurisdiction of an action by a State on a judgment recovered by it in one of its own courts against a citizen or corporation of another State to recover a pecuniary penalty for a violation of its municipal law. *Wisconsin v. Pelican*, 127 U. S. 265, reviewing the cases to which a State has been a party. This clause giving exclusive jurisdiction in suits to which a State is a party does not apply to suits against the United States. *Louisiana v. United States*, 22 Ct. Cl. 85.

The State must be either nominally or substantially a party, and it is not sufficient that it may be consequentially affected. *Fowler v. Lindsey*, 3 Dall. 411. It must be a party on the record. *U. S. Bank v. Planters' Bank*, 9 Wheat. 906. The Supreme Court has original jurisdiction in the following cases to which a State is a party: Possibly of a suit by a State against the United States (*Mississippi v. Johnson*, 4 Wall. 501; see *Florida v. Georgia*, 17 How. 478); of a suit between two States of the Union on questions of boundary, although it becomes necessary to examine into and construe compacts or agreements between those States, or although the decree may affect the territorial limits of the political jurisdiction and sovereignty of such States. *Rhode Island v. Massachusetts*, 12 Pet. 724; *Missouri v. Iowa*, 7 How. 660; *Florida v. Georgia*, 17 Id. 478; *Alabama v. Georgia*, 23 Id. 505; *Virginia v. West Virginia*, 11 Wall. 54. It has jurisdiction of a suit by a State against citizens of another State. *Pennsylvania v. Quicksilver Co.*, 10 Id. 553. It has no jurisdiction of questions of a political and not a judicial nature (*Mississippi v. Johnson*, 4 Wall. 497; *Georgia v. Stanton*, 6 Id. 50; *Cherokee Nation v. Georgia*, 5 Pet. 1; but see *Virginia v. West Virginia*, 11 Wall. 54); nor of suits against a State by another State suing for the benefit of a citizen (*New Hampshire v. Louisiana*, 108 U. S. 76); nor of suits to which any other political community than a State of the Union or a foreign state is a party. *Cherokee Nation v. Georgia*, *supra*; *Texas v. White*, 7 Wall. 719. Under this rule the District of Columbia is not a State of the Union (*Hepburn v. Ellzey*, 2 Cranch, 445); and an Indian tribe within the United States is not a foreign State. *Cherokee Nation v. Georgia*, *supra*. It has no jurisdiction of suits against a State by citizens of different States, or foreign citizens or subjects (11th Amendment; *Georgia v. Brailsford*, 2 Dall. 402; *Chisholm v. Georgia*, Id. 419; *Hollingsworth v. Virginia*, 3 Id. 378; *Cohens v. Virginia*, 6 Wheat. 264; *Osborn v. U. S. Bank*, 9 Id. 738; *U. S. Bank v. Planters' Bank*, Id. 904; *Georgia v. Madrazo*, 1 Pet. 110; *Cherokee Nation v. Georgia*, 5 Id. 1; *Briscoe v. Bank of Kentucky*, 11 Id. 257; *Curran v. Arkansas*, 15 How. 304; *Ex parte Madrazo*, 7 Pet. 627); nor of suits between a State and its citizens (*Cohens v. Virginia*, 6 Wheat. 398; *Pennsylvania v. Quicksilver Co.*, 10 Wall. 553); nor where a State is enforcing its penal laws (*Cohens v. Virginia*, *supra*); nor of a bill to enjoin the President in the performance of his official duties (*State v. Johnson*, 4 Wall. 475); nor of a suit between two individuals concerning land claimed by one under a grant from a State (*Fowler v. Lindsey*, 3 Dall. 411); nor of a suit by or against a corporation of which such State is a member, although the State may be the sole owner of it (*U. S. Bank v. Planters' Bank*, 9 Wheat. 904; *Bank of Kentucky v. Wister*, 2 Pet. 318; *Briscoe v. Bank of Kentucky*, 11 Id. 324; *Darrington v. Bank of Alabama*, 13 How. 12; *Curran v. Arkansas*, 15 Id. 304; *Davis v. Gray*, 16 Wall. 203); nor of suits by a State on any remote or contingent interest in itself (*Pennsylvania v. Wheeling Bridge Co.*, 13 How. 559); nor of a suit by an alien against a citizen. *Ex parte Barry*, 2 How. 65.

An indictment against a private person for an assault upon an ambassador or public



minister is not a case affecting such ambassador or minister. *United States v. Ortega*, 11 Wheat. 467. So, also, witnesses in a criminal trial are not affected by the cause. *Blyew v. United States*, 13 Wall. 595. An action cannot be brought in a State court on a firm debt against a firm of which a public minister is a partner. *Re Tracy*, 46 N. Y. Supr. Ct. 48. A consul is not entitled, by the law of nations, to the immunities and privileges of an ambassador or public minister, but is liable to civil suits like any other individual. *Gittings v. Crawford*, Taney, 1.

SECT. 688. — The revisers assumed that, in the modified form given in this section, the power to issue writs of *mandamus* to public officers was not wholly void, under *Marbury v. Madison*, 1 Cranch, 137, as explained in *Cohens v. Virginia*, 6 Wheat. 400. 1 Com. D. 397.

*"The Supreme Court shall have power to issue writs of prohibition in the district courts, when proceeding as courts of admiralty and maritime jurisdiction."*

The writ of prohibition commands the person to whom it is directed not to do something which, by the relator's suggestion, the court is informed he is about to do. If the act has been done, and nothing further remains to be done, the writ will not issue. *United States v. Peters*, 3 Dall. 121; *Ex parte Christy*, 3 How. 292; *United States v. Hoffman*, 4 Wall. 158; *Ex parte Easton*, 95 U. S. 72. The jurisdiction of the district court must be determined from the record, and no matter outside the record will be admitted in the Supreme Court. *Ex parte Christy*, 3 How. 292; *Ex parte Easton*, 95 U. S. 77. The writ cannot be issued under § 716, but can be issued only where the district court is proceeding as a court of admiralty, and is acting in excess of, or is taking cognizance of, matters not within its jurisdiction. *Ex parte Warmouth*, 17 Wall. 64; *Ex parte Christy*, 3 How. 292; *Ex parte Graham*, 10 Wall. 541; *Ex parte Easton*, 95 U. S. 72; *Ex parte Gordon*, 104 Id. 516. Its office is to prevent an unlawful assumption of jurisdiction. *Ex parte Gordon*, 104 U. S. 517. It cannot be issued from the Supreme Court where there is no appellate power given by law, and no special authority (*Ex parte Gordon*, 1 Black, 503); nor under proceedings to confiscate real estate under the act of July 17, 1862 (12 St. 589; *Ex parte Graham*, 10 Wall. 541); nor to perform the office of a proceeding for the correction of mere errors and irregularities (*Ex parte Ferry Co.* 104 U. S. 520); nor to correct an error in the judgment of the admiralty court, as the remedy is by appeal (*Ex parte Pennsylvania*, 109 U. S. 174); nor where the district court is proceeding to hear a libel claiming damages filed against a steamer for drowning certain seamen on a vessel with which the steamer wrongfully collided (*Ex parte Gordon*, 104 U. S. 515), although the amount involved is less than \$5000 (*Ex parte Ferry Co.*, 104 U. S. 519); nor to restrain proceedings in a suit to recover pilotage (*Ex parte Hagar*, 104 U. S. 520); nor where the State court is proceeding in a cause after it is removed (*Chesapeake R. Co. v. White*, 111 U. S. 134); nor to restrain the execution of sentence for crime of a person convicted in the circuit court (*Ex parte Gordon*, 1 Black, 503); nor to restrain a proceeding by bill in equity to determine the right to an elective office. *Ex parte Warmouth*, 17 Wall. 64. See *Smith v. Whitney*, 116 U. S. 176, for an extensive examination of the cases on prohibition.

*"And writs of mandamus, in cases warranted by the principles and usages of law."* — *Mandamus* is at present nothing more than an action at law between the parties, and is not even a prerogative writ, but is regarded as an ordinary process in cases to which it is applicable. *Kendall v. United States*, 12 Pet. 615; *Kendall v. Stokes*, 3 How. 100; *Kentucky v. Dennison*, 24 Id. 97. Its office is to compel the performance of a plain and positive duty. It is issued on the application of one who has a clear right to demand such performance, and who has no other adequate remedy. It is never granted in anticipation of an omission of duty, but only after actual default. *Ex parte Cutting*, 94 U. S. 20. It is the recognized remedy when the case is outside of judicial discretion, and



is one of irregularity, or against law, or of flagrant injustice, or without jurisdiction. *Ex parte* Bradley, 7 Wall. 379. It is used to restrain inferior courts within the limits of their authority, and to compel them to execute their jurisdiction. *Ex parte* Bradley, 7 Wall. 378. Sect. 13 of the judiciary act was declared unconstitutional in *Marbury v. Madison*, 1 Cranch, 137, so far as it purported to give jurisdiction to issue a *mandamus* in cases of which the Supreme Court had no original jurisdiction. Rev. Stats., § 688, limits the power to issue a *mandamus* to officers to cases of which the Supreme Court has original jurisdiction. *Virginia v. Rives*, 100 U. S. 313. It is applicable only where there is a legal right, without any existing legal remedy, *e. g.*, to correcting actions of courts against their officers, including counsellors and attorneys. *Ex parte* Bradley, 7 Wall. 376. The Supreme Court has no original jurisdiction to issue a *mandamus* except in cases affecting ambassadors, other public ministers, and consuls, and those in which a State is a party; but if a *mandamus* is necessary as auxiliary to the appellate jurisdiction of the Supreme Court, it may be issued. *Marbury v. Madison*, 1 Cranch, 175. A *mandamus* to an officer is an exercise of original jurisdiction, but a *mandamus* to an inferior court is in the nature of appellate jurisdiction. *Ex parte* Crane, 5 Pet. 190; *Ex parte* Bradley, 7 Wall. 375. The term "appellate" in the Constitution is used in its broadest sense, as embracing the power to review and correct the proceedings of subordinate tribunals, brought before the Supreme Court for examination in the modes provided by law. *Virginia v. Rives*, 100 U. S. 327. *Mandamus* will not issue in any case until all adequate remedies are exhausted. *Ex parte* *Virginia Comm'rs*, 112 U. S. 177. *Mandamus* does not lie to control the judicial discretion of the judge or court; but this discretion is not unlimited, but must be a sound discretion and according to law. *Ex parte* Secombe, 19 How. 13; *Ex parte* Burr, 9 Wheat. 530; *Ex parte* Bradley, 7 Wall. 377; *Ex parte* Taylor, 14 How. 3; *Ex parte* Many, Id. 24; *United States v. Lawrence*, 3 Dall. 42; *Life Ins. Co. v. Wilson*, 8 Pet. 291; *Ex parte* Hoyt, 13 Id. 279; *Ex parte* Whitney, Id. 404; *Ex parte* Newman, 14 Wall. 152; *Ex parte* Railway Co., 101 U. S. 720. *Mandamus* will not lie to control the action of an executive officer of the government in matters requiring judgment and consideration, or dependent upon discretion; but only for ministerial acts, requiring the exercise of no judgment or discretion. *Decatur v. Paulding*, 14 Pet. 499; *Litchfield v. Register*, 9 Id. 577; *Carrick v. Lamar*, 116 U. S. 426; *Gaines v. Thompson*, 7 Wall. 353; *Reeside v. Walker*, 11 How. 289; *United States v. Seaman*, 17 Id. 230; *United States v. Guthrie*, Id. 304; *Comm'r v. Whiteley*, 4 Wall. 522; *United States v. Comm'r*, 5 Id. 563.

"To any courts appointed under the authority of the United States." — *Mandamus* will lie to an inferior court in the following cases: To require an inferior court to decide a matter within its jurisdiction, and pending before it for judicial determination, but not to control its decision (*Ex parte* Flippin, 94 U. S. 350; *Ex parte* Railway Co., 101 Id. 720; *Ex parte* Burtis, 103 Id. 238; *Ex parte* Morgan, 114 Id. 175; *Ex parte* Brown, 116 Id. 401; *Ex parte* Parker, 120 Id. 743); to the Court of Claims to hear and decide. *Ex parte* *United States*, 16 Wall. 699. An order dismissing a writ of error for failure to file a transcript and have the cause docketed within the time allowed by law, is a refusal to hear and decide, and *mandamus* is the proper remedy. *Ex parte* Bradstreet, 7 Pet. 647; *Ex parte* Newman, 14 Wall. 165; *Harrington v. Holler*, 111 U. S. 796. *Mandamus* will lie to compel a judge to reinstate a cause which he had wrongfully dismissed (*Ex parte* Bradstreet, 7 Pet. 647); but not to an order remanding a cause removed, for which the act of March 3, 1875 gives an appeal or writ of error (*Ex parte* Hoad, 105 U. S. 579); and to compel a judge to render a judgment, or enter a decree. *Ex parte* Newman, 14 Wall. 165. Where a judge has rendered judgment, but died before signing it, *mandamus* will lie to compel his successor to sign it. *Life Ins. Co. v. Wilson*, 8 Pet. 303. It lies to compel a judge to sign a bill of exceptions, or to review, correct, and settle a bill already



signed (*Ex parte* Crane, 5 Pet. 192); but not where his motion on an order to show cause declares the bill to be untrue (*Ex parte* Bradstreet, 4 Pet. 102); to compel a judge to reinstate an attorney unlawfully disbarred (*Ex parte* Bradley, 17 Wall. 364; *Ex parte* Robinson, 19 Id. 505); but not one disbarred lawfully (*Ex parte* Burr, 9 Wheat. 529; *Ex parte* Secombe, 19 How. 9); to compel a marshal to levy an execution on property, the title to which is in dispute (*Life Ins. Co. v. Adams*, 9 Pet. 573); to compel the allowance of an appeal improperly denied (*United States v. Gomez*, 3 Wall. 752; *Ex parte* Railroad Co., 95 U. S. 221); or to compel the clerk to prepare and deliver the transcript (*United States v. Gomez, supra*); but not when a writ of error has not issued. *Ex parte* Ralston, 119 U. S. 613. It lies to compel a county court to levy a tax for the payment of county bonds. *Shelley v. St. Charles Co.*, 30 F. R. 603.

*Mandamus* will not lie to an inferior court in the following cases: To reverse its decisions made in the exercise of its legitimate jurisdiction (*Ex parte* Flippin, 94 U. S. 348; *Ex parte* Burtis, 103 Id. 238); although the form of the proceeding may not be strictly regular (*Ex parte* Wall, 107 U. S. 272); or although the act may seem to bear harshly or oppressively upon the party (*Ex parte* Whitney, 13 Pet. 404; *Ex parte* Perry, 102 U. S. 183); or although the amount involved may not allow an appeal or writ of error. *Ex parte* Newman, 14 Wall. 152; *Re* Burdett, 127 U. S. 771. It will not lie to take the place of a writ of error (*Ex parte* Hoard, 105 U. S. 578; *Ex parte* Loring, 94 Id. 418; *Ex parte* B. & O. R. Co., 108 Id. 567); or to compel a court to allow amendments to the pleadings (*Ex parte* Bradstreet, 7 Pet. 647); or to allow more than one plea to be filed (*Ex parte* Davenport, 6 Pet. 661); or to review the judgment of the circuit court on a plea to the jurisdiction (*Ex parte* Railway Co., 103 U. S. 794; *Ex parte* B. & O. R. Co., 108 Id. 566); or to review the action of the circuit court in refusing to punish a person for contempt (*Ex parte* Burtis, 103 U. S. 238); or to compel a circuit court to remand a cause removed, or to reinstate a cause remanded (*Ex parte* Hoard, 105 U. S. 578; *Re* Sherman, 127 U. S. 364); or to compel a judge to sign a bill of exceptions tendered several weeks after trial, which he is requested to correct from memory (*Ex parte* Bradstreet, 4 Pet. 102); or to compel a judge to spread the whole of a charge on the bill of exceptions (*Ex parte* Crane, 5 Pet. 192); or to review the action of a judge in refusing to amend a judgment (*Ex parte* Morgan, 114 U. S. 174); or to compel a judge to set aside a judgment by default (*Ex parte* Roberts, 6 Pet. 216); or to revise its decision in refusing to quash a process subsequent to the judgment (*Ex parte* Flippin, 94 U. S. 350); or to compel a clerk to furnish a transcript where a writ of error has not issued. *Ex parte* Ralston, 116 U. S. 613.

"Or to persons holding office under the authority of the United States," &c. — *Mandamus* lies to require the Postmaster-General to credit relators with the full amount of the award of the solicitors. *Kendall v. United States*, 12 Pet. 524. Also to the Commissioner of Patents, to compel him to prepare a patent, which he has granted, to lay it before the Secretary for his signature, and to countersign it. *Butterworth v. Hoe*, 112 U. S. 68.

*Mandamus* will not lie to persons holding office under the authority of the United States in the following cases: To the Secretary of the Treasury or to the Secretary of the Navy, to compel him to pay an officer (*Brashear v. Mason*, 6 How. 92; *Reeside v. Walker*, 11 Id. 272; *United States v. Guthrie*, 17 Id. 284); to the Secretary of the Navy, where the compensation to be paid to the relator under an act of Congress was different in the act from what it was in the resolution, and the Secretary gave her an election, whereas she claimed both (*Decatur v. Paulding*, 14 Pet. 497); to the register of a government land office, to compel him to enter an application for land, although an application for a *mandamus* has been refused by the highest court of the State (*McCluny v. Silliman*, 2 Wheat. 369); to the Commissioner of the General Land Office or the Secretary of the Interior, to compel the issuance of a patent. *Secretary v. McGarrahan*, 9 Wall. 314; *United States v. Commissioner*, 5 Id. 563. See *Butterworth v. Hoe*, 112 U. S. 68.



SECT. 690.—The provisions here referred to show sufficiently the courts from which the several classes of cases may be removed, and this section is accordingly reduced from the language of § 13 of the judiciary act. 1 Com. D. 398. By St. March 3, 1875, ch. 137, § 5 (18 St. 470), providing that suits improperly brought in or removed to the circuit court may be dismissed or remanded, the order of the circuit court dismissing or remanding said cause to the State court was made reviewable by the Supreme Court on writ of error or appeal. *Cobb v. Globe Ins. Co.*, 3 Hughes, 455; *Hoadley v. San Francisco*, 94 U. S. 4; *Ayers v. Chicago*, 101 Id. 184. But since the act of 1887, ch. 373, (see p. 127, *ante*) the Supreme Court cannot review, on appeal or in error, an order of the circuit court remanding a cause to a State court. *Morey v. Lockhart*, 123 U. S. 56. The above act of 1875 did not change the rule that a suit in a State court which was within the description of suits removable into the circuit court, could be removed, although it could not have been originally brought in the latter court. *Warner v. Pennsylvania R. Co.*, 13 Blatch. 231.

Cases arising under St. March 1, 1875, ch. 114, to protect citizens in their civil and legal rights (see note, § 1977), were, by § 5, made reviewable by the Supreme Court, without regard to the sum in controversy, as provided by law for the review of other causes in that court; and § 5 of the act of 1887 (see p. 127, *ante*), expressly provides that this act of 1875 is not affected by the act of 1887. By St. Feb. 25, 1879, ch. 99 (20 St. 320; note, § 702), the final judgment or decree of the Supreme Court of the District of Columbia in any case where the matter in dispute, exclusive of costs, exceeds the value of \$2500, may be reviewed in the United States Supreme Court upon writ of error or appeal like writs of error on judgments or appeals from decrees rendered in a circuit court. This act took away the right of the Supreme Court to determine a pending cause in which the matter in dispute is less than the jurisdictional amount named in this act. *Railroad Co. v. Grant*, 98 U. S. 398; *Dennison v. Alexander*, 103 Id. 522. The judgment in the lower court, without adding interest or costs, determines the value in dispute. *Railroad Co. v. Troom*, 100 U. S. 112. If the recovery would be against each defendant separately, the amount claimed for each must exceed the jurisdictional amount. *Paving Co. v. Mulford*, Id. 147. For the act of March 3, 1885, ch. 355 (23 St. 443), increasing to \$5000 the amount in dispute, except in cases involving the validity of patents and copyrights, on appeals and writs of error in the District of Columbia, see note, § 702. See also, notes, §§ 691, 692, for the rules determining the amount in dispute.

The appellate power of the Supreme Court is not derived from acts of Congress, but is conferred by Art. 3, § 2, cl. 2, of the Constitution, "with such exceptions and under such regulations as the Congress shall make." As to whether, if Congress should repeal all exceptions and regulations, the Supreme Court could exercise general appellate jurisdiction under rules prescribed by itself, *quære*; but so long as Congress has made exceptions and regulations, the description by it of certain appellate jurisdiction implies a negative to the exercise of such appellate power as is not comprehended within such jurisdiction. *Durousseau v. United States*, 6 Cranch, 314; *United States v. Young*, 94 U. S. 258; *Railroad Co. v. Grant*, 98 Id. 401; *Ex parte Vallandigham*, 1 Wall. 251; *Ex parte McCardle*, 7 Id. 506. In *Durousseau v. United States*, *supra*, the whole subject of the appellate jurisdiction of the Supreme Court was carefully examined.

SECT. 691.—See note, § 2158. 18 St. 316, § 3, changes the \$2000 here named to \$5000. *Dow v. Johnson*, 100 U. S. 163; *May v. Sloan*, 101 Id. 231. This section was here reframed to show that to any of the final judgments rendered by circuit courts under this title a writ of error will lie; and the general provision is here first extended to district courts acting as circuit courts, it appearing to have been the policy of Congress to provide a direct appeal to the Supreme Court in many cases where the appeal had lain to the circuit court. 1 Com. D. 400.



See also, generally, notes on §§ 631, 633, 636, 692, 695, 699, 701, 702, 707, 709, 997. Cases arising under the civil rights act of 1875 (18 St. 335; see note, § 1977) were thereby made reviewable by the Supreme Court without regard to the sum in controversy; and, as stated on p. 141, *ante*, this was not affected by the act of 1887. As to the District of Columbia, see notes, §§ 702, 705. As to how the error should appear on the record, see note, § 997. As to criminal cases, see note, § 697. An appeal is a civil-law process, and brings both the law and the facts up for review. A writ of error is a common-law process, and brings up only the law for review. *United States v. Goodwin*, 7 Cranch, 108; *Wiscart v. Dauchy*, 3 Dall. 321. A party may both take out a writ of error and appeal, and the Supreme Court will determine which is proper. *Hurst v. Hollingsworth*, 94 U. S. 111. The act of March 3, 1875 (18 St. 420), does not affect Rev. Stats. §§ 691, 692. *Whitsitt v. Railroad Co.*, 103 U. S. 770. A case cannot come up by agreement. *Washington County v. Durant*, 7 Wall. 694. A final judgment or decree is one terminating the litigation on the merits of the case, so that, on affirmance by the Supreme Court, the court below has nothing to do but to execute the judgment already rendered. *Whiting v. United States Bank*, 13 Pet. 6; *Forgay v. Conrad*, 6 How. 201; *Craighead v. Wilson*, 18 Id. 199; *Beebe v. Russell*, 19 Id. 283; *Bronson v. Railroad Co.*, 2 Black, 524; *Thomson v. Dean*, 7 Wall. 342; *St. Clair Co. v. Lovingsston*, 18 Id. 628; *Parcels v. Johnson*, 20 Id. 653; *Railroad Co. v. Swasey*, 23 Id. 405; *Crosby v. Buchanan*, Id. 420; *Comm'rs v. Lucas*, 93 U. S. 108; *St. Louis R. Co. v. Southern Express Co.*, 108 Id. 24; *Missouri R. Co. v. Dinsmore*, Id. 30; *Ex parte Norton*, Id. 237; *Bostwick v. Brinkerhoff*, 106 Id. 4; *Mower v. Fletcher*, 114 Id. 127. It is not easy to decide what is final in equity within the above rule, and some apparent conflict may exist between the cases; but at law the question is not difficult. *Bostwick v. Brinkerhoff*, 106 U. S. 4. The word "final" relates to all judgments and decrees determining the particular cause, and not those only which finally decide the right, so that it can never again be litigated. Thus judgments in actions of ejectment, and decrees dismissing a bill without prejudice, do not finally decide the right, but are final judgments within the acts of Congress. *Weston v. Charlestown*, 3 Pet. 464. Judgments are final within the meaning of the acts of Congress, without the words "*ideo consideratum est*." *Whitaker v. Bramson*, 2 Paine, 216. A writ of error will lie only from a final judgment. *Rutherford v. Fisher*, 4 Dall. 22; *Mayberry v. Thompson*, 5 How. 121; *Beebe v. Russell*, 19 Id. 283; *Barton v. Forsyth*, 5 Wall. 190. It will lie when a party is aggrieved in the foundation, proceedings, judgment, or execution. *Wayman v. Southard*, 10 Wheat. 23; *Suydam v. Williamson*, 20 How. 437; *Riggs v. Johnson County*, 6 Wall. 187. A judgment entered by a clerk of the court on the mere finding of a referee is subject to review. *Heckers v. Fowler*, 2 Wall. 123; *York R. Co. v. Myers*, 18 How. 246. Decisions resting within the discretion of the court cannot be re-examined on a writ of error or appeal. *Liter v. Green*, 2 Wheat. 306; *Silsby v. Foote*, 14 How. 218; *Morsell v. Hall*, 13 Id. 212; *United States v. Buford*, 3 Pet. 12; *Jenkins v. Banning*, 23 How. 455; *Mandeville v. Wilson*, 5 Cranch, 15; *Spencer v. Lapsley*, 20 How. 264; *Cook v. Burnley*, 11 Wall. 676; *Erskine v. Hohnbach*, 14 Id. 613. The Supreme Court has jurisdiction of an appeal or writ of error where the court below had no jurisdiction to reverse the action of such court. *Morris' Cotton*, 8 Wall. 507. The actual point of time when a judgment or decree may be said to be rendered or passed admits of some latitude, and depends somewhat upon the usage and practice of the particular court. *Silsby v. Foote*, 20 How. 295. In Louisiana there is no final judgment until the judgment is signed by the judge. *Yznaga del Valle v. Harrison*, 93 U. S. 234. Until a decree is actually entered, the court can withhold it. *Ex parte Sawyer*, 21 Wall. 239. Where a motion for a new trial is duly made, the judgment is not final until such motion is overruled. *Brown v. Evans*, 8 Sawyer, 510. A writ of error cannot be brought in the name of a steamboat, or any other than a human being, or



some corporate or associated aggregation of persons. *Steamboat Burns*, 9 Wall. 237. A party to a judgment may sue out a writ of error, although it was rendered by default or want of a plea. *Macker v. Thomas*, 7 Wheat. 530. Such defects in the declaration or complaint as could have been taken advantage of before judgment by general demurrer may be reviewed; and, if the judgment would have been arrested on motion because it did not state facts sufficient to constitute a cause of action, it may be reversed on error. *McAllister v. Kuhn*, 96 U. S. 89. A judgment rendered on default on a declaration setting forth no cause of action will be reversed and remanded, with directions that judgment be arrested. *Cragin v. Lovell*, 109 U. S. 194. On a writ of error on a joint judgment against several, all must join. *Williams v. United States Bank*, 11 Wheat. 414; *Owings v. Kincannon*, 7 Pet. 399; *The Protector*, 11 Wall. 82; *Hampton v. Rouse*, 13 Id. 187; *Mussina v. Cavazos*, 6 Id. 355. But one may prosecute a writ of error if the others are notified in writing to appear, and fail to appear, or appear and refuse to join. *Masterson v. Herndon*, 10 Wall. 418. A writ of error sued out by a part only of joint defendants without a summons and severance, or proceedings equivalent thereto, will be dismissed (*Feibelman v. Packard*, 108 U. S. 14); and though several defendants may be affected by a judgment or decree, yet there may be such a separate judgment or decree against one of these, that he can appeal or bring a writ of error without joining the others. *Germain v. Mason*, 12 Wall. 259. According to the law of Mississippi, in the case of a joint action on a bond or note, separate judgments may be taken against the several defendants; and the plaintiff may take judgment against some, and discontinue as to others. But there is no final judgment from which a writ of error will lie from the United States Supreme Court before the case is finally disposed of as to all the parties to the record. *United States v. Girault*, 11 How. 31. A proceeding for contempt for violating an interlocutory injunction restraining the plaintiff in error from using a certain patent cannot, as an independent proceeding, be reviewed by either writ of error or appeal. *Hayes v. Fisher*, 102 U. S. 121.

*Final judgments.* — A judgment is not the less final because it is rendered on an equal division of the court. *Hartman v. Greenhow*, 102 U. S. 676; *Lessieur v. Price*, 12 How. 59. It is immaterial whether a judgment is in the exercise of original or appellate jurisdiction. *Hartman v. Greenhow*, 102 U. S. 676. Error will lie to an order striking out a judgment after the lapse of a term. *U. S. Bank v. Moss*, 6 How. 31.

The following are final judgments:—

A judgment sustaining a demurrer and rendering judgment accordingly (*Rogers v. Burlington*, 3 Wall. 654); a judgment sustaining a demurrer for want of jurisdiction in an action of replevin, and *mandamus* cannot be used (*Ex parte B. & O. R. Co.*, 108 U. S. 566; *Ex parte Hoard*, 105 Id. 578; *Ex parte Loring*, 94 Id. 418; *Ex parte Ry. Co.*, 103 Id. 794); an order striking out an answer, and entering judgment against the defendant (*Mandelbaum v. The People*, 8 Wall. 310; *Hozey v. Buchanan*, 16 Pet. 215; *Trustees v. Forbes*, 8 How. Pr. 285; *Crucible Co. v. Steel Works*, 9 Abb. Pr. n. s. 195; *Union Bank v. Mott*, 11 Abb. Pr. 42; *Sheldon v. Adams*, 18 Id. 405; *Fuller v. Claffin*, 93 U. S. 16); but not an order refusing to strike out an answer (*Fuller v. Claffin*, 93 U. S. 16); a judgment dismissing a petition of intervention. *Gumbel v. Pitkin*, 113 U. S. 548. See *Connor v. Peugh*, 18 How. 394. Under St. March 3, 1875, § 5 (18 St. 472), an order remanding a cause to the State court was reviewable by the Supreme Court. *Ayers v. Chicago*, 101 U. S. 184. Before this act the remedy was by *mandamus* to compel action (*Railroad Co. v. Wiswall*, 23 Wall. 507); but under the act of 1887 an order of the circuit court remanding a case cannot be reviewed by the Supreme Court. *Morey v. Lockhart*, 123 U. S. 56. An order distributing the proceeds of a sale is final, as it disposes of the fund (*Gumbel v. Pitkin*, 113 U. S. 548); so is a judgment against a plaintiff in error, although the record does not show that one plea was in any way disposed of (*Wilson v. Daniel*, 3 Dallas,



401); so is an order awarding a peremptory writ of *mandamus*. *Davies v. Corbin*, 112 U. S. 36. But such order is reviewable only when the value of the matter in dispute exceeds \$5000. *Insurance Co. v. Wheelwright*, 7 Wheat. 534. A judgment on a *mandamus* deciding expressly a question not presented in a former order of *mandamus* is reviewable. *Memphis v. Brown*, 94 U. S. 717. Where a peremptory *mandamus* is granted and an order entered accordingly, and subsequently, during the same term, a motion to set aside the order is refused, and the order is re-entered, such judgment is the final judgment. *Memphis v. Brown*, *supra*. An order dismissing a petition in the nature of an *audita querela* is final (*New Orleans R. Co. v. Morgan*, 10 Wall. 262); so is a judgment reversing a judgment granting a writ of prohibition (*Weston v. Charlestown*, 5 Pet. 449); and so is a reversal with directions to enter a certain judgment, leaving nothing for the judicial discretion of the court. *Mower v. Fletcher*, 114 U. S. 127. But a reversal with leave for further proceedings in the court below is not final (*Moore v. Robbins*, 18 Wall. 588; *Bostwick v. Brinkerhoff*, 106 U. S. 3); and the decision of the court below on such a judgment is not a final judgment of the highest court of a State, although such judgment below is the necessary result of the reversal by the highest court. *McComb v. Commissioners*, 91 U. S. 1. A reversal with leave to proceed anew when the defendant consents to a certain judgment, which consent appears by the record, is final; and so is a judgment affirming a general judgment of the court below for the defendant. *Sparrow v. Strong*, 3 Wall. 105.

The following judgments are not final: — A judgment affirming a judgment sustaining a demurrer to a rejoinder with nothing further (*Miners' Bank v. United States*, 5 How. 214); a judgment sustaining a demurrer on the ground of multifariousness, and overruling it in part, but containing nothing more (*De Armas v. United States*, 6 How. 103); a judgment on a demurrer to certain parts of a replication, and on a motion to strike out certain other parts, which replication still contains some essential allegations (*Holcombe v. McKusick*, 20 How. 552); a judgment on a plea in abatement. *Fitzpatrick v. Flannagan*, 106 U. S. 660. Where by the local law an attachment of a debtor's property can be made upon certain facts whose existence is to be passed upon by a jury, such proceedings are really proceedings in abatement, and not final. *Leitensdorfer v. Webb*, 20 How. 185. The plea of another action pending is a plea in abatement and a decision thereon is not a final judgment. *Piquignot v. Pennsylvania R. Co.*, 16 How. 104; *Stephens v. Monongahela Bank*, 111 U. S. 197. A decision overruling a plea of the statute of limitations is not a final judgment. *Rutherford v. Fisher*, 4 Dall. 22; nor is a decision on a motion for judgment on the pleadings or on a subsequent motion to vacate such a judgment (*Cheang-Kee v. United States*, 3 Wall. 320). An application to supply a lost writ, declaration, or other pleading, is addressed to the discretion of the court, and a decision thereon cannot be reviewed by a writ of error. *Cook v. Burnley*, 11 Wall. 676. A judgment on a writ of error *coram nobis* is not final (*Walden v. Craig*, 9 Wheat. 576; *Pickett v. Legerwood*, 7 Pet. 148; *United States v. Plumer*, 3 Cliff. 28); nor are decisions on questions of amendments of the pleadings (*Resler v. Shehee*, 1 Cranch, 110; *Mandeville v. Wilson*, 5 Id. 15; *Moss v. Riddle*, 5 Id. 351; *Marine Ins. Co. v. Hodgson*, 6 Id. 206; *Walden v. Craig*, 9 Wheat. 576; *Chirac v. Reinicker*, 11 Id. 280; *Wright v. Hollingsworth*, 1 Pet. 165; *United States v. Buford*, 3 Id. 12; *Matheson v. Grant*, 2 How. 263; *Jenkins v. Banning*, 23 Id. 455; *Brown v. The Cadmus*, 2 Paine, 564); nor on amendments of the verdict (*Stearns v. Barrett*, 1 Mason, 153); nor on amendments of its own records. *Cromwell v. Pittsburg Bank*, 2 Wall. Jr. 569. This is true if the amendments are made before the end of the term; and afterwards, if they are of mere form, or of a clerical error, or a misprision of the clerk, and the like; but otherwise not (*Jackson v. Ashton*, 10 Pet. 480; *U. S. Bank v. Moss*, 6 How. 31, 38; *Schell v. Dodge*, 107 U. S. 630); and the terms on amendment cannot be reviewed. *Brown v. The Cadmus*, 2 Paine, 564.



A judgment of nonsuit is not final (*Evans v. Phillips*, 4 Wheat. 73); nor is a refusal to grant a nonsuit (*Gelston v. Hoyt*, 3 Wheat. 246); nor a refusal to reinstate after a nonsuit. *United States v. Evans*, 5 Cranch, 280; *Welch v. Mandeville*, 7 Id. 152. Where a rule of court allows the plaintiff to sign judgment for the defendant when he omits an affidavit of defence, the judgment is not final if the amount is undetermined, until there are appropriate proceedings for determining the amount, unless there are concurring circumstances which denote the intention of the parties that it shall be final and complete between them. *Whitaker v. Bramson*, 2 Paine, 209.

The following judgments also are not final:—

A decision granting or refusing to grant a continuance (*Woods v. Young*, 4 Cranch, 237; *Barrow v. Hill*, 13 How. 54; *Thompson v. Selden*, 20 Id. 194; *McFaul v. Ramsey*, Id. 523); decisions on the mode of conducting trials, the order of introducing evidence, and the times when it is to be introduced, unless the Supreme Court has prescribed some fixed general rules (*Philadelphia R. Co. v. Stimpson*, 14 Pet. 448; *Turner v. Yeates*, 16 How. 14); and also decisions on the examination of witnesses (*Rea v. Missouri*, 17 Wall. 532); a decision refusing to allow the proper mode of taking testimony, where such testimony, if properly taken, could not have been reviewed by the higher court (*Parsons v. Bedford*, 3 Pet. 433); a decision as to the order in which counsel shall address the jury (*Day v. Woodworth*, 13 How. 363; *United States v. Dunham*, 11 L. Rep. N. S. 591; *Hall v. Weare*, 92 U. S. 728; *Lancaster v. Collins*, 115 Id. 222); decisions on the enforcement or disregard of a rule requiring requests for charges or instructions to be in writing and presented at a certain time. *Insurance Co. v. Francisco*, 17 Wall. 672. If a jury fails to observe the instructions of the court, or finds excessive damages, the remedy is not by writ of error, but by a motion for a new trial (*Chesapeake Co. v. Knapp*, 9 Pet. 569); so, also, when the verdict is on insufficient evidence (*The City v. Babcock*, 3 Wall. 240); or gives excessive damages. *Railroad Co. v. Fraloff*, 100 U. S. 24; *Wabash R. Co. v. McDaniels*, 107 Id. 456; *Woodruff v. Hough*, 91 Id. 602. Decisions on questions of allowing costs and disbursements are not final. *Findlay v. Hinde*, 1 Pet. 241; *Canter v. Insurance Co.*, 3 Id. 307; *United States v. The Malek-Adhel*, 2 How. 210; *Lubker v. The N. H. Quimby*, 8 Rep. 806; *Taylor v. Woods*, 3 Woods, 146; *Elastic Fabrics Co. v. Smith*, 100 U. S. 110; *Wood v. Weimar*, 104 Id. 792. A forthcoming bond under the laws of Mississippi is a part of the process of execution, and a refusal to quash such a bond is not a final judgment. *Amis v. Smith*, 16 Pet. 314. An order quashing or refusing to quash an execution is final. *McCargo v. Chapman*, 20 How. 555; *Evans v. Gee*, 14 Pet. 1; *Boyle v. Zacharie*, 6 Id. 654. A decision affirming an order of a lower court setting aside a sheriff's return to an execution, and allowing an *alias* execution is not final (*Wells v. McGregor*, 13 Wall. 188; *Phillip's Practice*, 66); or one refusing to stay an execution. *Early v. Rogers*, 16 How. 599; and see *The Elmira*, 16 F. R. 133. Where different parties claim a fund in the hands of a marshal, which had arisen from sales under an execution, a decision as to whom the money should be paid is not a final judgment. *Curtis v. Petitpain*, 18 How. 109; *Bayard v. Lombard*, 9 Id. 530. Nor is a review of a judgment on a motion to set aside a verdict, or for a new trial (*Doswell v. De La Lanza*, 20 How. 29; *Henderson v. Moore*, 5 Cranch, 11; *Marine Ins. Co. v. Hodgson*, 6 Id. 206; *Barr v. Gratz*, 4 Wheat. 220; *Sparrow v. Strong*, 3 Wall. 105; *Freeborn v. Smith*, 2 Id. 160; *Ins. Co. v. Barton*, 13 Id. 603; *Insurance Co. v. Young*, 5 Cranch, 187; *Mulhall v. Keenan*, 18 Wall. 342; *Railway Co. v. Twombly*, 100 U. S. 78; *United States v. Gillies*, Pet. C. C. 159; *Kerr v. Clampitt*, 95 U. S. 190); and awarding a *procedendo*, even since § 914, Rev. Stats. *Newcomb v. Wood*, 97 U. S. 581. A judgment on a motion in arrest of judgment which has no more effect than a motion for a new trial cannot be reviewed. *Canal Co. v. Hart*, 114 U. S. 654. An order directing the payment of money into court pending litigation is not a final judg-



ment. *Louisiana Bank v. Whitney*, 121 U. S. 284. Quashing an inquisition, when by law the court can direct another to be taken, is equivalent to setting aside a verdict and awarding a new trial, and is not final. *Chesapeake Co. v. Union Bank*, 8 Pet. 260. An order remanding a cause for further proceedings in the court below not inconsistent with the judgment is not final (*Houston v. Moore*, 3 Wheat. 433; *Winn v. Jackson*, 12 Id. 135; *Brown v. Union Bank*, 4 How. 465; *Pepper v. Dunlap*, 5 Id. 51; *Tracy v. Holcombe*, 24 Id. 426; *Rankin v. State*, 11 Wall. 380; *St. Clair Co. v. Lovington*, 18 Id. 628; *Moore v. Robbins*, Id. 588; *Parcels v. Johnson*, 20 Id. 653; *McComb v. Knox County*, 91 U. S. 1; *Ex parte French*, Id. 423; *Zeller v. Switzer*, Id. 487; *Baker v. White*, 92 Id. 176; *Kimball v. Evans*, 93 Id. 320; *Davis v. Crouch*, 94 Id. 514; *Bostwick v. Brinkerhoff*, 106 Id. 3); nor is a judgment of reversal only (*Mayberry v. Thompson*, 5 How. 121); nor is a reversal ordering a new trial (*Houston v. Moore*, 3 Wheat. 433; *Parcels v. Johnson*, 20 Wall. 653; *Brown v. Union Bank*, 4 How. 465; *Tracy v. Holcombe*, 24 Id. 426; *Baker v. White*, 92 U. S. 176); nor is a reversal such as to require a new trial on the merits (*Rankin v. State*, 11 Wall. 380); but a reversal with directions to enter a certain judgment leaves nothing for the judicial discretion of the court below, and is final. *Mower v. Fletcher*, 114 U. S. 127. A judgment awarding or refusing to award a writ of restitution in actions of ejectment is not final (*Smith v. Trabue*, 9 Pet. 4; *Gregg v. Forsyth*, 2 Wall. 56); nor is an order setting aside a writ of restitution awarded to a defendant, and awarding one to the plaintiff. *Barton v. Forsyth*, 5 Wall. 190. Error will lie to proceedings subsequent to the mandate. *Sizer v. Many*, 16 How. 98; *Martin v. Hunter*, 1 Wheat. 304; *Perkins v. Fourniquet*, 14 How. 328; *Hinckley v. Morton*, 103 U. S. 764. A second writ of error brings up nothing but the proceedings subsequent to the mandate. *Roberts v. Cooper*, 20 How. 481; *Hinckley v. Morton*, 103 U. S. 764; *Ames v. Quimby*, 106 Id. 342; *Clark v. Keith*, Id. 464. The granting or refusal to grant a certificate of reasonable cause on a seizure is not a final judgment, being no part of the original cause, but is a collateral matter arising after such judgment. *United States v. Abatoir Place*, 106 U. S. 160. A refusal to grant an *exoneretur* on a bail bond, being addressed to the discretion of the court, is not a final judgment (*Morsell v. Hall*, 13 How. 215); nor is a refusal of a judge, on a suit by the government against a public debtor, to order the jury to certify the amount due such debtor on a set-off claimed by him, as such certificate could not be the foundation of a valid judgment against the United States. *Schaumburg v. United States*, 103 U. S. 667. A judgment ordering an executory process to issue to a mortgagee according to the laws of Louisiana, is equivalent to a judgment *nisi*, and is not final. *Levy v. Fitzpatrick*, 15 Pet. 172. An order of a circuit court directing a verdict of a jury on an issue sent to it from the Orphan's Court of Maryland, to be certified to such court, is not a final judgment. *Van Ness v. Van Ness*, 6 How. 68; *s. p. Brown v. Wiley*, 4 Wall. 165.

A party to an action who has received a discharge in bankruptcy pending an action, cannot bring a writ of error. *Herndon v. Howard*, 9 Wall. 664; *Knox v. Exchange Bank*, 12 Wall. 379. Where, pending a writ of error, subsequently dismissed, the defendant in error dies, and the other side wishes a new writ, application should be made to the court below to revive the suit in the name of the representatives of the deceased. *McClane v. Boon*, 6 Wall. 244. In a judicial proceeding of confiscation, under the acts of Congress of Aug. 6, 1861, and July 17, 1862, the person whose property is seized can prosecute a writ of error, though not a claimant in the court below. *McVeigh v. United States*, 11 Wall. 259; *Miller v. United States*, Id. 268. A decision of a Supreme Court of a Territory dismissing a writ of error because of failure to docket an appeal, is not a final judgment, the remedy in such case being by mandamus. *Insurance Co. v. Comstock*, 16 Wall. 258; *Railroad Co. v. Wiswall*, 23 Id. 507; *Harrington v. Holler*, 111 U. S. 796; *Ex parte Bradstreet*, 7 Pet. 647; *Ex parte Newman*, 14 Wall. 165; *Ex parte Railway Co.*,



101 U. S. 720. A decision that a proceeding be finally stayed is not a final judgment ; but the remedy in such a case is by mandamus. *Livingston v. Dorgenois*, 7 Cranch, 577. A writ of error will not lie to restore an attorney disbarred when the court has exceeded its jurisdiction ; but the remedy is by mandamus. *Ex parte Robinson*, 19 Wall. 505. For decisions from particular courts held not reviewable, see *Mountz v. Hodgson*, 4 Cranch, 324 ; *Phillips v. Preston*, 5 How. 278 ; *Nicholls v. Hodges*, 1 Pet. 562 ; *West v. Smith*, 8 How. 402 ; *Miles v. United States*, 103 U. S. 304.

*"Matter in dispute."*—The limitation as to amount applies to suits by the United States, except in cases under § 699. *United States v. Broadhead*, 127 U. S. 212. The purpose of Congress was to make the rule precise and definite. Ordinarily the value appears in the pleadings and judgment. Where the recovery of specific property, real or personal, is claimed, affidavits of value are permitted. *Williamson v. Kincaid*, 4 Dall. 20 ; *Course v. Stead*, Id. 22 ; *United States v. The Union*, 4 Cranch, 216 ; *Elgin v. Marshall*, 106 U. S. 580. The act is to be construed with strictness and vigor. *Elgin v. Marshall*, *supra*. The jurisdiction of the Supreme Court depends upon the matter in dispute in it, and not in the court below. *Hilton v. Dickinson*, 108 U. S. 165 ; *Dows v. Johnson*, 110 Id. 223. Jurisdictional amount, if determined by judgment or decree, is fixed at rendition, and not at the time of the writ of error, and neither interest on the judgment nor costs of suit can enter into the computation. *Bank v. Daniel*, 12 Pet. 52 ; *Walker v. United States*, 4 Wall. 164 ; *Knapp v. Banks*, 2 How. 73 ; *Western Union Tel. Co. v. Rogers*, 93 U. S. 566 ; *Railroad Co. v. Trook*, 100 Id. 112 ; *Street v. Ferry*, 119 Id. 385. And after the Supreme Court has obtained jurisdiction, no subsequent change in the value of the matter in controversy can oust the jurisdiction. *Cooke v. United States*, 2 Wall. 218. The amount of the judgment, and not of the verdict, determines the jurisdiction. *New York R. Co. v. National Bank*, 118 U. S. 608. When property condemned is in value more than \$5000, but, after deducting duties, is less than \$5000, duties being not due at the rendition of the decree, the value of the property governs. *United States v. 84 Boxes of Sugar*, 7 Pet. 453. It must appear by the record, or otherwise, that the value of the matter in dispute exceeds \$5000. *Parker v. Morrill*, 106 U. S. 1. A claim for less than \$5000, "and upwards," is too indefinite (*Olney v. The Falcon*, 17 How. 19) ; and if a party does not claim in his pleadings an amount necessary for an appeal, he cannot appeal, although the evidence may show that he is entitled to an amount sufficient to give jurisdiction (*Agnew v. Dorman*, Taney, 386) ; and in admiralty interest on the claim cannot be allowed unless claimed. *Udall v. The Ohio*, 17 How. 17 ; *Olney v. The Falcon*, Id. 19 ; *The Rio Grande*, 19 Wall. 178. A stipulation of the parties that judgment may be entered for a sum over \$5000, in an action on a money demand, in contradiction of the pleadings, and made to give the Supreme Court jurisdiction, cannot give it jurisdiction. *Webster v. Buffalo Ins. Co.*, 110 U. S. 386, 388 ; *Gruner v. United States*, 11 How. 163. The required valuation is limited to the matter in dispute in the particular suit ; any estimate of value as to any matter not actually the subject of the suit is to be excluded ; nothing can be added by reason of the probative force of the judgment itself in some subsequent proceeding, nor the contingent loss or damage which one party may sustain. *Ross v. Prentiss*, 3 How. 772 ; *Elgin v. Marshall*, 106 U. S. 578 ; *Bruce v. Manchester*, 117 Id. 514. If jurisdiction is invoked because of the collateral effect a judgment may have in another action, it must appear that the judgment conclusively settles the rights of the parties in a matter actually in dispute, the sum or value of which exceeds the required amount. *Troy v. Evans*, 97 U. S. 1. See *New Jersey Zinc Co. v. Trotter*, 108 U. S. 564. The matter in dispute must be money, or some rights the value of which in money can be calculated and ascertained. *Barry v. Mercein*, 5 How. 103 ; *Pratt v. Fitzhugh*, 1 Black, 271 ; *DeKrafft v. Barney*, 2 Id. 704 ; *Potts v. Chumasero*, 92 U. S. 358, 361 ; *Youngstown*



*Bank v. Hughes*, 106 Id. 524. The plaintiff in error must show that the amount is sufficient to give jurisdiction. *Hogan v. Foison*, 10 Pet. 160; *Johnson v. Wilkins*, 116 U. S. 392; *Wilson v. Blair*, 119 Id. 387. Where there is no distinct statement of the value of the property in controversy, affidavits as to the value of the property are permitted (*Whiteside v. Haselton*, 110 U. S. 296; *Williamson v. Kincaid*, 4 Dall. 20; *Course v. Stead*, Id. 22); but where the value is stated in the pleadings, or other proceedings below, affidavits cannot be received to prove a different value to give or defeat jurisdiction. *Richmond v. Milwaukie*, 21 How. 391; *Dodge v. Knowles*, 114 U. S. 430. They cannot be received after the cause is dismissed for want of jurisdiction. Id. After a reversal by the Supreme Court evidence will not be received that the matter in dispute is not enough. *Dodge v. Knowles*, *supra*. A finding of a court that the amount in controversy exceeded \$5000 cannot be controlled by affidavits that its value is less than \$5000. *Zeigler v. Hopkins*, 117 U. S. 689. Where the judgment of the court below was on an amended petition, the amount in such amended petition, and not in the original petition, determines the jurisdiction of the Supreme Court. *Washer v. Bullitt County*, 110 U. S. 562. Where a plaintiff before trial discontinues as to a part, the part remaining is the matter in dispute. *Opelika v. Daniel*, 109 U. S. 108. Where the plaintiff in open court, by permission of court, remits all the verdict in excess of \$5000, and judgment is entered for that sum and costs, the Supreme Court has no jurisdiction. *Thompson v. Butler*, 95 U. S. 694; *Alabama Ins. Co. v. Nichols*, 109 Id. 232. A court may refuse to permit a verdict to be reduced by a plaintiff on his own motion; and if the object is to deprive the appellate court of jurisdiction in a meritorious case, it is to be presumed that it will not be done. If, however, the reduction is permitted, the errors in the record are shut out from re-examination where the jurisdiction depends upon the amount in controversy. *Thompson v. Butler*, 95 U. S. 696. If a *remittitur* is not entered until after judgment, the case would have been different, and if made without the defendant's assent more like *Kanouse v. Martin*, 15 How. 198, where the declaration having been amended after steps taken to transfer the case, it was held that jurisdiction could not be thus defeated. *Thompson v. Butler*, *supra*; *New York R. Co. v. National Bank*, 118 U. S. 608. A judgment for \$5000 "in coin" is only \$5000, in determining jurisdiction. *Thompson v. Butler*, *supra*.

There is no jurisdiction where the amount in dispute is exactly \$5000 (*Walker v. United States*, 4 Wall. 163; *Western Union Tel. Co. v. Rogers*, 93 U. S. 565); nor where of the plaintiff's claim of more than \$5000 the defendant admits his liability for a portion, leaving the remainder disputed by him of less than \$5000. *Gray v. Blanchard*, 97 U. S. 564; *Hilton v. Dickinson*, 108 Id. 165; *Jenness v. National Bank*, 110 Id. 52; *Tintsman v. National Bank*, 100 Id. 6; *Wabash R. Co. v. Knox*, 110 Id. 304. Thus, when the plaintiff below sues for \$5000 or more, and recovers nothing, or only a sum, which, being deducted from the amount or value sued for, leaves a sum equal to or more than the jurisdictional limit for which he failed to get a judgment or decree, the Supreme Court has jurisdiction (*Hilton v. Dickinson*, 108 U. S. 175); but not where such sum remaining is less than \$5000. *Dows v. Johnson*, 110 U. S. 223. It has no jurisdiction of a writ where the judgment is for the plaintiff in a replevin suit for a portion, leaving a remainder less in value than \$5000, and he appeals. *Pierce v. Wade*, 100 U. S. 444.

The whole record is examined. *Webster v. Insurance Co.*, 110 U. S. 386; *Bradstreet Co. v. Higgins*, 112 Id. 227; *Bowman v. Railway Co.*, 115 Id. 613. Until it is in some way shown by the record that the sum demanded is not the matter in dispute, the sum demanded will govern; but when it is shown that the sum demanded is not the real matter in dispute, the sum shown, and not the sum demanded, will prevail. *Lee v. Watson*, 1 Wall. 337; *Schacker v. Hartford Fire Ins. Co.*, 93 U. S. 241; *Gray v. Blanchard*, 97 Id. 564; *Tintsman v. National Bank*, 100 Id. 6; *Banking Assoc. v. Insurance Assoc.*, 102



Id. 121; *Hilton v. Dickinson*, 108 Id. 174; *Bowman v. Chicago Ry. Co.*, 115 Id. 613. The amount as stated in the body of the declaration, and not merely the damages alleged, or the prayer for judgment at its conclusion, determines the jurisdiction. *Lee v. Watson*, 1 Wall. 337; *Hilton v. Dickinson*, 108 U. S. 174. In an action on an official bond the value of the matter in dispute is the amount due for the breach of the condition, and not the penal sum (*United States v. McDowell*, 4 Cranch, 316; *United States v. Hill*, 123 U. S. 683); while in a suit of replevin for goods distrained for rent, the amount for which avowry is made determines the jurisdiction, yet if the writ be issued to try the title to property, the value of the article replevied determines the matter in dispute. *Peyton v. Robertson*, 9 Wheat. 527. The averment of value when a plaintiff sues for property shows the amount in dispute, as much as an averment of debt or damage does when he sues for money. *Bennett v. Butterworth*, 8 How. 129; *Parker v. Latey*, 12 Wall. 390. No change in the value subsequent to the judgment can oust the jurisdiction. *Cooke v. United States*, 2 Wall. 218. The value of the matter in dispute is to be determined by the whole record, including counter-claims, and not by the *ad damnum* alone. *Hilton v. Dickinson*, 108 U. S. 165; *Bradstreet Co. v. Higgins*, 112 Id. 228; *Washington Market Co. v. Hoffman*, 101 Id. 112; *Dushane v. Benedict*, 120 Id. 630. Where a judgment or decree against a defendant, who pleads no counter-claim or set-off, and asks no affirmative relief, is brought on appeal or writ of error to the Supreme Court, the amount in controversy is the amount of the judgment or decree sought to be reversed. *Henderson v. Wadsworth*, 115 U. S. 276; *Gordon v. Ogden*, 3 Pet. 33; *Oliver v. Alexander*, 6 Id. 143; *Knapp v. Banks*, 2 How. 73; *Rich v. Lambert*, 12 Id. 347; *Walker v. United States*, 4 Wall. 163; *Merrill v. Petty*, 16 Id. 338; *Troy v. Evans*, 97 U. S. 1; *Hilton v. Dickinson*, 108 Id. 165; *Bradstreet Co. v. Higgins*, 112 Id. 227; *National Bank v. Redick*, 110 Id. 224; *Elgin v. Marshall*, 106 Id. 578. The Supreme Court has jurisdiction of a writ of error or an appeal by a defendant, where the recovery against him is as much in amount or value as is needed to bring a case here; and when, having pleaded a set-off or counter-claim for enough to give jurisdiction, he is defeated on his plea altogether, or recovers only an amount, or value, which being deducted from his claim as pleaded leaves enough not allowed to give jurisdiction. *Hilton v. Dickinson*, 108 U. S. 175. It has jurisdiction over a writ of error sued out by a defendant in an action brought for the recovery of rent less in amount than the jurisdictional limit, but in which the tenant put in a counter-claim, insisting on an equitable right to a conveyance of the land which exceeded the limit. *Stinson v. Dousman*, 20 How. 461; *Elgin v. Marshall*, 106 U. S. 581. On a writ of error from a Territory brought by the defendant where the plaintiff obtains judgment for \$969.63, the Supreme Court has no jurisdiction, although there is a counter-claim of less than \$1000, but more than enough added to \$969.63 to make \$1000. The court held that if error were held on this branch of the claim, it would only go in reduction of the plaintiff's judgment of \$969.63. *Nagle v. Rutledge*, 100 U. S. 675. The defendant may recover on his set-off, although the plaintiff is defeated on his claim, if the State practice allows it. *Partridge v. Insurance Co.*, 15 Wall. 580. On an appeal by the defendant who denies the plaintiff's claim, and claims a set-off which is not allowed, the matter in dispute is the difference between the claim established by the plaintiff and the amount of the set-off claimed by the defendant, *i. e.*, the amount of the judgment plus the amount of the set-off claimed. *Ryan v. Bindley*, 1 Wall. 67; *Hilton v. Dickinson*, 108 U. S. 173; *Bradstreet Co. v. Higgins*, 112 Id. 227.

When distinct causes of action, in favor of distinct parties, are united in one suit, and distinct judgments are rendered for or against the several parties, their judgments cannot be joined to give jurisdiction. *Ex parte B. & O. R. Co.*, 106 U. S. 5; *Farmers' Loan & Trust Co. v. Waterman*, Id. 265; *Adams v. Crittenden*, Id. 576; *Schwed v. Smith*, Id. 188; *Hawley v. Fairbanks*, 108 Id. 548; *Tupper v. Wise*, 110 Id. 399;



*Henderson v. Wadsworth*, 115 Id. 276. The amount due several creditors in a creditors' bill cannot be joined. *Seaver v. Bigelows*, 5 Wall. 208; *Schwed v. Smith*, 106 U. S. 188. Where the land in a particular district was assessed for taxation, each owner being liable only for the amount with which he was separately charged, and the bill of complaint filed by a number of them praying for an injunction was dismissed, and they appealed, it was held that the several amounts could not be joined. *Russell v. Stansell*, 105 U. S. 303. The court has no jurisdiction where the value of the matter in dispute actually determined against the parties appealing exceeds the jurisdictional limit, but is divided into distinct claims belonging to different parties, no one of which is sufficient, although the decision in one is necessarily the same in all, because rendered upon precisely the same state of facts. *Russell v. Stansell*, 105 U. S. 303; *Elgin v. Marshall*, 106 Id. 582. The court will not take jurisdiction where the value of the premises, the title to which was involved in the action, was less than the limit, although they were part of a larger tract held under one title, on which the recovery in ejectment had been obtained against several tenants whose rights all depended on the same questions. *Grant v. M'Kee*, 1 Pet. 248; *Elgin v. Marshall*, 106 U. S. 581. In a suit brought by A. against B. and several persons who had purchased certificates of him, which were claimed by A., where there is no pretence of a joint obligation, the amount claimed against each cannot be united to give jurisdiction. *Paving Co. v. Mulford*, 100 U. S. 147. On a writ to compel a tax collector to collect a single tax which has been levied for the joint benefit of all the relators, and in which they have a common and undivided interest, the amount in controversy is the whole tax, and if that is over \$5000 the Supreme Court has jurisdiction on appeal. *Shields v. Thomas*, 17 How. 3, 5; *The Connemara*, 103 U. S. 754; *Davies v. Corbin*, 112 Id. 40. Where a complaint in an action of ejectment alleges a joint entry and ouster, and the answer does not set up separate claims to distinct parcels of the land by the several defendants, and the judgment for recovery is against all the defendants jointly, the value of the entire land is the amount in controversy (*Friend v. Wise*, 111 U. S. 797); but where a plaintiff in ejectment put in possession of the whole is afterwards forced to restore a portion, the value of that portion is the matter in dispute. *Grant v. M'Kee*, 1 Pet. 248. Where the sole question at issue is the legal title to the whole fund, as between a trustee under a deed of trust and a judgment creditor, and there is no question of payment to, or distribution among the cestuis que trust, the value of the fund is the amount in controversy, and not the amount due the several cestuis que trust. *Ex parte B. & O. R. Co.*, 106 U. S. 5; *Freeman v. Dawson*, 110 Id. 269.

In a suit for partition the value of the part in controversy, and not of the whole property sought to be partitioned, determines the value. *McCarthy v. Provost*, 103 U. S. 673. If, in a trial for trespass *quare clausum*, to which was joined a count in trespass *de bon. asp.*, the defendant pleads the general issue, there is no title in dispute, and the value of the land cannot be taken into account. *New Jersey Zinc Co. v. Trotter*, 108 U. S. 565, following *Elgin v. Marshall*, 106 U. S. 578. In assumpsit on a policy of insurance for \$2000 the damages were placed at \$3000; but since it was apparent from the whole record that there could have been no recovery for more than \$1400, and interest from a certain period, which did not amount to \$2000, it was held that the Supreme Court had no jurisdiction. *Shacker v. Hartford Fire Ins. Co.*, 93 U. S. 241. An appeal in a suit against a person to remove him from an office may be maintained if the salary during the term of office would exceed \$5000. *Columbian Ins. Co. v. Wheelwright*, 7 Wheat. 534; *United States v. Addison*, 22 How. 174; *Smith v. Whitney*, 116 U. S. 173. Except in special cases, the United States Supreme Court has no jurisdiction to review judgments or decrees of the circuit or district court arising under the Constitution, unless the amount in dispute exceeds \$5000. *Adams v. Crittenden*, 106 U. S. 576. A case not involving a sufficient



jurisdictional amount will be dismissed, although accompanied by a certificate of division of opinion, unless such certificate presents a proper case under § 697. *Waterville v. Van Slyke*, 116 U. S. 699.

SECT. 692. — See note, § 691. 18 St. 316 changes the \$2000 here named to \$5000. See preceding note. As the cited provision of 1864, providing that appeals from the district courts in prize cases shall be directly to the Supreme Court, had the effect to cut off the permanent provision for prize appeals from the circuit court, the latter is here omitted. 1 Com. D. 400. The review by the Supreme Court, upon appeal, of the judgments and decrees entered upon the findings in admiralty and maritime causes, referred to in St. Feb. 16, 1875, c. 77 (note, § 631 *ante*), is, by § 1, limited to the questions of law arising upon the record, and to such rulings of the circuit court, excepted to at the time, as may be presented by a bill of exceptions prepared as in actions at law. The act of March 3, 1875 (pp. 94, 124, *ante*), did not affect this section. *Whittitt v. Railroad Co.*, 103 U. S. 770. The Supreme Court has jurisdiction over an appeal from a decree of a circuit court, though entered under the supervision and direction of the district judge, who under § 614 had no right to vote on the decree. *Baker v. Power*, 124 U. S. 167. Consent cannot give jurisdiction. *Washington County v. Durant*, 7 Wall. 694; *The Lucy*, 8 Id. 307. And when it appears that the appellant has purchased the appellee's interest in the decree appealed from, the case will be dismissed. *Cleveland v. Chamberlain*, 1 Black, 419. The Supreme Court has power to reverse a decision of a circuit court in a case of which the latter had no jurisdiction. *Morris's Cotton*, 8 Wall. 507. As to the necessity of joining parties on appeal, see *Masterson v. Herndon*, 10 Wall. 416; *The Protector*, 11 Id. 82; *Germain v. Mason*, 12 Id. 259. A second appeal brings up only the proceedings subsequent to the mandate. *Supervisors v. Kennicott*, 94 U. S. 498. The Seventh Amendment does not apply to causes of equity and admiralty; and St. Feb. 16, 1875, does not affect § 633, as that section, allowing a writ of error from the circuit to the district court in civil actions where the matter in dispute exceeds the amount of \$50, applies only to the few common-law actions within the jurisdiction of the district courts. *United States v. Wonson*, 1 Gall. 5; *United States v. Fifteen Hogsheads*, 5 Blatch. 106; *Boyd v. Clark*, 13 F. R. 908. The jurisdiction of the Supreme Court upon appeal is statutory; and if some act of Congress does not authorize a case to be brought to it, it cannot take jurisdiction. *Butterfield v. Usher*, 91 U. S. 248.

A decree, to be final for the purposes of an appeal, must leave the case in such a condition that if there is an affirmance here the court below will have nothing to do but to execute the decree it has already entered. *Dainese v. Kendall*, 119 U. S. 53; citing *Bostwick v. Brinkerhoff*, 106 U. S. 3; *Grant v. Phoenix Insurance Co.*, Id. 429, 431; *St. Louis & I. M. & S. R. Co. v. Southern Express Co.*, 108 Id. 24, 28; *Ex parte Norton* Id. 237, 242; *Mower v. Fletcher*, 114 Id. 127. The decree must be final as to all matters within the pleadings. *Craighead v. Wilson*, 18 How. 201; *Winthrop Iron Co. v. Meeker*, 109 U. S. 184. A decree deciding the right of property in contest, and directing it to be delivered up by the defendant to the complainant, or directing its sale, or the payment of a certain sum of money to the complainant, which decree the complainant is entitled to have carried immediately into execution, is final, although there are accounts between the parties to be settled by a further decree. *Forgay v. Conrad*, 6 How. 201; *Ray v. Law*, 3 Cranch, 179; *Whiting v. U. S. Bank*, 13 Pet. 6; *Michaud v. Girod*, 4 How. 503; *Orchard v. Hughes*, 1 Wall. 73; *Milwaukie R. Co. v. Soutter*, 2 Id. 440; *Withenbury v. United States*, 5 Id. 821; *Thompson v. Dean*, 7 Id. 346; *Winthrop Iron Co. v. Meeker*, 109 U. S. 180; *Ex parte Norton*, 108 Id. 237. But this does not apply to cases where money is directed to be paid into court, or property delivered to a receiver, or property held in trust to be delivered to a new trustee, as such decrees are to preserve the subject-matter and keep it within the control of



the court. *Forgay v. Conrad*, 6 How. 204. A decree directing a receiver to pay into court a certain amount found due on the settlement of his account is final. *Hinckley v. Railroad Co.*, 94 U. S. 467. A decree dissolving an injunction, ordering a sale by trustees, and the bringing of the money into court, is a final decree (*Thomson v. Dean*, 7 Wall. 342; *Railroad Co. v. Bradleys*, Id. 577); but *quære*, if the decree had merely dissolved the injunction, thereby merely permitting a sale by the trustees. *Railroad Co. v. Bradleys*, *supra*. In a suit by stockholders to have set aside certain proceedings, and to have a receiver appointed, a decree granting such prayer is final, although the court "reserves such further directions as may be necessary to carry the decree into effect concerning costs, or as may be equitable and just," and there are accounts to be adjusted between the parties growing out of the proceedings of the defendants during the pendency of the suit. Here the money recovery is merely an incident; whereas in suits by patentees to establish their patents and recover for the infringement, the money recovery is a part of the subject-matter. *Winthrop Iron Co. v. Meeker*, 109 U. S. 180. In a suit brought to compel a railroad company to do an express company's business upon the payment of lawful charges, a decree requiring the carriage, fixing the compensation, adjudging costs, and awarding execution, is a final decree, although leave is given to either party to apply at any time in the future for a modification of the rate of compensation (*St. Louis R. Co. v. Southern Express Co.*, 108 U. S. 24); and although a controversy about the rate of compensation during the pendency of the suit has been referred to a master, as such matters are mere incidents of the suit. Id.; *Missouri R. Co. v. Dinsmore*, 108 U. S. 30. A decree that the equity of the case is with the complainant, granting a perpetual injunction, and adjudging costs, is final, although leave is given either party to apply at the foot of the decree for further orders necessary for the due execution of the decree, or such "as may be required in relation to any matter not finally determined by it," inasmuch as such quoted words are added merely as a precaution. *French v. Shoemaker*, 12 Wall. 98. A decree ordering a sum to be paid into court within a limited time, "or, in default thereof, the court will appoint a receiver," is final, as the order is positive, with a warning of a certain measure to compel obedience (*Wabash Canal v. Beers*, 1 Black, 54); but a decree that a judgment be entered if an appeal is not taken, is not final. *Ex parte Sawyer*, 21 Wall. 235. Where a plaintiff seeks alternative relief, and a decree decides against certain of the alternatives, but refuses to decide on one on account of lack of necessary parties, a decree on a bill afterwards brought with such necessary parties is the only final decree. *Crosby v. Buchanan*, 23 Wall. 453. A decree of foreclosure and sale of mortgaged premises is final, as the return and confirmation of the sale are but a mode of executing the original decree. *Whiting v. U. S. Bank*, 13 Pet. 15; *Michaud v. Girod*, 4 How. 503; *Forgay v. Conrad*, 6 Id. 204; *Bronson v. Railroad Co.*, 2 Black, 524; *Ray v. Law*, 3 Cranch, 179. But to authorize a decree of sale without consent, the amount due on the debt must be ascertained. *Barnard v. Gibson*, 7 How. 650; *Crawford v. Points*, 13 Id. 11; *Humiston v. Stainthorp*, 2 Wall. 106; *Grant v. Insurance Co.*, 106 U. S. 431; *Railroad Co. v. Swasey*, 23 Wall. 410. The order of seizure and sale called "executory process" in Louisiana is equivalent to a decree of foreclosure and sale, and is a final decree. *Marin v. Lalley*, 17 Wall. 14. A decree in a suit for the foreclosure of a railroad mortgage, fixing the compensation of trustees under the mortgage from the funds realized from the sale, is a final decree (*Williams v. Morgan*, 111 U. S. 684); so is a decree on a petition for an allowance of costs out of a fund in court. *Trustees v. Greenough*, 105 U. S. 531. A decree confirming a sale, if it is final, can be appealed from (*Blossom v. Railroad Co.*, 1 Wall. 655; *Butterfield v. Usher*, 91 U. S. 246; *Sage v. Railroad Co.*, 96 Id. 712); but a decree setting aside a sale and ordering another is not final (*Butterfield v. Usher*, 91 U. S. 248); yet a decree cutting off the equity of redemption, and passing the title subject to certain fixed trusts, is final. *Sage v. Railroad Co.*, *supra*. There may be appeals from an order



confirming a sale under a decree of foreclosure, although there is pending an appeal from the principal decree in the suit which ordered the sale. *Orchard v. Hughes*, 1 Wall. 73; *Blossom v. Railroad Co.*, Id. 657. An appeal lies from a decree distributing the proceeds of a sale under a foreclosure (*Chicago R. Co. v. Fosdick*, 106 U. S. 83); and from a decree distributing the proceeds, and directing the receiver to collect the available assets, and report at the next term, at which a decree is passed allowing him the amount collected. *Smith v. Woolfolk*, 115 U. S. 147; see *Young v. Smith*, 15 Pet. 287. Of two decrees, one declaring to whom a fund belongs, and the other declaring the amount due and appropriating that amount, the latter is the final decree. *Cushing v. Laird*, 15 Blatch. 219. As to appeals by intervenors, see *Savannah v. Jesup*, 106 U. S. 563. No appeal lies from the order of a circuit judge discharging a prisoner on *habeas corpus*. *Carper v. Fitzgerald*, 121 U. S. 87.

A decree of a circuit court affirming a decree of the district court, "with costs to be taxed," is, perhaps, a final decree (*Craig v. The Hartford*, McAll. 92; *Rubber Co. v. Goodyear*, 6 Wall. 153; *Silsby v. Foote*, 20 How. 290; *Wheeler v. Harris*, 13 Wall. 51); but where there is a second decree, after such a decree, declaring the amount due, including costs, such second decree will be regarded as the final decree. *Wheeler v. Harris*, *supra*. No appeal will lie where the act is a mere ministerial duty necessarily growing out of the decree which was being carried into effect. *Blossom v. Railroad Co.*, 1 Wall. 655. But there may be appeals from decrees of the circuit courts upon matters which arise after the case has been to the Supreme Court. Id. On a second appeal, proceedings subsequent to the first decision, which are erroneous and prejudicial to the appellant's rights as to matters not concluded by the original decree, are open to review. *Richards v. Mackall*, 112 U. S. 373; *Perkins v. Fourniquet*, 14 How. 328; *Hinckley v. Morton*, 103 U. S. 764; *Tyler v. Magwire*, 17 Wall. 253; *Supervisors v. Kennicott*, 94 U. S. 498. Inadvertent expressions in the opinion on a former appeal which were not material to the decision of the case are not binding. *Barney v. Railroad Co.*, 117 U. S. 228. Until the court below has acted on the mandate, and entered a final decree in pursuance thereof, there is no final decree from which there can be a second appeal. *Corning v. Troy Factory*, 15 How. 451. A decree on the execution of a mandate ordering a decree to be entered for interest due and secured by mortgage; and that the amount of money in the hands of a receiver applicable thereto be ascertained and applied; and that if such money was not sufficient, then to ascertain the balance due; and if such balance be not paid within a certain time, then to enter an order directing a sale, is final, from which a party aggrieved by error in finding the amount of interest due, or in omitting to ascertain and apply the amount in the receiver's hands, can appeal (*Milwaukie R. Co. v. Soutter*, 2 Wall. 443; *Perkins v. Fourniquet*, 14 How. 330); but there is no appeal from a decree entered in accordance with the mandate of the Supreme Court (*Humphrey v. Baker*, 103 U. S. 736; *McMicken v. Perin*, 20 How. 133); or from an order which is nothing more than the entry of the mandate. *United States v. Fremont*, 18 How. 30.

The following decrees are not final:—

The reasons for a decree are a part of a decree, and cannot be appealed from. *Corning v. The Troy Iron Factory*, 17 How. 451. An order fixing terms for amendments is not a final decree. *Sheets v. Selden*, 7 Wall. 416. A cross bill is a mere auxiliary, and any decision thereon is not a final decree. *Ayres v. Carver*, 17 How. 591; *Ex parte Railway Co.*, 95 U. S. 225. No appeal lies from a refusal of leave to file a cross-bill. *Indiana R. Co. v. Insurance Co.*, 109 U. S. 168. A decree affirming an order refusing to grant, or refusing to dissolve an injunction, is not final (*Gibbons v. Ogden*, 6 Wheat. 448; *Reddall v. Bryan*, 24 How. 420; *Verden v. Coleman*, 18 Id. 86; *Norton v. Hood*, 12 F. R. 763); nor, on a bill to enjoin a judgment, is a decree not dismissing the bill, nor making the injunction perpetual, but continuing it and granting a new trial (*Lea v. Kelly*, 15 Pet. 213); nor



a decree making an injunction perpetual as to a certain amount, and continuing the case for further consideration as to the remainder (*Brown v. Swann*, 9 Pet. 1); nor a decree dissolving an injunction without dismissing the bill (*Young v. Grundy*, 6 Cranch, 51; *McCullum v. Eager*, 2 How. 61; *Hiriart v. Ballou*, 9 Pet. 167; *Moses v. Mayor*, 15 Wall. 390; *Thomas v. Wooldridge*, 23 Id. 283); but a decree dissolving an injunction ordering a sale by trustees, and the bringing of the money into court, is final (*Thomson v. Dean*, 7 Wall. 342; *Railroad Co. v. Bradleys*, Id. 577); *quære*, however, if the decree had merely dissolved the injunction, thereby merely permitting a sale. *Railroad Co. v. Bradleys*, *supra*. In a suit alleging a certain community of acquets and gains in certain property, and praying an account and payment of the amount due, a decree establishing such a community, referring to a master for an account, and reserving all other matters until the coming in of the report, is not final. *Perkins v. Fourniquet*, 6 How. 208. A decree setting aside a deed of trust made by a bankrupt before his bankruptcy, directing the trustees under the deed to deliver over to the assignee all the property remaining in their hands, but without deciding how far the trustees were liable for money paid to the creditors, and directing an account to be taken of such sums so paid, in order to a final decree, is not final. *Pulliam v. Christian*, 6 How. 209. A decree establishing the rights of certain parties to an estate, and referring to a master to take an account of the amount expended by each on the property, and the amount received by each, and the balance due each, is not final. *Craighead v. Wilson*, 18 How. 201. In *Michoud v. Girod*, 4 How. 503, the question of jurisdiction was not raised, and in *Forgay v. Conrad*, 6 How. 201, the circumstances were peculiar. A decree referring to a master to take an account in which he has more than ministerial duties is not final (*Beebe v. Russell*, 19 How. 286; *Ogilvie v. Insurance Co.*, 2 Black, 540); but if the duties are ministerial the decree is final. *Id.* In an action to settle an estate a decree accepting a master's report is not final. *Young v. Smith*, 15 Pet. 287. See also as to cases referred to a master, *Parsons v. Robinson*, 122 U. S. 112; *Burlington R. Co. v. Simmons*, 123 Id. 52; *Jones v. Craig*, 127 Id. 213; *Grant v. Phoenix Ins. Co.*, 106 Id. 429. But see *Thomson v. Dean*, 7 Wall. 346, that a decree is final, although the bill may be retained for an adjusting by further decree the accounts between the parties pursuant to the decree. A decree referring matters to a master in a patent case to ascertain the amount of damage by infringement, in which the bill is not dismissed and there is no decree for costs, is not final (*Barnard v. Gibson*, 7 How. 657; *Humiston v. Stainthorp*, 2 Wall. 106); as the amount of damages is a part of the subject-matter in such cases, and not merely an incident, as in equity cases. *Winthrop Iron Co. v. Meeker*, 109 U. S. 180; and compare *Chace v. Vasquez*, 11 Wheat. 429. A decree ordering that a fund in court be distributed, and that the executor pay into court such further sums as he may collect, to be distributed under direction of the court, is not final. *Young v. Smith*, 15 Pet. 287; see *Smith v. Woolfolk*, 115 U. S. 147. A decree distributing the proceeds in court, and directing the receiver to collect the available assets, and report at the next term, is final, where only a small amount is collected by the receiver, which by a decree he is allowed to retain. *Smith v. Woolfolk*, 115 U. S. 147. An order of court awarding process to obtain possession of land purchased at a sale under order of court, is merely a proceeding for carrying the decree into execution, and is not final. *Callan v. May*, 2 Black, 541. There can be no appeal from a refusal of a court to open a former decree. *Brockett v. Brockett*, 2 How. 238; *Wylie v. Cox*, 14 Id. 1; *McMicken v. Perin*, 18 Id. 509; *Terry v. Commercial Bank*, 92 U. S. 454; *Cambuston v. United States*, 95 Id. 285; see also cases under § 691, on motion for new trial. A decree on a petition in a foreclosure suit that a writ of assistance be revoked, is not a final decree. *Hentig v. Page*, 102 U. S. 219. A decree determining the validity of a mortgage, and not ordering a sale, but continuing the case for further orders, is not final. *Burlington R. Co. v. Simmons*, 123 U. S. 52. A decree in a partition suit, referring to a master to proceed to a partition according to law,



under the direction of the court, is not final. *Green v. Fisk*, 103 U. S. 518. A decree fixing the domicil of a testator and holding that there is jurisdiction to try the cause is not final. *Benjamin v. Dubois*, 118 U. S. 46. An order remanding a question to a subsequent term for inquiry into the facts is not final. *Grant v. Phoenix Ins. Co.*, 121 U. S. 118. The mere entry of a decree in pursuance of the mandate is not a decree which can be appealed from. *Humphrey v. Baker*, 103 U. S. 736; *United States v. Fremont*, 18 How. 30. An order of attachment for a refusal to obey a mandate is not final. *McMicken v. Perin*, 20 How. 133.

*Admiralty.*—If the decrees of a provisional court are by statute made the decrees of a circuit court, an appeal will lie. *The Grapeshot*, 7 Wall. 563; 9 Id. 129. The Supreme Court has no jurisdiction where the circuit court entertained an appeal before a final decree of the district court. *Mordecai v. Lindsay*, 19 How. 199; *Montgomery v. Anderson*, 21 Id. 386. The findings of fact in admiralty causes have the same effect as a special verdict in an action at law. *The Maggie J. Smith*, 123 U. S. 349. See note, § 631. It is immaterial that the case had been appealed from the district to the circuit court. *United States v. Nourse*, 6 Pet. 470.

The following decrees are final:—

A final decree *pro forma* (*The Oregon v. Rocca*, 18 How. 570); or a decree reading that a decree “be” entered (*Craig v. The Hartford*, McAll. 91); a decree refusing to order a sale as prayed for by one of two part-owners who have equal interests. *Davis v. The Seneca*, Gilpin, 31. In a prize cause, where several libels are consolidated on motion, a decree dismissing a claim and ordering execution for costs against the claimant is final. *Withenbury v. United States*, 5 Wall. 821. In such a cause, a decree awarding a restitution in favor of a claimant of a part of the property libelled, is a final decree from which the libellant can appeal. *Withenbury v. United States*, 5 Wall. 821. That a decree “with costs to be taxed” is final, see *Craig v. The Hartford*, McAll. 91; *Rubber Co. v. Good-year*, 6 Wall. 153; *Silsby v. Foote*, 20 How. 290; *Wheeler v. Harris*, 13 Wall. 51. But a decree by a circuit court in an admiralty suit, “affirming with costs” a decree of a district court, is not a final decree. *The Lucille*, 19 Wall. 73.

The following decrees are not final:—

An order or decree dismissing a libel *in rem*, for want of prosecution, because it is no bar to another suit (*The Merchant*, 4 Blatch. 105); a decree adjudging the liability of garnishees in an admiralty suit. *Cushing v. Laird*, 107 U. S. 76. A decree in a suit *in personam* for damages, awarding damages on a decree on a libel awarding restitution, with costs and damages, and ordering commissioners to determine the amount, is not final until the commissioners have made their report, because there may still be an appeal from the damages. *The Palmyra*, 10 Wheat. 502; *Chace v. Vasquez*, 11 Id. 429; compare *Barnard v. Gibson*, 7 How. 657; *Humiston v. Stainthorp*, 2 Wall. 106; *Winthrop Iron Co. v. Meeker*, 109 U. S. 180. A decree adjudging a certain gross sum due, subject to modification upon the report of a commissioner, is not final. *The Yuba*, 4 Blatch. 314. There is no final decree until all the claims on the money in the registry are ascertained and adjusted, and the proceeds distributed. *Montgomery v. Anderson*, 21 How. 388. To make a decree in a salvage case final, all the charges and expenses should be ascertained, the salvage apportioned, and the rights of each salvor definitely fixed so that he can appeal. A decree awarding a certain rate of salvage out of the proceeds, after deducting charges and expenses, and fees of court, is not final. *The New England*, 3 Sumner, 495. A decree that a judgment be entered if an appeal is not taken is not final if an appeal is taken; the decree becomes thereby inoperative. *Ex parte Sawyer*, 21 Wall. 235. A decree by a circuit court in an admiralty suit, merely “affirming with costs” a decree of a district court, is not a final decree. *The Lucille*, 19 Wall. 73. A decree refusing to quash an execution is not final. *The Elmira*, 16 F. R. 133. See also § 691.



*"Matter in Dispute."*—See *Gibson v. Shufeldt*, 122 U. S. 27. The value of the matter in dispute is determined at the time of the decree, and not at the time of the appeal. *Street v. Ferry*, 119 U. S. 385. And in admiralty cases interest cannot be added to the decree unless specially claimed in the libel. *Udall v. The Ohio*, 19 How. 17; *The Rio Grande*, 19 Wall. 178. The requisite amount in dispute must exist even where a Federal question is present. *Adams v. Crittenden*, 106 U. S. 576. An appeal from a decree of a circuit court dismissing a bill in equity filed by a bankrupt to enjoin an auditor from proceeding to compel its cashier to testify and produce the bankrupt's books, on the ground that it would unlawfully expose its business, diminish public confidence and its deposits and the value of its franchise, will be dismissed for want of jurisdiction, because the amount in dispute cannot be measured. *Youngstown Bank v. Hughes*, 106 U. S. 524. An appeal, allowed after a contest as to the value of the matter in dispute, will not be dismissed simply because upon examination of all the affidavits, the Supreme Court may be of the opinion that possibly the estimates acted upon below were too high. *Gage v. Pumpelly*, 108 U. S. 164. Where the plaintiff below recovers less than \$5000, and there is no set-off, or counter-claim, except to reduce the amount of the recovery, the Supreme Court has no jurisdiction of an appeal from a decree by the defendant below, who claims that under the rule of liability established against him below, the decree should have been for more than \$5000, so that he could appeal and show that he was not liable at all. *Lamar v. Micou*, 104 U. S. 465. Where the value of the matter in dispute, being one of the questions necessary to the determination of the cause, was decreed to be just \$5000, the appellant, by whose evidence as defendant below the amount claimed had been reduced to that sum, cannot show, by affidavits contradicting the evidence of his own witnesses below, that the real value is more than \$5000. *Talkington v. Dumbleton*, 123 U. S. 745. In *Zeigler v. Hopkins*, 117 U. S. 689, affidavits of value were permitted, as the finding of the court below as to value was not a material question, but was rather to determine the value of the matter in dispute for the purpose of an appeal, as in *Wilson v. Blair*, 119 U. S. 387. A case dismissed for want of a sufficient amount in dispute was reinstated on affidavits showing a sufficient amount. *Glacier Mining Co. v. Willis*, 127 U. S. 471. See *Richmond v. Milwaukie*, 21 How. 391. The rule is well settled that distinct decrees for or against distinct parties on distinct causes of action, or on a single cause of action in which there are distinct liabilities, cannot be joined, to give the United States Supreme Court jurisdiction on appeal (*Seaver v. Bigelows*, 5 Wall. 208; *Ex parte B. & O. R. Co.*, 106 U. S. 5; *Schwed v. Smith*, Id. 188; *Farmers' Loan & Trust Co. v. Waterman*, Id. 265, 270; *Adams v. Crittenden*, Id. 576; *Hawley v. Fairbanks*, 108 Id. 543; *Fourth National Bank v. Stout*, 113 Id. 684; *Stewart v. Dunham*, 115 Id. 61, 64; *Ex parte Phoenix Insurance Co.*, 117 Id. 367; *Paving Co. v. Mulford*, 100 Id. 147; *Russell v. Stansell*, 105 Id. 303; *Oliver v. Alexander*, 6 Pet. 143; *Stratton v. Jarvis*, 8 Id. 4; *Spear v. Place*, 11 How. 522; *Rich v. Lambert*, 12 Id. 347); nor can a decree *in rem* and a decree *in personam*, where the two suits are not brought in same district, and are not consolidated and brought into one district. *Merrill v. Petty*, 16 Wall. 338. Where, in a suit by or against several, the matter in dispute is not on separate and distinct causes of action, but all claim under one and the same title, and have a common and undivided interest in the matter, the interest of all such parties determines the jurisdiction, although the decree after establishing the common right makes a division among the parties. *Shields v. Thomas*, 17 How. 3; *Market Co. v. Hoffman*, 101 U. S. 112; *The Connemara*, 103 Id. 754; *Ex parte B. & O. R. Co.*, 106 Id. 6; *Freeman v. Dawson*, 110 Id. 264; *Farmers' Loan & Trust Co. v. Waterman*, 106 Id. 270; *Davies v. Corbin*, 112 Id. 36. Thus where the respondent, as administrator, is decreed to pay a sum of money more than \$5000 to the representatives of the decedent, the share of each of whom is less than \$5000, the liability of the administrator is single



and entire, and he can appeal. *Shields v. Thomas*, 17 How. 3. On an appeal by the respondent in a suit by several, each on the same act of the respondent, where all joined in the bill which sought an injunction in favor of each, and a decree establishing the rights of each, the interest of all can be joined (*Market Co. v. Hoffman*, 101 U. S. 112); and on an appeal by a trustee for creditors from a decree awarding the trust property, in value over \$5000, to a judgment creditor, the whole matter in dispute is the title to the trust property, and the Supreme Court has jurisdiction, although the amount due any one creditor under such trust will not exceed \$5000. *Freeman v. Dawson*, 110 U. S. 269; *Rodd v. Heartt*, 17 Wall. 354. An appeal lies by a tax collector from a judgment on a *mandamus* obtained by the joint application of a number of judgment creditors ordering him to levy a tax of more than \$5000. *Davies v. Corbin*, 112 U. S. 36. The United States Supreme Court has no jurisdiction of an appeal in a suit by certain persons who filed a bill against a corporation to collect interest on certain bonds secured by a mortgage, where the interest sued for by both together does not amount to \$5000. *Bruce v. Manchester Railroad Co.*, 117 U. S. 514. An appeal from a decree on a bill brought by a creditor for his share of the assets of a debtor, in which other creditors intervene, will be maintained only as to creditors whose claim exceeds \$5000. *Fourth National Bank v. Stout*, 113 U. S. 684. A person having made an assignment in favor of his creditors, one of them in behalf of himself and such others as would unite with him filed a bill to set aside as fraudulent a previous conveyance in favor of A. Several creditors united as complainants. The bill was dismissed, and they appealed. Held, that the amount in dispute was their distributive shares thereof, which were less than \$5000. *Terry v. Hatch*, 93 U. S. 44; *Chatfield v. Boyle*, 105 Id. 231. As to the value in dispute in a suit to determine the validity of an assignment of property, see *Estes v. Gunter*, 121 U. S. 183. In a suit by creditors against a bankrupt, claims amounting to \$440,000, including a decree in favor of A. for \$23,000, and in favor of B. for \$88,000, were proved and allowed. There was realized about \$30,000, and a *pro rata* division was decreed. A. took a separate appeal from the allowance of B.'s claim, without joining any other party to the record with him as appellant, or any party as defendant except one Hatch. Held that the matter in dispute was not \$2000, being the difference between the amount to which A. was entitled under the decree, and what would be his *pro rata* share if B.'s claim were disallowed. *Terry v. Hatch*, 93 U. S. 44. On a bill in equity to enforce a sale of land to satisfy a lien under a trust deed, the amount of the debt and not the value of the land determines. *Farmers' Bank v. Hooff*, 7 Pet. 168. In a suit to enjoin the levy of an execution on land, the amount of the execution, and not the value of the land, determines the jurisdiction. *Ross v. Prentiss*, 3 How. 772. The jurisdiction cannot be determined from the amount of the penalty of the bond taken when an injunction is granted. *Brown v. Shannon*, 20 How. 58. A cross-appeal is but an incident to the main appeal, and the amount in controversy in the cross-appeal is immaterial. *Walsh v. Mayer*, 111 U. S. 31. Where the libellant recovered in the district court a decree for \$500, which, upon appeal by the adverse party, was reversed by the circuit court and the libel dismissed, and the libellant thereupon appealed to the Supreme Court, it was held that the amount in controversy in the circuit court and Supreme Court was but \$500, and the appeal was dismissed. *The D. R. Martin*, 91 U. S. 365. The Supreme Court has no jurisdiction of an appeal from a decree in a suit in admiralty on a libel *in rem* against a vessel for \$27,000 damages, in which a stipulation was filed for \$2100 as the value of the vessel, where there were no allegations as to the ownership of the vessel at the time of the collision, by which a decree could have been made the basis of a libel *in personam*. *The Jessie Williamson, Jr.*, 108 U. S. 311. In the following cases the interest of the several persons cannot be joined: Of seamen, in a libel for wages (*Oliver v. Alexander*, 6 Pet.



143); the interest of each claimant of the goods saved by salvage service for his separate and distinct share of the salvage (*Stratton v. Jarvis*, 8 Pet. 4); the interests of several owners of a cargo, having distinct interests, who had united in a libel (*Rich v. Lambert*, 12 How. 347); interests of claimants, each for a separate part, in a libel for freight (*Clifton v. Sheldon*, 23 How. 481; *Rogers v. The St. Charles*, 19 Id. 108); interests of several libellants in a decree against a steamer for damages from a collision, on an appeal by the steamer. *Ex parte B. & O. R. Co.*, 106 U. S. 5. But where salvors unite in a claim for a single salvage service, jointly rendered by them, the amount in controversy on an appeal by the owner of the property is the amount of the decree (*The Connemara*, 103 U. S. 754); and where several unite in a libel, and on an appeal the interest of any one exceeds \$5000, the Supreme Court has jurisdiction. *The Rio Grande*, 19 Wall. 178. In a proceeding by a person for the advantage of the limited liability act (Rev. Stats. §§ 4283, 4289), the amount in controversy is the difference between the value of his interest in the vessel and the total amount claimed against him. *The Mamie*, 105 U. S. 773. So, if a libel for assault and battery does not lay any sum as *ad damnum*, the libellant cannot appeal from a decree in his favor for a sum less than the amount required for an appeal. *Jenks v. Lewis*, 3 Mason, 503. If the libellant admits his claim to be less than the amount requisite for an appeal, although more is claimed in the libel, there is no appeal. *McGinnis v. Carlton*, Abb. Adm. 570. On a decree for more than \$2000 against a shipowner, with the right to set off against it certain freight money, reducing it below \$2000, he cannot set off the freight and still save his right to appeal. *Sampson v. Welsh*, 24 How. 207. In a suit brought to abate a nuisance, the value of the object to be obtained, and not the damages claimed, governs. *Miss. Railroad Co. v. Ward*, 2 Black, 485. In a suit for partition the value of the undivided part in question is alone considered. *McCarthy v. Provost*, 103 U. S. 673.

SECT. 693. — See notes, §§ 631, 652. As the writ or appeal is allowed in case of division of opinion in civil cases only, the effect of this provision is that writs of error and appeals may be had in civil cases where less than \$2000 is in dispute, taking the place, with the same scope of inquiry, of the old certificate of division. Where the case involves more than \$2000, errors committed by the lower court, whether by a divided or unanimous opinion, are equally assignable, and may be examined by the appellate court. 1 Com. D. 401. The act of April 29, 1802, ch. 31, § 6 (2 St. 159), allowing the case to be certified up before judgment, was superseded by § 1 of St. June 1, 1872, ch. 255 (17 St. 196); and final judgments of the circuit courts in civil actions, wherein there has been a division of opinion, are only reversible in the Supreme Court on writ of error or appeal. *Bartholow v. Trustees*, 105 U. S. 6.

By 18 St. 315, ch. 77 (stated with § 631 note), the review of the judgments and decrees, entered upon findings in admiralty causes by the Supreme Court on appeal, is limited to the questions of law arising upon the record, and to such rulings of the circuit court, excepted to at the time, as may be presented by a bill of exceptions prepared as in actions at law. Notwithstanding this provision, the clerk may charge for including the evidence in an admiralty cause in the final record on final decree (*The Alice Tainter*, 14 Blatch. 225); and, as this provision relates only to the appellate power of the Supreme Court, if the amount involved does not permit a review by that court, a more general finding of fact and law is sufficient. *Re Vitrified Pipes*, Id. 276.

This section does not apply to the District of Columbia. *Ross v. Triplet*, 3 Wheat. 600. For the object of the act of 1802 (2 St. 159, now embraced in Rev. Stats. §§ 650, 651, 652, 693, 697), see *United States v. Daniel*, 6 Wheat. 542. The defect of § 6 of the act of 1802, was the delay it created by frequently suspending proceedings in the midst of a trial, which the act of June 1, 1872, ch. 255 (17 St. 196, Rev. Stats. §§ 651, 652, 693), was passed to remedy. Under § 693, divisions of opinion



can be reviewed only by writ of error or appeal from the final judgment or decree. *Bartholow v. Trustees*, 105 U. S. 6; *Dow v. Johnson*, 100 Id. 164. Under both the act of 1802 and Rev. Stats. § 693, the Supreme Court has jurisdiction without regard to the amount in controversy. *Dow v. Johnson*, 100 U. S. 162; *contra*, *Robbins v. Firemen's Ins. Co.*, 16 Blatch. 232. If the amount in controversy exceeds \$5000, the final judgment or decree can be reviewed under §§ 691, 692. The Supreme Court will not decide a question when it appears from the record that there must be a new trial owing to an imperfect verdict (*United States v. Buzzo*, 18 Wall. 125); or if an indictment is bad, and no good one can be framed from the facts (*United States v. Britton*, 108 U. S. 207); nor where it appears that the proceedings below have been discontinued. *Veazie v. Wadleigh*, 11 Pet. 55. Where the Supreme Court is equally divided, on a certificate of division the case will be remitted to the court below, to take such action as the rules of court or principles of law require. *Silliman v. Bridge Co.*, 1 Black, 582; *Hannauer v. Woodruff*, 10 Wall. 482. There need be but one party before the court. *Ex parte Milligan*, 4 Wall. 113; *contra*, *Wiggins v. Gray*, 24 How. 303.

"*Any final judgment or decree.*" — As to what are final judgments and decrees, see notes, §§ 631, 633, 691, 692.

"*In any civil suit or proceeding.*" — As to what is a civil suit or proceeding, see notes, *ante*, pp. 95, 97, 98. A proceeding on a petition of *habeas corpus* is a civil proceeding. *Ex parte Tom Tong*, 108 U. S. 556; *Ex parte Cota*, 110 Id. 385.

"*Before a circuit court which was held, at the time, by a circuit justice,*" &c. — The circuit justice is the justice of the Supreme Court allotted to the circuit. § 605. There must be two judges entitled to vote, and voting on the question; and as the district judge cannot vote on error or appeal from his own decisions, there can be no certificate in such cases, where such judge is one of the judges holding the circuit court (Rev. Stats. § 614; *United States v. Lancaster*, 5 Wheat. 434; *United States v. Emholt*, 105 U. S. 414); and there can be no certificate where one judge was not present at the trial. *Taylor v. Carpenter*, 2 Wood. & M. 3.

"*Wherein the said judges certify as provided by law.*" — See §§ 650, 652.

"*That their opinions were opposed.*" — There must be a real division of opinion, and one from courtesy to counsel or *pro forma* is not sufficient. *United States v. Chicago*, 7 How. 192; *Webster v. Cooper*, 10 How. 54; *United States v. Stone*, 14 Pet. 524; *Daniels v. Railroad Co.*, 3 Wall. 255. A certificate will not be granted where the judges are agreed in opinion, or do not think there is doubt enough to justify them in submitting the question to the Supreme Court (*Ex parte Gordon*, 1 Black, 505); although in an important case a decision was rendered on division *pro forma*. *Jones v. Van Zandt*, 5 How. 224; and see *United States v. Stone*, *supra*. If it appears from the whole record that there has been no division of opinion, the Supreme Court has no jurisdiction, although a division may be certified in form. *Railroad Co. v. White*, 101 U. S. 98.

"*Upon any question which occurred on the trial or hearing of the said suit or proceeding.*" — The question must actually have arisen, and not merely be anticipated (*United States v. Chicago*, *supra*; and the probability that difficult and important questions of law will arise on the trial of an indictment in the circuit court will not ordinarily justify the postponement of a trial, so as to await the holding of the court by two judges with a view to a certificate of division of opinion. *United States v. Fullerton*, 6 Blatch. 275. It must be a question arising out of the case, and not a mere abstract proposition; but sufficient facts should be set forth to show its bearings on the rights of the parties (*Crockett v. Newton*, 18 How. 581; *United States v. Bank of Columbus*, 19 Id. 385; *Havemeyer v. Iowa County*, 3 Wall. 303; *Ogilvie v. Insurance Co.*, 18 How. 577; *Daniels v. Railroad Co.*, 3 Wall. 256); nor can it be a purely hypothetical question. *Pelham v. Rose*, 9 Wall. 103. It must arise in the progress of a cause, and not incidentally, or in



relation to a collateral matter, after the rendition of the judgment or decree. *United States v. Chicago*, 7 How. 191; *Daniels v. Railroad Co.*, 3 Wall. 254; *Bank of United States v. Green*, 6 Pet. 28; *United States v. Daniel*, 6 Wheat. 548; *Devereaux v. Marr*, 12 Id. 212. The court can consider only the points on which the judges were divided. *Ogle v. Lee*, 2 Cranch, 33; *Wayman v. Southard*, 10 Wheat. 1. A question not certified will not be considered. *United States v. Ambrose*, 108 U. S. 336; *United States v. Briggs*, 5 How. 208; *Dennistoun v. Stewart*, 18 Id. 565; *Ward v. Chamberlain*, 2 Black, 430. The question must be one capable of being presented in a single point. *California Paving Co. v. Molitor*, 113 U. S. 616. The point on which there is a disagreement must be distinctly stated (*De Wolf v. Usher*, 3 Pet. 269; *United States v. Briggs*, 5 How. 208; *Daniels v. Railroad Co.*, 3 Wall. 250; *California Paving Co. v. Molitor*, 113 U. S. 616; *Sadler v. Hoover*, 7 How. 646; *Perkins v. Hart*, 11 Wheat. 237; *United States v. City Bank*, 19 How. 385; *Havemeyer v. Iowa County*, 3 Wall. 294; *United States v. Waddell*, 112 U. S. 76; *Harris v. Elliott*, 10 Pet. 25; *United States v. Minor*, 114 U. S. 233; *Ogilvie v. Insurance Co.*, 18 How. 577); but where two questions were decided, and the third is too vague to be answered, but the record discloses a grave constitutional question not argued or suggested by counsel, the case will be remanded with answers to the two questions, and for further proceedings. *United States v. Waddell*, 112 U. S. 76. A question stated in such broad and indefinite terms as to admit of several different answers depending upon different circumstances, will be regarded as immaterial to the decision of the case. *Enfield v. Jordan*, 119 U. S. 680. A question whether either of several counts charges the defendant with an offence under the laws of the United States is too vague and general (*United States v. Northway*, 120 U. S. 327); and a certificate of division cannot be used to bring up the question, whether upon all the facts specially found by the court in a jury-waived case, the plaintiff can recover. *State Bank v. St. Louis F. R. Co.*, 122 U. S. 21. The point stated must always be single, and not bring up the whole case for decision. *Wayman v. Southard*, 10 Wheat. 20; *Saunders v. Gould*, 4 Pet. 392; *United States v. Bailey*, 9 Id. 257; *Adams v. Jones*, 12 Id. 207; *White v. Turk*, Id. 238; *Nesmith v. Sheldon*, 6 How. 41; *Webster v. Cooper*, 10 Id. 54; *Dennistoun v. Stewart*, 18 Id. 565; *Daniels v. Railroad Co.*, 3 Wall. 250; *California Paving Co. v. Molitor*, 113 U. S. 616; *Waterville v. Van Slyke*, 116 Id. 701; *Williamsport Bank v. Knapp*, 119 Id. 357; *State Bank v. St. Louis F. R. Co.*, 122 Id. 21; *Jewell v. Knight*, 123 Id. 433. To allow the whole case to be brought up would, in effect, be an exercise of original, and not appellate jurisdiction (*United States v. Bailey*, 9 Pet. 267; *Adams v. Jones*, 12 Id. 207; *White v. Turk*, Id. 239; *Dennistoun v. Stewart*, 18 How. 569); and the whole case cannot be brought up, although the several questions on which it depends are separately certified (*White v. Turk*, 12 Pet. 239); or although the case is broken up into points, some of which may never arise. *Nesmith v. Sheldon*, 6 How. 41; *Luther v. Borden*, 7 Id. 1; *Webster v. Cooker*, 10 Id. 54; *Jewell v. Knight*, 123 U. S. 433. There may be several questions certified. *United States v. Waddell*, 112 U. S. 76; *United States v. Minor*, 114 Id. 233. If the questions are several in number, and apply to different stages of the trial, and relate to independent points, they are generally not proper. *United States v. Bailey*, 9 Pet. 267; *Nesmith v. Sheldon*, 6 How. 43; *White v. Turk*, 12 Pet. 238; *United States v. Stone*, 14 Id. 524; *Saunders v. Gould*, 4 Id. 392; *Grant v. Raymond*, 6 Id. 218; *United States v. Chicago*, 7 How. 192. If, however, there are several questions, though so material as to decide the whole case, yet arising at one time, at one stage of the cause, and involving little beyond one point, they may be certified. *United States v. Chicago*, *supra*. The question must be one of law, and not of fact nor of mixed law and fact (*Wilson v. Barnum*, 8 How. 258; *Dennistoun v. Stewart*, 18 Id. 565; *Weeth v. New England Mortgage Co.*, 106 U. S. 605; *California Paving Co. v. Molitor*, 113 Id. 616; *Ogilvie v. Insurance Co. v.* 18 How. 577; *Daniels v. Railroad Co.*,



3 Wall. 250; *Waterville v. Van Slyke*, 116 U. S. 699; *Williamsport Bank v. Knapp*, 119 Id. 357; *Jewell v. Knight*, 123 Id. 432), and it must not relate to matters of pure discretion (*Smith v. Vaughan*, 10 Pet. 366; *Packer v. Nixon*, Id. 411; *Davis v. Braden*, Id. 286; *United States v. Rosenburgh*, 7 Wall. 580); although, in deciding a question of discretion, a material point of right may arise, on which a division of opinion will give the Supreme Court jurisdiction. *United States v. Chicago*, 7 How. 191. In *United States v. Rosenburgh*, *supra*, however, it is questioned if this exception to the general rule is warranted by the decisions. See, also, *United States v. Wilson*, 7 Pet. 150, and *United States v. Reid*, 12 How. 361. The Supreme Court has no jurisdiction of a division on a motion to amend by enlarging the term of a demise (*Smith v. Vaughan*, 10 Pet. 366); or on a motion for a new trial (*United States v. Daniel*, 6 Wheat. 542; *Grant v. Raymond*, 6 Pet. 218); but where there is a division of opinion on a motion for a new trial, a new trial will be granted, and the cause submitted to a jury in the presence of two judges, and the question regularly certified. *United States v. Fullerton*, 6 Blatch. 275. Questions respecting the practice of the court in equity causes are not reviewable (*Packer v. Nixon*, 10 Pet. 410; *Wiggins v. Gray*, 24 How. 303); nor is a question of setting aside a decree on motion (*Wiggins v. Gray*, *supra*); nor whether an action of detinue founded on tort, abated by the death of a defendant, can be revived against his representatives (*Davis v. Braden*, 10 Pet. 288); nor a motion to quash an indictment (*United States v. Rosenburgh*, 7 Wall. 580; *United States v. Avery*, 13 Id. 251; *United States v. Hamilton*, 109 U. S. 63); nor a motion to quash certain parts of an indictment, even though such motion is on the ground of lack of jurisdiction. *United States v. Avery*, *supra*. It has no jurisdiction of a certificate on a division as to the amount of the bond to be given on suing out a writ of error (*Devereaux v. Marr*, *supra*); nor on the amount of a marshal's fees upon service of execution (*U. S. Bank v. Green*, *supra*); but it has jurisdiction of a division on a motion in arrest of judgment (*United States v. Kelly*, 11 Wheat. 417; *United States v. Fullerton*, 6 Blatch. 275), and of a division of opinion on a special verdict. *Somerville v. Hamilton*, 4 Wheat. 230.

*"May be reviewed and affirmed or reversed or modified by the Supreme Court, on writ of error or appeal, according to the nature of the case."* — Under the old law, the determination of the questions certified does not affect the right to bring up the whole case by a writ of error or appeal, after it was terminated in the court below (*Ogle v. Lee*, 2 Cranch, 33; *United States v. Bailey*, 9 Pet. 273; *Daniels v. Railroad Co.*, 3 Wall. 255); but now, under Rev. Stats. §§ 652, 693, there can be no certificate in a civil suit or proceeding until final judgment or decree, and then the case must be brought up on a writ of error or appeal. *Bartholow v. Trustees*, 105 U. S. 6.

*"And subject to the provisions of law applicable to other writs of error or appeals in regard to bail and supersedeas."* — To prevent the execution of the judgment or decree, notwithstanding the certificate of division, the provisions of § 1007 must be complied with.

SECT. 695. — See note § 1009. The jurisdiction in prize causes was involved in the grant of admiralty jurisdiction. *Glass v. The Betsey*, 3 Dall. 6; *The Admiral*, 3 Wall. 612. The Supreme Court has no original jurisdiction in prize causes (*The Harrison*, 1 Wheat. 298; *The William Bagaley*, 5 Wall. 412); but having only appellate jurisdiction, it will not allow a new claim to be interposed, but will remand the cause that it may be prosecuted in the lower court. *The Societe*, 9 Cranch, 209; *The Harrison*, 1 Wheat. 298. Prior to § 7 of the act of March 3, 1863 (12 St. 760), reproduced in § 13 of the act of June 30, 1864 (13 St. 310, and Rev. Stats. § 695), the Supreme Court had no appellate jurisdiction in prize causes, except on appeal from the circuit court. *The Admiral*, 3 Wall. 612. The circuit court has now no appellate jurisdiction in prize causes. See Rev. Stats. § 631. When the objection that the libel was not brought in the name of the United States is not contained in the pleadings, it is deemed to be waived. *Jecker v.*



Montgomery, 18 How. 124. A party who does not appeal cannot object to a part of the decree which is against him. *The Nancy*, 3 Wheat. 559. There must be some order, judgment, or decree of a circuit court; and an act of Congress allowing certain cases to be transferred to the Supreme Court without any decision on the case in the circuit court, is unconstitutional and void. *The Alicia*, 7 Wall. 571. If the court denies an order which should be granted, or allows one which should be denied, and objection taken thereto by the party appears upon the record, the appellate court can administer the proper relief. *The Pizarro*, 2 Wheat. 240. A case prosecuted as prize, but found from the record not to be a question of prize, but of forfeiture under a statute, will be remanded for further proceedings in the court below (*The Adelaide*, 9 Cranch, 244; *Alexander's Cotton*, 2 Wall. 404; *United States v. Weed*, 5 Id. 72; *The Watchful*, 6 Id. 93); and where a case is prosecuted on the instance side of the court which the court considers to be a case of prize, the cause will be remanded. *Jecker v. Montgomery*, 13 How. 498; *United States v. Weed*, *supra*. A decree is final in a prize cause, which disposes of the whole matter in controversy, upon a claim filed by certain parties, and which is final as to them and their rights, and final also so far as the claimants and their rights are concerned as to the United States; which leaves nothing to be litigated between the parties, and awards execution in favor of the libellants against the claimants. *Withenbury v. United States*, 5 Wall. 819; and see notes, §§ 565, 691, 692, 1006, 1009, 1012, 4636, 4637.

SECT. 696.—The further provision of the cited act of 1864 for transferring pending cases from the circuit to the Supreme Court, was held in *The Alicia*, *supra*, to be unconstitutional, as requiring the Supreme Court to exercise an original jurisdiction not in the power of Congress to confer.

SECT. 697.—The act of June 1, 1872, ch. 255, § 1, providing for a writ of error in cases of division of opinion, appears to relate only to civil cases, and does not supersede § 5 of the cited act of 1802, so far as the latter provides for an advisory decision by the Supreme Court in criminal cases. 1 Com. D. 402.

See note, § 693. This section provides the only means of revision in a criminal case. *United States v. Gibert*, 2 Sumner, 19; *United States v. Plumer*, 3 Cliff. 1. The imposition of a fine for contempt of court is a judgment in a criminal case. *New Orleans v. Steamship Co.*, 20 Wall. 387. But proceedings on a writ of *habeas corpus* are civil. *Ex parte Tom Tong*, 108 U. S. 556; *Ex parte Cota*, 110 Id. 385. The certificate need not expressly state a request by either party, if it can be fairly inferred from the record. *United States v. Harris*, 106 U. S. 629. The words "either party" are words of enlargement, and not of restriction, and there may be a certificate where there is only one party before the court, as on a petition for a writ of *habeas corpus*. *Ex parte Milligan*, 4 Wall. 114. In criminal cases the proceedings and judgment of the circuit court cannot be revised or controlled by writ of error, prohibition, or *certiorari*. *Ex parte Gordon*, 1 Black, 504. A correct judgment will be affirmed without answering all questions certified, but otherwise on reversal. *United States v. Reese*, 92 U. S. 214. See Rev. Stats. §§ 632, 698, 750, 997, 1013; act of April 7, 1874 (see note, § 702); *United States Sup. Ct. Rules*, No. 8, par. 6.

SECT. 698.—See notes, §§ 702, 750. While the act of 1803 required a transcript of all proceedings "of what kind soever in the cause," the "fees act" of 1853 directed what shall go into the record of equity and admiralty causes, and provided that copies of such entries and papers on file "as may be necessary on hearing of the appeal, may be certified up;" the modification being intended to save costs. As to new evidence in the Supreme Court the provision of 1803 related in terms to appeals from the circuit courts, but its application was not affected by making appeals in prize causes direct from the district courts. 1 Com. D. 403. Under the act of 1875 (stated in note, § 631) the findings of fact by the circuit court are conclusive; and only rulings on questions of law can be reviewed by bill



of exceptions. *The Abbotsford*, 98 U. S. 440 ; *The Benefactor*, 102 Id. 218 ; *The Adriatic*, 103 Id. 730.

"Upon an appeal of any cause in equity, or of admiralty and maritime jurisdiction, or of prize or no prize, a transcript of the record," &c. — The certificate of the clerk of the court that the transcript sent up on appeal contained a true copy of the record and the proceedings in the case, is *prima facie* evidence thereof. *The Rio Grande*, 19 Wall. 188. Since the act of June 8, 1872 (17 Stat. 330 ; Rev. Stats. §§ 558, 624, 678) a certificate signed by a deputy clerk in the name of, and for the clerk of the court, is sufficient. *Garneau v. Dozier*, 100 U. S. 7. By the act of Aug. 6, 1861 (12 St. 320) the district attorney of the United States of any district in California could certify to the same effect as the clerk of the court in all land cases to which the United States was a party (*United States v. Gomez*, 3 Wall. 766) ; and his certificate to a deposition contained in the record, that it was filed after trial of the cause, is of equal validity as if forming a part of his original certificate. *The Samuel*, 1 Wheat. 9. But proof that papers used below have been lost must be made by affidavit, and not by certificate of the clerk. *The Grapeshot*, 7 Wall. 563. If the certificate is not true, the remedy is by *certiorari* to supply deficiencies, and not by motion to dismiss. *The Rio Grande*, 19 Wall. 188 ; *Missouri R. Co. v. Dinsmore*, 108 U. S. 31. See Sup. Ct. Rules, No. 14. The parol testimony in chancery trials in the lower court should appear in the record. *Conn. v. Penn*, 5 Wheat. 424 ; *Mayor v. United States*, 5 Pet. 450.

Section 30 of the act of 1789 (1 St. 88), in relation to the oral examination of witnesses in open court, was not expressly repealed until Rev. Stats., § 862. Since that statute it may be that the circuit courts will permit the oral examination of witnesses in open court in equity cases, but they are not compelled by law to do so ; and if such a mode of examination is permitted, the testimony presented in that form must be taken down, or its substance stated in writing and made part of the record, or it will be entirely disregarded in the Supreme Court on appeal. And if testimony is objected to and ruled out, it must still be sent up with the record, subject to the objection, in order that the ruling may be considered by the Supreme Court. A case will not be sent back to have the rejected testimony taken, even though the Supreme Court might, on examination, be of opinion that the objection to it ought not to have been sustained. *Blease v. Garlington*, 92 U. S. 6. Instructions given by a judge in the trial of a feigned issue directed by a court of equity cannot be made the basis of an appeal, but only of a motion for a new trial (*Brockett v. Brockett*, 3 How. 691 ; *McLaughlan v. Bank*, 7 Id. 227 ; *Johnson v. Harmon*, 94 U. S. 379 ; *Watt v. Starke*, 101 Id. 250) ; and the same rule applies to trials in patent cases under the act of Feb. 16, 1875 (18 St. 315, § 2). *Watt v. Starke*, *supra*. The motion for a new trial must be made in the chancery court, and the party applying must procure notes of the proceedings and the evidence, for the use of the chancellor ; this is done by having the proceedings and evidence reported with the verdict, or by moving before the chancellor to send to the judge who tried the issue for his notes of trial, or by procuring a statement thereof in some other proper way. The evidence and proceedings then become a part of the record, and go up to the court of appeal, if an appeal is taken. 3 *Graham and Waterman on New Trials*, p. 1551 ; *Watt v. Starke*, 101 U. S. 250. Where in a suit for an infringement an account is prayed for and decreed, the record sent up should contain such account. *Cawood Patent*, 94 U. S. 709. In view of the effect of the act of Feb. 16, 1875, ch. 77 (18 St. 315), upon § 698, the court (*The Adriatic*, 103 U. S. 730) promulgated Rule 8, par. 6, which is as follows :—

"The record in causes of admiralty and maritime jurisdiction, where under the requirements of law the facts have been found in the court below, and our power to review is limited to the determination of questions of law arising on the record, shall be confined to the pleadings, the findings of fact and conclusions of law thereon, the bills of exceptions, the final judgment or decree, and such interlocutory orders and decrees as may be necessary to a proper review of the case."



"*Provided, that either the court below or the Supreme Court may order any original document or other evidence to be sent up, in addition to the copy of the record, or in lieu of a copy of a part thereof.*" — Only such original papers can be transmitted as require actual inspection as originals in order to give them their full effect in the determination of the suit (*Craig v. Smith*, 100 U. S. 232; *The Elsinour*, 1 Wheat. 439); but original affidavits, where there is no question of their authenticity, cannot be sent up. *Craig v. Smith*, *supra*.

"*And on such appeal no new evidence shall be received in the Supreme Court, except in admiralty and prize causes.*" — No new evidence can be now received in admiralty cases not of prize; equity cases are heard upon the proofs sent up with the record from the court below; and no new evidence can be received in the Supreme Court. Rev. Stats. § 698; *Blease v. Garlington*, 92 U. S. 4. In admiralty cases not of prize, new evidence was not allowed as a matter of course, but a sufficient excuse must be shown for not taking the evidence in the usual way before the court below, — such as that the evidence was discovered too late to procure such an examination, or that the witnesses had been subpoenaed and failed to appear, and could not be reached by attachment, and the like. *The Mabey*, 10 Wall. 419; *The Juniata*, 91 U. S. 366; *The Boston*, 1 Sumner, 328, 331; *Coffin v. Jenkins*, 3 Story, 108; *The Western Metropolis*, 12 Wall. 389. The commission was issued from the circuit court having jurisdiction where the witnesses are found. *The Ocean Queen*, 6 Blatch. 24. And application had first to be made to the Supreme Court for leave to introduce the new evidence. *Id.* The issuing of a commission to take further evidence by the clerk, in the execution of which both parties joined, furnished a presumption that the proper order was given; if not, the parties were presumed to have waived all objections. *Rich v. Lambert*, 12 How. 347. In prize causes the cause is heard in the first instance on the evidence transmitted from the circuit court, and it is then decided on that evidence whether it is proper to allow further proof. *The London Packet*, 2 Wheat. 371. An affidavit arriving after a decree of the circuit court and transmitted by it may be read in an admiralty case; but additional evidence consisting of affidavits not taken under a commission cannot be read. *Id.*

SECT. 699. — See note, § 690. By 18 St. 470, ch. 137, § 5, suits improperly brought in or removed to the circuit court may be dismissed or remanded.

CL. 1. As to what are final judgments and decrees, see notes, §§ 691, 692. This clause as to patents and copyrights was not repealed by the acts of 1875 and 1887, stated pp. 94, 124, 125, *ante*. *Miller-Magee Co. v. Carpenter*, 34 F. R. 433. This clause applies to suits between a patentee or author, and alleged infringer, as well as to those between rival patentees (*Philip v. Nock*, 13 Wall. 185); also to a suit drawing in question the validity of a patent and its infringement (*St. Paul Plough Works v. Starling*, 127 U. S. 376); but not to a suit to enforce the specific execution of a contract in relation to the use of a patent right. *Brown v. Shannon*, 20 How. 55. The above act of 1875 does not affect the rule that the verdict upon an issue which a court of chancery directs to be tried at law is merely advisory. *Watt v. Starke*, 101 U. S. 247. In a patent case a writ of error will not lie from a decree of the circuit court fixing the amount of costs, when it is less than \$2000. *Sizer v. Many*, 16 How. 98. In a suit to enforce the specific performance of a contract relating to the use of a patent right, it was held in *Brown v. Shannon*, 20 How. 55, that the amount involved must exceed \$2000. *Dale Tile Manuf. Co. v. Hyatt*, 125 U. S. 46, and cases there cited.

CL. 2. *Revenue*. See notes, §§ 711, 844. It having been held in *United States v. Bromley*, 12 How. 88, that the postal act of March 3, 1845, ch. 43 (5 St. 732), was a "revenue law" within the cited act of 1844, that phrase was here treated as meaning any revenue law. 1 Com. D. 404. "Revenue laws" mean laws imposing duties on imports and tonnage, or such as in terms provide for revenue; that is, laws directly traceable to the power granted to Congress by § 8, Art. I., of the Constitution "to lay and collect



taxes, duties, imposts, and excises." *United States v. Hill*, 123 U. S. 686; *United States v. Broadhead*, 127 Id. 212. Sect. 844, providing for the payment by a clerk of the surplus money into the treasury, is not a revenue law within the meaning of this section. *United States v. Hill*, *supra*. Nor is an action against sureties to recover on a bail bond conditioned for the appearance of the principal to answer to an indictment for making and forging checks against a United States assistant treasurer. *United States v. Broadhead*, *supra*. This clause does not apply to appeals from Territories. *United States v. Carr*, 8 How. 1. It applies only to actions brought by the United States. *Mason v. Gamble*, 21 How. 390. The act of March 3, 1845 (5 St. 736), in its character and object is a revenue law, as it acts upon the rates of postage, and increases the revenue by prohibiting and punishing fraudulent acts which lessen it. Revenue is the income of a state, and the revenue of the post-office department, being raised by a tax on mailable matter conveyed in the mail, is as much a part of the income of the government as moneys collected for duties on imports. *United States v. Bromley*, 12 How. 97; *Warner v. Fowler*, 4 Blatch. 311. Revenue laws do not include laws whose collateral and indirect operation might possibly conduce to the public or fiscal wealth. *United States v. Mayo*, 1 Gall. 397; *United States v. Norton*, 91 U. S. 569. The law does not include an action brought against a collector to recover duties paid under protest. It is probable that suits against a collector were omitted in the act of Congress by some oversight or accident. *Mason v. Gamble*, 21 How. 390. See now § 699, cl. 3, *ad finem*. This clause includes an action brought by the United States to recover the proceeds of the sale of certain goods in the hands of a bailee, which were claimed to be forfeited, and by agreement were sold by the bailee and the proceeds held to await the decision of the proper court. *Pettigrew v. United States*, 97 U. S. 385; *Snyder v. United States*, 112 Id. 216. The object of the law undoubtedly was to secure uniformity of decision in regard to the duties imposed. *Cary v. Curtis*, 3 How. 244.

CL. 3. The cited act of 1868 was here made applicable, in accordance with the above decision in *United States v. Bromley*, to any officer of any department of the United States revenue. 1 Com. D. 404. It seems to have been caused by the decision in *Mason v. Gamble*, 21 How. 390. *Averill v. Smith*, 17 Wall. 88.

CL. 4. The right of a railroad corporation as a common carrier to carry goods for hire does not fall within the provisions of this section. *Bowman v. Railroad Co.*, 115 U. S. 611. See note § 691.

SECT. 700. — Before this act, causes tried without a jury could not be reviewed on a writ of error (*Guild v. Frontin*, 18 How. 135; *Kelsey v. Forsyth*, 21 Id. 85; *Campbell v. Boyreau*, Id. 223; *Bond v. Dustin*, 112 U. S. 606); and this section provides the only means of reaching the Supreme Court in a case tried without a jury. *Boogher v. Insurance Co.*, 103 U. S. 90. This section and § 649 apply to cases tried in Louisiana (*Insurance Co. v. Tweed*, 7 Wall. 44; *Flanders v. Tweed*, 9 Id. 425; *Generes v. Campbell*, 11 Id. 193), and was not affected by the act of March 3, 1875, providing for a trial by jury. See *Phillips v. Moore*, 100 U. S. 208. The judgment below will be affirmed where there is no special verdict, nor agreed statement of facts, nor bill of exceptions to rulings. *Minor v. Tillotson*, 2 How. 392; *Prentice v. Zane*, 8 Id. 470; *Guild v. Frontin*, 18 Id. 135; *Kelsey v. Forsyth*, 21 Id. 85; *Lawler v. Clafflin*, 22 Id. 23; *New Orleans v. Gaines*, Id. 141; *Gilman v. Telegraph Co.*, 91 U. S. 603. But in such cases, under very special circumstances, the Supreme Court will simply dismiss the writ of error, as in *Burr v. Railroad Co.*, 1 Wall. 99, or will reverse the judgment below for a mistrial, and remand for a new trial, as in *Graham v. Bayne*, 18 How. 60; *Flanders v. Tweed*, 9 Wall. 431. On reversing an erroneous judgment rendered on a finding of facts covering all the points raised by the pleadings, the Supreme Court can direct such judgment to be entered as the finding requires. *Fort Scott v. Hickman*, 112 U. S. 150.



*"When an issue of fact."* — The findings of the court on questions of fact are conclusive (*Stanley v. Supervisors*, 121 U. S. 547; *Boogher v. Insurance Co.*, 103 Id. 97; *The Abbotsford*, 98 Id. 440); but not its conclusions of law on those facts. *French v. Edwards*, 21 Wall. 147.

*"In any civil cause."* — As to what are civil causes, see note, § 629.

*"Is tried and determined by the court without the intervention of a jury."* — Where, in accordance with State practice, a case is submitted to a judge as referee, error of law in the judgment of the court on the facts found by the referee is alone reviewable. *Paine v. Railroad Co.*, 118 U. S. 158; *Bond v. Dustin*, 112 Id. 604; *Roberts v. Benjamin*, 124 Id. 64. Facts found by a referee and confirmed by the court must be treated as findings of the court in order to give the Supreme Court power to inquire into the validity of the judgment. *Boogher v. Insurance Co.*, 103 U. S. 90.

*"The rulings of the court,"* &c. — This does not include the general finding of the court, nor its conclusions embodied in such general finding. *Cooper v. Omohundro*, 19 Wall. 65; *Martinton v. Fairbanks*, 112 U. S. 670; *Santa Anna v. Frank*, 113 Id. 339. Propositions of law submitted to a judge must be ruled on by him at the time they are made, or at least before his finding of the facts, and his rulings are subject to exception. *Clement v. Insurance Co.*, 7 Blatch. 53.

*"In the progress of the trial of the cause."* — This includes all rulings made on questions of law down to the time the finding on the facts is formally made. *Clement v. Insurance Co.*, 7 Blatch. 53.

*"If excepted to at the time."* — The exceptions must be taken at the time the rulings are made. *Nickerson v. Steamship Co.*, 4 Morr. Trans. 360. The rulings on admission of evidence must be excepted to as on a trial before a jury. *Weems v. George*, 13 How. 190; *Campbell v. Boyreau*, 21 Id. 223; *Tyng v. Grinnell*, 92 U. S. 467; *Norris v. Jackson*, 9 Wall. 125; *Clement v. Insurance Co.*, 7 Blatch. 53; *Martinton v. Fairbanks*, 112 U. S. 673. But on exceptions to the admission of immaterial evidence, a judgment will not be reversed when such evidence could not have prejudiced the party excepting (*Mining Co. v. Taylor*, 100 U. S. 37); and a judgment will not be reversed for the improper rejection of immaterial evidence. *Arthurs v. Hart*, 17 How. 6. Rulings on matters in the discretion of the judge cannot be excepted to, such as on granting, or a refusal to grant, a new trial (*Cooper v. Omohundro*, 19 Wall. 65); or on the allowance of time for the production of further evidence (*Gilman v. Telegraph Co.*, 91 U. S. 603); or on a motion to strike out a judgment entered on the pleadings. *Cheang Kee v. United States*, 3 Wall. 320. The decision of the judge on the weight of evidence is not subject to exception (*Bond v. Brown*, 12 How. 254; *Stanley v. Supervisors*, 121 U. S. 548); nor is a refusal of the judge to rule at the close of the plaintiff's case that the latter cannot recover (*Insurance Co. v. Folsom*, 18 Wall. 237; s. c. 9 Blatch. 201); nor is the refusal of the judge to make a special finding. *Insurance Co. v. Folsom*, *supra*; *Clement v. Insurance Co.*, 7 Blatch. 52.

*"And duly presented by a bill of exceptions."* — The bill of exceptions must be prepared and settled before the end of the term at which the case was tried. *Sweet v. Perkins*, 24 F. R. 777; *Müller v. Ehlers*, 91 U. S. 249. Each bill of exceptions is considered as presenting a distinct case, and the Supreme Court decides solely on the evidence contained in it, or in the rest of the record and referred to by it. *Jones v. Buckell*, 3 Morr. Trans. 553. The bill of exceptions brings up nothing for revision except what it would have done in a jury trial. *Insurance v. Folsom*, 18 Wall. 249. And errors assigned on a motion for a new trial, and not made a part of the record by a bill of exceptions, will not be regarded. *Levy v. Dangel*, 3 Morr. Trans. 115. Without a bill of exceptions, the validity of an order setting aside a nonsuit cannot be reviewed. *Loring v. Frue*, 3 Morr. Trans. 174. A bill of exceptions cannot be used to bring



up the whole testimony for review, any more than in a trial by jury. *Graham v. Bayne*, 18 How. 62; *Norris v. Jackson*, 9 Wall. 125; *Martinton v. Fairbanks*, 112 U. S. 674.

*"May be reviewed by the Supreme Court upon a writ of error or upon appeal."*—As to when a case must be brought up by a writ of error and when by appeal, see notes on §§ 691, 692. Although § 4 of the cited act of 1865 provided, as here, that the review may be "upon a writ of error or upon appeal," the revisers suggested, citing *Norris v. Jackson*, 9 Wall. 125, 127, a writ of error as the only proper means for taking up the questions of law. 1 Com. D. 405. If the judge in a jury-waived case chooses to find generally for one side or the other, the losing party has no redress on error except for erroneous rulings in the progress of the trial duly excepted to, and errors on the face of the pleadings; and the finding itself, if general, cannot be reviewed by a bill of exceptions, or in any other way. *Dirst v. Morris*, 14 Wall. 490; *Norris v. Jackson*, 9 Id. 125; *Generes v. Campbell*, 11 Id. 193; *Miller v. Insurance Co.*, 12 Id. 285; *Richmond v. Smith*, 15 Id. 429; *Dickinson v. Planters' Bank*, 16 Id. 250; *Town of Ohio v. Marcy*, 18 Id. 552; *Farrell v. United States*, 99 U. S. 221; *Insurance Co. v. Folsom*, 18 Wall. 237; *Cooper v. Omohundro*, 19 Id. 65; *Crews v. Brewer*, Id. 70; *Martinton v. Fairbanks*, 112 U. S. 674; *Boardman v. Toffey*, 117 Id. 271. A statement of facts signed by counsel, but not passed on by the judge, cannot be noticed on error (*Generes v. Bonnemer*, 7 Wall. 564; *Avendano v. Gay*, 8 Id. 376; *Kearney v. Case*, 12 Id. 275; *Bethell v. Mathews*, 13 Id. 1; *Tyre & Spring Works Co. v. Spalding*, 116 U. S. 541); nor can a statement or opinion filed after entry of judgment. *Flanders v. Tweed*, 9 Wall. 425; *United States v. King*, 7 How. 833; *Generes v. Bonnemer*, 7 Wall. 564. But if a statement of facts is filed by the judge after entry of judgment, it will be presumed to have been done at the request of the parties on the trial. *McGavock v. Woodlief*, 20 How. 225. A finding of the court which is a conclusion of fact, although excepted to and alleged as error, cannot be reviewed. *Booth v. Tiernan*, 109 U. S. 205. And the Supreme Court can make no adjudication in regard to facts upon which the plaintiff in error seeks to raise a question of law, when they are not admitted in the pleadings, or specially found by the court, and there is a general finding for the defendant in error on the course of action which involves such question of law, there being no exception by the plaintiff in error to any ruling of the court in regard to such question. *Otoe County v. Baldwin*, 111 U. S. 1.

*"And when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment."*—The evident object of this section is to give special findings the same effect for the purposes of a writ of error as a special verdict, or an agreed case. *Supervisors v. Kennicott*, 103 U. S. 554. Even before this section a judgment on agreed facts spread at large on the record could be reviewed by the Supreme Court on a writ of error, and this act did not change such law even where the finding is general. *United States v. Eliason*, 16 Pet. 291; *Stimpson v. Railroad Co.*, 10 How. 329; *Graham v. Bayne*, 18 Id. 60; *Suydam v. Williamson*, 20 Id. 427; *Campbell v. Boyreau*, 21 Id. 223; *Burr v. Des Moines R. Co.*, 1 Wall. 99; *Supervisors v. Kennicott*, 103 U. S. 556. On both special and general findings, rulings properly excepted to can be reviewed (*Miller v. Insurance Co.*, 12 Wall. 285); but the findings themselves, whether general or special, need no bill of exceptions to bring them up on the record. *Insurance Co. v. Boon*, 95 U. S. 117. A general exception to a special finding is not sufficient. *Insurance Co. v. Sea*, 21 Wall. 158. Where the finding is special, the review, even without a bill of exceptions, may extend to the question whether the facts found are sufficient to support the judgment (*St. Louis v. Ferry Co.*, 11 Wall. 423; *Tyng v. Grinnell*, 92 U. S. 467; *Allen v. St. Louis Bank*, 120 Id. 30); though formerly the law was otherwise (*Cucullu v. Emmerling*, 22 How. 86); and if the facts are not sufficient to support the judgment, the cause may be remanded for the trial of other issues involved therein. *Ex parte French*,



91 U. S. 423. The court can consider only the sufficiency of the facts found to support the judgment, and cannot pass upon the evidence although this is in the record. *Dickinson v. Planters' Bank*, 16 Wall. 257; *Town of Ohio v. Marcy*, 18 Id. 552; *Saulet v. Shepherd*, 4 Id. 502; *Copelin v. Insurance Co.*, 9 Id. 461; *Insurance Co. v. Folsom*, 18 Id. 237; *Insurance Co. v. Sea*, 21 Id. 158; *United States v. Dawson*, 101 U. S. 569; *Tyng v. Grinnell*, 92 Id. 467; *Martinton v. Fairbanks*, 112 Id. 674. The court cannot consider facts not stated as a part of the special finding, although contained in the judge's opinion (*Dickinson v. Planters' Bank*, *supra*; *Town of Ohio v. Marcy*, *supra*); nor although contained in a stipulation filed by the parties. *Tyre & Spring Works Co. v. Spalding*, 116 U. S. 546. The findings must contain a statement of the ultimate facts or propositions which the evidence was intended to establish, and not the evidence on which it was supposed to rest (*Suydam v. Williamson*, 20 How. 432; *Miller v. Insurance Co.*, 12 Wall. 285); and a special verdict cannot be reviewed if it fails to find any of the essential facts. *Prentice v. Zane*, 8 How. 484; *Graham v. Bayne*, 18 Id. 62; *Burr v. Des Moines R. Co.*, 1 Wall. 99; *Norris v. Jackson*, 9 Id. 125. An opinion stating evidence instead of facts found is not a statement of facts. *Flanders v. Tweed*, 7 Wall. 44. For a case where a court filed an opinion embodying its findings and conclusions of law, and at the next term on hearing the parties ordered a special finding with conclusions of law entered *nunc pro tunc*, see *Insurance Co. v. Boon*, 95 U. S. 117.

SECT. 701. — See Rev. Stats. §§ 571, 636, 691, 692, 695, and notes thereon; also § 24 of the judiciary act. Under this section, a judgment of affirmance is entered where no error appears of record, or there is no question presented for revision (*Taylor v. Morton*, 2 Black, 481; *Pomeroy v. Indiana Bank*, 1 Wall. 592); but, under § 709, if jurisdiction is not shown by the record, the writ of error is dismissed. *Suydam v. Williamson*, 20 How. 427. The circuit court cannot modify a decree that has been affirmed. *Chaires v. United States*, 3 How. 611; *Southard v. Russell*, 16 Id. 547; *Durant v. Essex Co.*, 101 U. S. 555. Where the Supreme Court affirms a judgment of a circuit court overruling a plaintiff's demurrer to the defendant's plea, it cannot on motion of the plaintiff amend the judgment entered in the cause by instructing the court below to permit the plaintiff to withdraw his demurrer. *United States v. Tingey*, 5 Pet. 131. Where, on undisputed facts, a verdict is clearly right, the Supreme Court will not reverse because on some disputed points a charge may be technically inaccurate. *Walbrun v. Babbitt*, 16 Wall. 577. Where the judges of the Supreme Court are equally divided on the merits of the case, the judgment or decree of the court below is affirmed. *The Antelope*, 10 Wheat. 66; *Etting v. U. S. Bank*, 11 Id. 59; *Brown v. Aspden*, 14 Id. 28; *Durant v. Essex Co.*, 7 Wall. 107; 101 U. S. 555. But in such cases the Supreme Court could not change the decree of the circuit court, nor in admiralty cases could it allow interest. *Hemenway v. Fisher*, 20 How. 260. But where the judges are equally divided as to their jurisdiction, the writ will be dismissed. *Holmes v. Jennison*, 14 Pet. 598. A reversal for lack of jurisdiction is ordinarily accompanied with directions to the court below to dismiss the cause (*Cutler v. Rae*, 7 How. 729); but where the lower court rendered a judgment or decree for the plaintiff in a cause of which it had no jurisdiction, the judgment or decree will be reversed, as otherwise the party prevailing would have the benefit of the judgment. *Mansfield R. Co. v. Swan*, 111 U. S. 385. When it does not appear that the circuit court had jurisdiction of a suit removed to it from a State court, the judgment will be reversed, with directions to remand to the State court, unless on the return of the case such jurisdiction is made to appear. *Thayer v. Life Assoc.*, 112 U. S. 717; *Mansfield R. Co. v. Swan*, 111 Id. 379; *Hancock v. Holbrook*, 112 Id. 231. Where the jurisdiction of the Supreme Court over a case properly before it by a writ of error or appeal is taken away, the judgment entry is that the suit abate. *McNulty v. Batty*, 10 How. 72; *Preston v. Bracken*, Id. 81. In *Ex parte McCardle*, 7



Wall. 506, such a case was dismissed for want of jurisdiction. A judgment rendered on default on a declaration setting forth no cause of action may be reversed on error, and the case remanded with directions that judgment be arrested. *Slacum v. Pomery*, 6 Cranch, 221; *Cragin v. Lovell*, 109 U. S. 194. When a special verdict is imperfect or ambiguous, or when it finds only the evidence of facts, and not the facts themselves, or finds but a part of the facts in issue, and is silent as to others, the judgment will be reversed and a *venire de novo* will be ordered. *Barnes v. Williams*, 11 Wheat. 415; *Carrington v. Pratt*, 18 How. 63; *Prentice v. Zane*, 8 Id. 484; *Suydam v. Williamson*, 20 Id. 441. A *venire de novo* is ordered when a bill of exceptions contains all the evidence (*Graham v. Bayne*, 18 How. 60); and is frequently ordered upon a bill of exceptions to enable a party to amend. *United States v. Hawkins*, 10 Pet. 131. Where, after verdict, an agreement of counsel was filed as to the amount of damages to be awarded the plaintiff upon several alternatives, the Supreme Court refused to take notice of it, but, finding error, reversed the judgment and awarded a *venire de novo*. *Lanusse v. Barker*, 3 Wheat. 147. Where, on a declaration against four insurance companies setting forth their respective liabilities, the verdict was that the said defendants did promise and assume, as the said plaintiff hath alleged, and his damages were assessed at \$10,000, and a joint judgment was entered, the Supreme Court on reversing it directed a judgment against each of the defendants for one fourth the amount of the assessed damages, and for a joint judgment for costs. *Insurance Cos. v. Boykin*, 12 Wall. 433. Where, in a suit on an insurance policy for a total loss, there was a judgment for the whole amount insured, with interest and \$5000 damages, and the damages were held illegal, the Supreme Court directed the court below to enter a judgment for the residue. *Insurance Co. v. Piaggio*, 16 Wall. 378. A judgment on demurrer to evidence on which there was no joinder in demurrer will be reversed and a new trial awarded. *Fowle v. Alexandria*, 11 Wheat. 320. But where on a demurrer to evidence, which was sustained, the Supreme Court was satisfied that the evidence was sufficient to enable the plaintiff to recover, the case was reversed, with directions to enter judgment for the plaintiff. *U. S. Bank v. Smith*, 11 Wheat. 171; see also *Livingston v. Insurance Co.*, 6 Cranch, 274; *M'Arthur v. Porter*, 1 Pet. 626; *Farrar v. United States*, 5 Id. 373; *Hudson v. Guestier*, 6 Cranch, 285, note. On a reversal, with directions to enter a judgment for the plaintiff in error, costs should be included in the judgment. *McKnight v. Craig*, 6 Cranch, 183. Where a judgment for a defendant on special findings embracing only a part of the issues is reversed by the Supreme Court, the lower court can make any judgment except for the defendant on the facts set forth in the findings. *Ex parte French*, 91 U. S. 423. On fatally defective pleadings, the Supreme Court does not direct an amendment or a repleader, but reverses and remands for further proceedings (*Garland v. Davis*, 4 How. 131); but on reversing an erroneous judgment on special findings covering all the issues raised by the pleadings, the Supreme Court can direct a judgment for the defendant. *Fort Scott v. Hickman*, 112 U. S. 165, and cases there cited. Where the law is settled by the Supreme Court, but the findings show uncertainty as to the facts on which judgment is to be based, the cause will be remanded for further proceedings. *Little Miami R. Co. v. United States*, 108 U. S. 277. A reversal directing restitution of money must be obeyed by the distributees. *Ex parte Morris*, 9 Wall. 605. Where there has been no *supersedeas*, a reversal will not vacate a sale under a decree. *South Fork Canal Co. v. Gordon*, 2 Abb. U. S. 479.

*Mandate.* — See United States Supreme Court Rules, Rule 24. The mandate may be directed to the court whose judgment is affirmed. *Clerke v. Harwood*, 3 Dall. 342. The court below is to construe the mandate reasonably (*Milwaukie R. Co. v. Soutter*, 2 Wall. 510); and in case of doubt as to its meaning can examine the opinion delivered in the case (*West v. Breshear*, 14 Pet. 51; *Story v. Livingston*, 13 Id. 359; *Mitchell v. United*



States, 15 Id. 52; *Milwaukie R. Co. v. Soutter*, 2 Wall. 510); but on disobedience to a mandate or mistake as to its meaning, the Supreme Court may under § 716 issue a *mandamus* or other appropriate writ. *Sibbald v. United States*, 12 Pet. 488; *Ex parte Johnson*, 9 Wall. 605; *United States v. Fossatt*, 21 How. 445. While generally after a mandate the want of jurisdiction of neither the Supreme Court nor the court below can be shown (*Skillern v. May*, 6 Cranch, 267; *Ex parte Story*, 12 Pet. 339; *Washington Bridge Co. v. Stewart*, 3 How. 413); yet the Supreme Court even after a mandate can reverse its judgments made by mistake or fraud in a case of which it had no jurisdiction. *Cochrane v. Deener*, 95 U. S. 355; *Snow v. United States*, 118 Id. 354; *Ex parte Crenshaw*, 15 Pet. 119; *United States v. Gomez*, 23 How. 326; *Tyler v. Magwire*, 17 Wall. 253; *Sibbald v. United States*, 12 Pet. 488; *Killian v. Ebbinghaus*, 111 U. S. 798. On a mandate the circuit court can give interest on damages only where they have been decreed by the Supreme Court on appeal. *Boyce v. Grundy*, 9 Pet. 275. After a demurrer has been overruled by the Supreme Court the party cannot file other demurrers. *Hitchcock v. Galveston*, 3 Woods, 269. Although after a mandate the pleadings may be amended (*The Pennsylvania*, 12 Blatch. 67; *Williams v. Gibbes*, 20 How. 535; *Marine Insurance Co. v. Hodgson*, 6 Cranch, 206; *Jackson v. Ashton*, 10 Pet. 480; *Garland v. Davis*, 4 How. 131); yet new pleadings cannot be filed if the rights of the parties are finally determined. *Stewart v. Salamon*, 97 U. S. 361. The court below cannot award a new trial after a mandate has been issued. *Ex parte Dubuque R. Co.*, 1 Wall. 69. A mandate does not affect the rights of third parties not before the court (*Ex parte Sawyer*, 21 Wall. 235); and after a mandate affirming a decree for the distribution of a fund, the court below can entertain the claims of persons not previously before the court. *Re Howard*, 9 Wall. 175. An appeal from a decree passed in accordance with the mandate will be dismissed on motion. *Stewart v. Salamon*, 97 U. S. 361; *Humphrey v. Baker*, 103 Id. 736. A subsequent appeal brings up only the proceedings subsequent to the mandate. *Supervisors v. Kennicott*, 94 U. S. 498; *The Lady Pike*, 96 Id. 461; *Hinckley v. Morton*, 103 Id. 764; *Ames v. Quinby*, 106 Id. 342; *Clark v. Keith*, Id. 464; *Chaffin v. Taylor*, 116 Id. 571.

SECT. 702. — The appellate jurisdiction of the Supreme Court over decisions of the Territorial courts was given specially, and differed somewhat in the several acts establishing the Territories. In the acts establishing the Territories of New Mexico (9 St. 449), Utah (9 St. 455), Arizona (12 St. 665), Idaho (12 St. 811), and Montana (13 St. 88), a writ of error or appeal was allowed in cases of "*habeas corpus* involving the question of personal freedom" (the ordinary expression being "restraint of personal liberty"), writs of error not being allowed in ordinary cases of *habeas corpus*; in the New Mexico act there is coupled a provision relating to the removal of causes involving "the title to slaves." This section is made a general enactment for the removal of cases from all the Territorial courts. 1 Com. D. 406.

19 St. 240, ch. 69, inserts "when" after "cause" in the 11th line of this section. 18 St. 253, ch. 469, § 3, provides for a writ of error in criminal cases, in Utah, of sentence to capital punishment or conviction of bigamy or polygamy. *Wiggins v. People*, 93 U. S. 465; *Wilkerson v. Utah*, 99 Id. 130; *Reynolds v. United States*, 98 Id. 145. By 19 St. 61, ch. 147, § 5, all previous or subsequent cases of appeal or writ of error from the supreme court of the Territory of Colorado may be determined by the United States Supreme Court, and the remand of proceedings shall be directed to the circuit or district court of that district, or the State supreme court; and § 8 provides for the transfer of cases from the Territorial to the circuit and district courts. *Bates v. Payson*, 4 Dillon, 265; *Ames v. Colorado Central R. Co.*, Id. 264.

St. March 3, 1885, ch. 355 (23 St. 443), provides —

"That no appeal or writ of error shall hereafter be allowed from any judgement or decree in any suit at law or in equity in the supreme court of the District of Columbia, or in the supreme court of any



of the Territories of the United States, unless the matter in dispute, exclusive of costs, shall exceed the sum of \$5000. SEC. 2. That the preceding section shall not apply to any case wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of or an authority exercised under the United States; but in all such cases an appeal or writ of error may be brought without regard to the sum or value in dispute."

This act does not grant the right of appeal in questions as to the right of holding office under Territorial statutes. *People v. Clayton*, 11 Pac. Rep. 213. Under it the jurisdictional value is the value at the time of the final judgment or decree, not at the time of the appeal or writ of error. *Street v. Ferry*, 119 U. S. 385.

St. April 7, 1874, ch. 80 (18 St. 27), provides —

"SEC. 1. That it shall not be necessary in any of the courts of the several Territories of the United States to exercise separately the common-law and chancery jurisdictions vested in said courts; and that the several codes and rules of practice adopted in said Territories respectively, in so far as they authorize a mingling of said jurisdictions or a uniform course of proceeding in all cases whether legal or equitable, be confirmed; and that all proceedings heretofore had or taken in said courts in conformity with said respective codes and rules of practice, so far as relates to the form and mode of proceeding, be, and the same are hereby, validated and confirmed: *Provided*, That no party has been or shall be deprived of the right of trial by jury in cases cognizable at common law.

"SEC. 2. That the appellate jurisdiction of the Supreme Court of the United States over the judgments and decrees of said Territorial courts in cases of trial by jury shall be exercised by writ of error, and in all other cases by appeal according to such rules and regulations as to form and modes of proceeding as the said Supreme Court have prescribed or may hereafter prescribe: *Provided*, That on appeal, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified by the court below, and transmitted to the Supreme Court together with the transcript of the proceedings and judgment or decree; but no appellate proceedings in said Supreme Court, heretofore taken upon any such judgment or decree, shall be invalidated by reason of being instituted by writ of error or by appeal: *And provided further*, That the appellate court may make any order in any case heretofore appealed, which may be necessary to save the rights of the parties; and that this act shall not apply to cases now pending in the Supreme Court of the United States where the record has already been filed."

The appellate jurisdiction here provided for can only be exercised by appeal in cases not tried by a jury. *Stringfellow v. Cain*, 99 U. S. 610; *Mantle v. Noyes*, 5 Mont. 274.

On § 702, see notes, §§ 691, 692, 1909, 1911. No writ of error lies from a judgment of a Territorial court to the Supreme Court of the United States, unless some act of Congress provides for it. *Clarke v. Bazadone*, 1 Cranch, 212. A writ of error will not lie to an order of a Territorial court refusing to set aside a judgment by default (*McAllister v. Kuhn*, 96 U. S. 87; see *Kerr v. Clampitt*, 95 Id. 188); or to an order refusing a motion for a new trial (*Leitensdorfer v. Webb*, 20 How. 176; *Sparrow v. Strong*, 4 Wall. 584; *Railway Co. v. Twombly*, 100 U. S. 78); or to a judgment reversing a judgment and instructing the court below to award a *venire de novo* (*Brown v. Union Bank*, 4 How. 465); or to an order setting aside a return to an execution (*Wells v. McGregor*, 13 Wall. 188); or to a judgment sustaining a demurrer and awarding a *procedendo* (*Holcombe v. McKusick*, 20 How. 552; *Miners' Bank v. United States*, 5 Id. 213); or to bring up in an attachment suit points necessary to sustain the attachment. *Leitensdorfer v. Webb*, 20 How. 176. The final judgments of the Territory of Washington in criminal cases can be reviewed only when the Constitution or a statute or treaty of the United States is brought in question. *Watts v. Washington Territory*, 91 U. S. 580. The Supreme Court will not hear a case at the instance of a criminal who has escaped, unless he submits himself to the jurisdiction of the court below. *Smith v. United States*, 94 U. S. 97. An appeal cannot be used to bring up the action of the court on proceedings for the allotment of dower in a law action, although such proceedings are not carried on according to common-law forms. *Parish v. Ellis*, 16 Pet. 151. A case in equity comes up by appeal, although removed into the supreme court of the Territory by a writ of



error. *Brewster v. Wakefield*, 22 How. 118. Subsequent lien-holders need not be joined in an appeal by a mortgagor from a decree foreclosing a mortgage. *Id.*

Under this section and § 1909 either the amount in dispute must exceed \$1000, or the decision be on a writ of *habeas corpus* involving a question of personal freedom. *United States v. Railroad Co.*, 105 U. S. 263. The limitation as to amount applies in cases where the United States are appellants. *Id.*; *United States v. Thompson*, 93 U. S. 586. Where the question relates solely to the counting of votes for and against the removal of a county seat, the value of the matter in dispute cannot be computed. *Potts v. Chumascero*, 92 U. S. 358. No appeal can be taken where neither party had any interest in the property in dispute. *Lownsdale v. Parrish*, 21 How. 290. A writ of error will not lie where only a counterclaim of less than \$1000 is in dispute. *Nagle v. Rutledge*, 100 U. S. 675. In a suit on a contract for the sale of a mining claim the property and rent together determine the matter in dispute. *Stinson v. Dousman*, 20 How. 461; see *Sparrow v. Strong*, 3 Wall. 97. Under this section the Supreme Court cannot review a judgment of the supreme court of a Territory, on conviction on an indictment for cohabiting with a woman, under the act of March 22, 1882, § 3 (22 St. 31). *Snow v. United States*, 118 U. S. 346. The decree of a supreme court of a Territory correctly reversing a decree of a lower court will be affirmed. *United States v. Hart*, 6 Wall. 770.

"*In the same manner and under the same regulations.*" — As to the meaning of this phrase see note on § 1003; *Wells v. McGregor*, 13 Wall. 188. The citation may be signed by a judge or justice of the Territorial court, or by a justice of the Supreme Court. *Brown v. McConnell*, 124 U. S. 491; *Sheppard v. Wilson*, 5 How. 210.

All cases tried by a jury go up by a writ of error, and all others by appeal. *Stringfellow v. Cain*, 99 U. S. 610; *Cannon v. Pratt*, *Id.* 619; *Hecht v. Boughton*, 105 *Id.* 235; *United States v. Hailey*, 118 *Id.* 233; *Story v. Black*, 119 *Id.* 235. By affirming a judgment of an inferior court the supreme court of a Territory adopts the findings of such court as its own. Cases cited *supra*. But on reversing a judgment, the supreme court of the Territory should make other findings (*Stringfellow v. Cain*, *supra*); otherwise the judgment must be affirmed. *Gray v. Howe*, 108 U. S. 12. Conclusions called by the judge of the Territorial court conclusions of law, but really of fact, are considered as the latter by the supreme court. *Eilers v. Boatman*, 111 U. S. 356.

SECT. 703. — See §§ 567, 568. An act of Congress is necessary to bring up a decision of a Territorial court, after the Territory has become a State. *Hunt v. Palao*, 4 How. 589; *Sheppard v. Wilson*, 5 *Id.* 210; *McNulty v. Batty*, 10 *Id.* 72; *Preston v. Bracken*, *Id.* 81; see *Freeborn v. Smith*, 2 Wall. 160. Congress has sole power to declare how judgments of Territorial courts shall be carried into execution or reviewed. *Hunt v. Palao*, 4 How. 589; *Benner v. Porter*, 9 *Id.* 235.

"*And the Supreme Court shall direct the mandate to such court as the nature of the writ of error or appeal requires.*" — Concurrent legislation of Congress and the State is necessary in respect to cases pending in the Supreme Court, to enable it to send the mandate for further proceedings in the proper court. *Benner v. Porter*, 9 How. 235.

SECT. 704. — Where the State does not form part of a judicial circuit, the case is removed into the district court, but otherwise into the circuit court. *Express Co. v. Kountze*, 8 Wall. 342.

SECT. 705. — *Thompson v. Riggs*, 5 Wall. 663. See notes, §§ 691, 692, 997, 1012. The act of Feb. 25, 1879, ch. 99, § 4 (see note, p. 141, *ante*), increased the amount to \$2500. Under the act of March 3, 1885, ch. 355 (see note, § 702), the amount in dispute must exceed \$5000, exclusive of costs. For cases which can be reviewed by the Supreme Court without regard to the amount in dispute, see that act. As to what is a final judgment, order, or decree, see *Brown v. Wiley*, 4 Wall. 165.



The Supreme court of the United States cannot review the judgment of the supreme court of the District of Columbia in criminal cases. *United States v. More*, 3 Cranch, 159. As to amount in controversy, see *Van Ness v. Van Ness*, 6 How. 62; *Columbian Insurance Co. v. Wheelwright*, 7 Wheat. 534; *Ritchie v. Mauro*, 2 Pet. 243; *Nicholls v. Hodges*, 1 Black, 562; *Lee v. Lee*, 8 Pet. 44; *De Krafft v. Barney*, 2 Black, 704. The Supreme Court has appellate jurisdiction under St. 1885 (23 St. 443), over a judgment of the supreme court of the District of Columbia dismissing a writ of prohibition to a court-martial where the amount involved exceeds \$5000. *Smith v. Whitney*, 116 U. S. 167. A case tried in the district court of the District of Columbia must be reviewed by the supreme court of the District before this court can examine it. *Garnett v. United States*, 11 Wall. 256. A writ of error will lie to the supreme court of the District of Columbia in cases which, by the construction of the courts of Maryland, do not allow of the writ. *Railroad Co. v. Church*, 19 Wall. 62. The act which created the supreme court of the District of Columbia vested in it the same powers and jurisdiction that had previously belonged to the circuit court, and the appellate power of this court was declared to be the same as that which it had by law over the circuit court. *Railroad Co. v. Church*, 19 Wall. 62; *Stanton v. Embrey*, 93 U. S. 548.

"*In the same manner and under the same regulations.*"—As to the meaning of this phrase see note, § 1003. The citation may be signed by any justice of the supreme court of the District of Columbia. *Richards v. Mackall*, 113 U. S. 539. The patent referred to in this act of 1885 is a patent for an invention, and not for land. *Street v. Ferry*, 119 U. S. 385.

SECT. 706. — An appeal involving no principle of extensive operation will be dismissed. *Campbell v. Read*, 2 Wall. 198. No writ of error lies on a judgment of less than \$100, although more is claimed. *Wise v. Columbian Turnpike Co.*, 7 Cranch, 276. Rev. St. of District of Columbia, § 848 (seemingly the equivalent of this section), was repealed by the act of Feb. 25, 1879 (see p. 141, *ante*). *Dennison v. Alexander*, 103 U. S. 522. 23 St. 437 (see note, § 764), by restoring the appellate jurisdiction of the Supreme court in *habeas corpus* cases over decisions of the circuit court, necessarily restored it over similar decisions of the supreme court of the District of Columbia. *Wales v. Whitney*, 114 U. S. 564.

SECT. 707. — See notes, *post*, chaps. 20, 21. This section enlarges the government's right of appeal by omitting the limitations contained in earlier statutes, and by giving such right absolutely. *Bradshaw v. United States*, 14 Ct. Cl. 145. The reference to § 1089 should be to § 1086. *Id.* An appeal is a matter of right which the court cannot prevent, and which a party may exercise at his own volition. *United States v. Adams*, 6 Wall. 101. The Supreme Court can review the judgments of the Court of Claims only by appeal, and not by writ of error. *United States v. Young*, 94 U. S. 258; 95 *Id.* 641. When a judgment is vacated by the Court of Claims and a new trial granted, the Supreme Court has no jurisdiction by appeal until a final judgment is rendered. *Id.* The United States may appeal from an adverse judgment of the Court of Claims in all cases where such court is required by law to take jurisdiction of a claim, and judicially determine it (*Vigo's Case*, 21 Wall. 648; *Ex parte Zellner*, 9 *Id.* 244); and on an appeal by the United States, only the claim allowed is brought up. *United States v. Hickey*, 17 Wall. 9. Appeals lie from the judgments of the Court of Claims to the Supreme Court (*United States v. Jones*, 119 U. S. 477); and an appeal is not vacated by the action of Congress in appropriating money to pay the claim. *Id.* On an appeal from a decree in a special case, of which equitable jurisdiction was given by a special act, no statement of facts is necessary. *Harvey v. United States*, 4 Morr. Trans. 699. On a failure by the Court of Claims to find a material fact or to state the amount recovered, the judgment will be reversed. *United States v. Clark*, 94 U. S. 73. A refusal to find a material fact may be excepted to. *United States v. Adams*, 9 Wall. 661.

An appeal lies on a claim referred to the Court of Claims by a joint resolution (*Dikelman v. United States*, 9 Ct. Cl. 320); but not on a claim referred to it merely to decide a



certain fact to guide the United States in the execution of its treaty stipulations. *Ex parte Atocha*, 17 Wall. 439. No appeal lies from an order passed on a change of attorneys (Desmare *v.* United States, 9 Ct. Cl. 1); or on an order refusing a new trial (*Ex parte Russell*, 13 Wall. 664); or under an act directing the Court of Claims to reopen and re-adjudicate a claim, and if it finds a further amount due, that the same shall be a part of the original judgment (United States *v.* Grant, 110 U. S. 225); or from the action of the Secretary of the Treasury in remitting penalties under § 179 of the act of June 30, 1864 (13 St. 305) as amended by the act of March 3, 1865 (13 St. 483). *Dorsheimer v. United States*, 7 Wall. 166. For cases growing out of treaties under Rev. Stats. § 1066, see *Great Western Ins. Co. v. United States*, 112 U. S. 193; *Alling v. United States*, 114 Id. 562. As to how far the Supreme Court will look into the facts, see *United States v. Pugh*, 99 U. S. 265. As to reversing and ordering a new trial where a verdict had been erroneously set aside, see *Shepherd v. Thompson*, 122 U. S. 231. An appeal by the United States from a judgment of the Court of Claims rendered *pro forma* against the opinion of that court for the purpose of an appeal, will be dismissed. *United States v. Gleeson*, 124 U. S. 255. In the following cases *pro forma* judgments not objected to were decided on appeal: *Twenty Per Cent Cases*, 20 Wall. 179; *United States v. Martin*, 94 U. S. 400; *United States v. Driscoll*, 96 Id. 421; *United States v. Fisher*, 109 Id. 143.

St. March 3, 1875, ch. 133 (18 St. 452), provides that land-grant railroads shall not thereafter be paid for transporting United States property, troops, or army officers, but that the act shall not be construed as preventing suits therefor in the Court of Claims with right of appeal.

SECT. 708. — The act of May 9, 1866 (14 St. 44), did not dispense with the existing regulations for appeals. *United States v. Clark*, 94 U. S. 73. The limitation ceases to run from the time of the application for an appeal, and subsequent delays will not prejudice the party. *United States v. Adams*, 6 Wall. 101.

SECT. 709. — Amended by 18 St. 318, ch. 80, by striking out the last four lines of the 1st paragraph, and the word "reaffirm" in the first line of the 2d paragraph. Although the cited act of 1867 contained no repealing clause, yet, under the rule adverted to in this connection in *Stewart v. Kahn*, 11 Wall. 493, that a provision omitted in a statute revising another statute, cannot be enforced, this act was treated as superseding the concluding sentence of § 25 of the judiciary act. 1 Com. D. 410.

Sect. 709 is constitutional. *Martin v. Hunter*, 1 Wheat. 304; *Cohens v. Virginia*, 6 Id. 264; *Ableman v. Booth*, 21 How. 506; *Williams v. Bruffy*, 102 U. S. 248. It is the only means of bringing a case from the supreme court of a State (*Verden v. Coleman*, 22 How. 192); and, to give jurisdiction, it is not necessary to show that the State court erred in its decision. *Furnam v. Nichol*, 8 Wall. 44. There is no distinction between civil and criminal cases. *Twitchell v. Pennsylvania*, 7 Wall. 321. But a writ of error taken by a person convicted of crime who has escaped will not be heard until he submits himself to the jurisdiction of the court below. *Bonahan v. Nebraska*, 125 U. S. 692. The citizenship of the parties is immaterial (*French v. Hopkins*, 124 U. S. 524); and so is the amount in dispute. *Buel v. Van Ness*, 8 Wheat. 312. Consent cannot give jurisdiction. *Mills v. Brown*, 16 Pet. 525; *Mansfield R. Co. v. Swan*, 111 U. S. 379. And the United States can bring a writ of error to a State court only when a private individual could. *United States v. Thompson*, 93 U. S. 586. This section includes all cases involving rights protected by the Federal Constitution, laws, and treaties, however created (*New Orleans v. De Armas*, 9 Pet. 224); and when a Federal question is clearly raised there is jurisdiction, however frivolous the objection. *Hall v. Jordan*, 15 Wall. 393. This is true although the State court in deciding a Federal question violated one of its own rules (*Darrington v. State Bank*, 13 How. 12); or its practice. *Beer Co. v. Massachusetts*, 97 U. S. 25. In chancery cases, or other cases where the evidence becomes a part of the



record in the highest court of a State, the Supreme Court can review the law and facts, so far as is necessary to determine the validity of the right set up under the act of Congress; but in cases where the court of a State holds conclusive the facts passed upon by a jury, or by the court in jury-waived cases, or by a referee, the Supreme Court cannot review the facts. *Boggs v. The Merced Mining Co.*, 3 Wall. 304; *River Bridge Co. v. Kansas Pacific Ry. Co.*, 92 U. S. 317.

“*A final judgment or decree.*” — As to what is or is not a final judgment or decree, see also notes on §§ 691, 692. The judgment may be reviewed, although on a case stated (*Aldrich v. Insurance Co.*, 8 Wall. 491); and although rendered on an equal division of the judges (*Hartman v. Greenhow*, 102 U. S. 672); and when the State court is exercising both original and appellate jurisdiction. *Id.* A judgment or decree determining the particular cause is final. *Weston v. Charleston*, 2 Pet. 449; *Jones v. Craig*, 127 U. S. 213. A judgment of the supreme court of a State ordering a specified judgment is a final judgment. That judgment is final which terminates the litigation between the parties on the merits of the case, so that if there should be an affirmance in the supreme court, the court below would have nothing to do but to execute the judgment it has already rendered. *Mower v. Fletcher*, 114 U. S. 127; *Bostwick v. Brinkerhoff*, 106 Id. 3, and cases there cited. A judgment reversing and remanding “for further proceedings according to law” is not final; and a judgment entered by the lower court is not a judgment of the highest court of a State, although the necessary result of the decision of such highest court. *McComb v. Commissioners*, 91 U. S. 1; *Johnson v. Keith*, 117 Id. 199. A judgment on which a writ of error is brought with an appeal bond operating as a *supersedeas*, under the circumstances, was held the one to be re-examined, although such judgment had been subsequently set aside by the State court, and a new one entered. *Edwards v. Elliott*, 21 Wall. 551. A decree of foreclosure sale where the rights of all the parties have been settled, and nothing remains to be done but to make the sale and pay out the proceeds, is a final decree (*Ray v. Law*, 3 Cranch, 179; *Whiting v. U. S. Bank*, 13 Pet. 15; *Railroad Co. v. Swasey*, 23 Wall. 405); but the amount due on the debt must be determined, and the property to be sold ascertained and defined, and a reference to a master is not sufficient. *Railroad Co. v. Swasey*, *supra*. A decree dissolving an injunction without dismissing the bill is not final. *Young v. Grundy*, 6 Cranch, 51; *McCollum v. Eager*, 2 How. 61; *Hiriart v. Ballon*, 9 Pet. 167; *Moses v. The Mayor*, 15 Wall. 390; *Thomas v. Wooldridge*, 23 Id. 283. When the court of appeals of a State affirms an interlocutory order of a lower court and remands the case, it is not a final decree from which a writ of error will lie, though such order is appealable under the State law. *Reddall v. Bryan*, 24 How. 420. The decision of a State court on a motion to grant a rehearing in an equity suit is not reviewable by the Supreme Court. *Steines v. Franklin County*, 14 Wall. 15. Where the judgment against the principal on a bond is reversed because he is held not entitled to the exemption of the bankrupt act, and the judgment against his sureties affirmed because they were held not entitled to the benefit of his discharge, both judgments are final within the meaning of this section. *O'Dowd v. Russell*, 14 Wall. 402. A decree of the highest court of the State dissolving an injunction granted by an inferior court leaves the whole case to be disposed of on the merits, and is therefore not a final decree within the meaning of this section. *Moses v. The Mayor*, 15 Wall. 387.

“*In any suit.*” — Any proceeding in a court of justice by which an individual pursues that remedy which the law affords him is a suit. *Weston v. Charleston*, 2 Pet. 449; *Sewing Machine Cases*, 18 Wall. 585; *Kohl v. United States*, 91 U. S. 375. The following are “suits:” A writ of prohibition (*Sewing Machine Cases*, 18 Wall. 585); a writ of right (*Green v. Lister*, 8 Cranch. 224); a writ of *habeas corpus* (*Holmes v. Jennison*, 14 Pet. 564; *Ex parte Milligan*, 4 Wall. 113); proceedings to take land for public uses by condemnation. *Kohl v. United States*, 91 U. S. 375.



"*In the highest court of a State, in which a decision in the suit could be had.*" — It need not be the highest court of the State, but must be the highest in which the suit could be had. Where leave of the highest court of the State is necessary in order to bring a suit before it, a refusal of the court on a proper application to grant leave is equivalent to a judgment of affirmance, and is a final judgment of the highest court, &c. *Gregory v. McVeigh*, 23 Wall. 306. A writ of error does not lie to a court to review its refusal to allow an appeal of which it had not appellate jurisdiction, but does lie to such inferior court. *Miller v. Joseph*, 17 Wall. 655. The writ lies to an inferior court where there can be a review only by consent of the higher court, or a judge thereof, and a judge refuses consent (*Gregory v. McVeigh*, 23 Wall. 306); it lies to the higher court where the application is to the court, which refuses, as this is equivalent to an affirmance. *Richmond R. Co. v. Louisa R. Co.*, 13 How. 80; *Gregory v. McVeigh*, 23 Wall. 306. See also *In re Royall*, 125 U. S. 696. The fact that the general assembly of the State has the power to set aside the judgment of the State court does not prevent it from being the highest court of the State within the meaning of this section. *Olney v. Arnold*, 3 Dall. 308. The Supreme Court acts only on the judgment of the highest court of the State. Only such questions as either have been or ought to have been passed upon by that court in the regular course of its proceedings can be considered on error. *Fashnacht v. Frank*, 23 Wall. 420. There can be no review of a ruling on a petition for a removal made after the final judgment, which ruling was not, and could not have been passed on by the highest court of the State. *Fashnacht v. Frank*, 23 Wall. 416. Whether a political body which passed a certain statute is a State is a question over which this court has no jurisdiction under this section. *Scott v. Jones*, 5 How. 344.

The Supreme Court has jurisdiction only over such Federal questions as are given it by statute. *Wiscart v. Dauchy*, 3 Dall. 321; *Durousseau v. United States*, 6 Cranch, 307; *The Lucy*, 8 Wall. 307; *Ex parte McCordle*, 6 Id. 318; *Murdock v. Memphis*, 20 Id. 620. It must affirmatively appear from the record that a Federal question was raised and presented to the State court. *Murdock v. Memphis*, 20 Wall. 636; *Wallace v. Parker*, 6 Pet. 680; *Railroad Co. v. Rock*, 4 Wall. 117; *Supervisors of Santa Cruz County v. Railroad Co.*, 111 U. S. 361; *Chouteau v. Gibson*, Id. 200; *Railway Co. v. Guthard*, 114 Id. 133. As to what composes the record, and as to how far the opinion of the State court can be examined to determine the existence of a Federal question, see note on "record," § 997. As to what the record should show, see also *Inglee v. Coolidge*, 2 Wheat. 363; *Lagrange v. Chouteau*, 4 Pet. 287; *Lande v. Louisiana*, 18 How. 192; *Medberry v. Ohio*, 24 Id. 413; *Attorney-General v. Meeting House*, 1 Black, 262; *Railroad Co. v. Rock*, 4 Wall. 177; *Choteau v. Marguerite*, 12 Pet. 507; *Ocean Ins. Co. v. Polleys*, 13 Id. 157; *Coons v. Gallagher*, 15 Id. 18; *Armstrong v. Athens Co.*, 16 Id. 281; *Boughton v. Exchange Bank*, 104 U. S. 427; *Insurance Co. v. Treasurer*, 11 Wall. 204; *Cockroft v. Vose*, 14 Id. 5; *Sevier v. Haskell*, Id. 12; *Steines v. Franklin Co.*, Id. 15; *Hurley v. Street*, Id. 85; *Caperton v. Bowyer*, 14 Id. 216; *Commercial Bank v. Rochester*, 15 Id. 639; *Murray v. Charlestown*, 96 U. S. 432; *Maxwell v. Newbold*, 18 How. 511. The certificate only makes the record more certain and specific, but cannot originate a Federal question. *Parmelee v. Lawrence*, 11 Wall. 36; *Lawler v. Walker*, 14 How. 152; *Railroad Co. v. Rock*, 4 Wall. 177; *Brown v. Atwell*, 92 U. S. 330. But see *Gross v. Mortgage Co.*, 108 U. S. 485. Nor can the record of the judge who tried the case at *nisi prius* originate a Federal question. *Inglee v. Coolidge*, 2 Wheat. 363. In *Adams County v. Railroad Co.*, 112 U. S. 123, there was no Federal question discovered, in spite of the certificate of the chief justice of a State court in allowing the writ that such question had been decided. The Federal question need not have been formally raised; but it is sufficient if it appears by clear and necessary intendment that a Federal question was raised and presented to the State court. *Crowell v. Randall*, 10 Pet. 368; *Armstrong v.*



Athens Co., 16 Id. 281; *Hickie v. Starke*, 1 Id. 94; *Bridge Proprietors v. Hoboken Co.*, 1 Wall. 143; *Furman v. Nichol*, 8 Id. 44; *Murray v. Charlestown*, 96 U. S. 442; *Detroit Railway Co. v. Guthard*, 114 Id. 136; *Eureka Lake Co. v. Yuba County*, 116 Id. 410; *Otis v. Oregon Co.*, Id. 548. It is not enough that a Federal question might have been raised (*Hoyt v. Sheldon*, 1 Black, 518; *Railroad Co. v. Guthard*, 114 U. S. 136); nor that one ought to have been raised and might have been decided (*The Victory*, 6 Wall. 382; *Manufacturing Co. v. Massachusetts*, Id. 632; *Gibson v. Choteau*, 8 Wall. 314); nor that the party intended to raise one. *Mathewson v. Bank*, 7 How. 260. The Federal question must have been raised and presented by the plaintiff in error. *Wynn v. Morris*, 20 How. 3. The party must claim for himself, and not for a third person in whose title he has no interest. *Owings v. Norwood*, 5 Cranch, 344; *Montgomery v. Hernandez*, 12 Wheat. 129; *Henderson v. Tennessee*, 10 How. 311; *Hale v. Gaines*, 22 Id. 149, 160; *Verden v. Coleman*, 1 Black, 472; *Long v. Converse*, 91 U. S. 113; *Miller v. Lancaster Bank*, 106 Id. 544. The Federal question must have been raised and presented to the highest court of the State before the entry of a final judgment in the case. *Mathewson v. Bank*, 7 How. 260; *Detroit Railway Co. v. Guthard*, 114 U. S. 133; *Brown v. Colorado*, 106 Id. 95; *Susquehanna Boom Co. v. Branch Boom Co.*, 110 Id. 57; *Simmerman v. Nebraska*, 116 Id. 54. In *Myrick v. Thompson*, 99 U. S. 294, the question was raised for the first time in the supreme court of a State. In *Parmelee v. Lawrence*, 11 Wall. 38, it was held that a Federal question could not be considered if raised for the first time in the argument of counsel before the State court. And it cannot be considered if raised for the first time on a petition for a rehearing. *Boom Co. v. Boom Co.*, 110 U. S. 59.

It must appear that the court either knew or ought to have known that a Federal question was involved in the decision to be made. *Brown v. Colorado*, 106 U. S. 95; *Boom Co. v. Boom Co.*, 110 U. S. 57. It must affirmatively appear that the State court actually decided such question, or that its decision was necessary to the judgment or decree rendered in the case. *The Victory*, 6 Wall. 384; *Murdock v. Memphis*, 20 Wall. 636; *Chouteau v. Gibson*, 111 U. S. 200; *McManus v. O'Sullivan*, 91 Id. 578; *Bolling v. Lersner*, Id. 594; *Crossley v. New Orleans*, 108 Id. 105; *Adams County v. Railroad Co.*, 112 Id. 127; *Day v. Gallup*, 2 Wall. 97; *Buck v. Colbath*, 3 Id. 334; *Moore v. Miss.*, 21 Id. 636; *Brown v. Atwell*, 92 U. S. 327; *Citizen's Bank v. Board of Liquidators*, 98 Id. 140; *Detroit Railway Co. v. Guthard*, 114 Id. 136; *McKinney v. Carroll*, 12 Pet. 66; *DeSasure v. Gaillard*, 127 U. S. 234. That an act of Congress was applicable would not be sufficient. *Maxwell v. Newbold*, 18 How. 515; criticising *Miller v. Nicholls*, 4 Wheat. 311. And where the decision of a Federal question is necessarily involved, the Supreme Court has jurisdiction, although no mention is made of the Federal question in the opinion. *Arrowsmith v. Harmoning*, 118 U. S. 194. The State court decides a Federal question by affirming a decision of a court below on a petition for review setting forth the decision of such lower court. *Stewart v. Kahn*, 11 Wall. 493. And as it must appear affirmatively that a Federal question was raised and presented, an assignment of error that an inferior State court had held a certain statute to be "valid and constitutional," and an entry by the highest court that such statute was not "in any respect repugnant to the Constitution of the United States," does not give jurisdiction, being too indefinite (*Edwards v. Elliott*, 21 Wall. 532); nor does a certificate that "there was drawn in question the validity of statutes of the State," without specifying them (*Lawler v. Walker*, 14 How. 149); nor does a certificate that a statute was "in conflict with the Constitution" (*Messenger v. Mason*, 10 Wall. 507); nor that "the charge of the court, the verdict of the jury, and the judgment below are each against, and in conflict with the Constitution and laws of the United States." *Maxwell v. Newbold*, 18 How. 511. Specific mention of the clause of the Constitution, or any reference to the Constitution, is unnecessary, but it is simply necessary that apt words shall be used to describe some provision of the Constitution. *Spencer*



*v. Merchant*, 125 U. S. 352. The Federal question must have been decided against the right claimed by the plaintiff in error (*Murdock v. Memphis*, 20 Wall. 636; *Burke v. Gaines*, 19 How. 388; *Smith v. Adsit*, 16 Wall. 185); and this may be done by evading a direct decision on a necessary point. *Chapman v. Goodnow*, 123 U. S. 548. If the Federal question was decided in favor of the plaintiff in error, the judgment must be affirmed. *Murdock v. Memphis*, 20 Wall. 636; *Gordon v. Caldcleugh*, 3 Cranch, 268; *Strader v. Baldwin*, 9 How. 261; *Linton v. Stanton*, 12 Id. 423; *Reddall v. Bryan*, 24 Id. 420; *Ryan v. Thomas*, 4 Wall. 603; *Commonwealth Bank v. Griffith*, 14 Pet. 56; *Walker v. Taylor*, 5 How. 64; *Hale v. Gaines*, 22 Id. 144; *Fulton v. McAfee*, 16 Pet. 149; *Verden v. Coleman*, 1 Black, 472. Although the Federal question was erroneously decided against the plaintiff in error, yet if any non-Federal question was decided by the State court broad enough to sustain the judgment, it will be affirmed (*Murdock v. Memphis*, 20 Wall. 636; *Railroad Co. v. Railroad Co.*, 14 Id. 23; *Rector v. Ashley*, 6 Id. 142; *Jenkins v. Loewenthal*, 110 U. S. 222; *Brooks v. Missouri*, 124 Id. 400; *Williams v. Oliver*, 12 How. 111, 125; *Almonester v. Kenton*, 9 Id. 1; *Aicardi v. State*, 19 Wall. 107); even though the Supreme Court considers the decision of the non-Federal question as unsound. *De Saussure v. Gaillard*, 127 U. S. 234. Where a case has been decided in an inferior court of a State on a single point which would give the Supreme Court jurisdiction, it will not be presumed that the State court decided it on some other ground not found in the record or suggested in the latter court. *Keith v. Clark*, 97 U. S. 454. Where there are two questions presented in the State court, one not Federal and the other Federal, and the case is decided on the former, the Supreme Court has no jurisdiction (*Crossley v. New Orleans*, 108 U. S. 105); and the opinion can be consulted to see if the non-Federal question was alone passed on. *McManus v. O'Sullivan*, 91 U. S. 579. If there were two good grounds for decision, one Federal and the other non-Federal, the court will presume that it was decided on non-Federal grounds (*Klinger v. Missouri*, 13 Wall. 263; *Phoenix Insurance Co. v. Treasurer*, 11 Id. 204; *Commercial Bank v. Rochester*, 15 Id. 639; *Mills v. Brown*, 16 Pet. 525); and the opinion need not be consulted. *Bolling v. Lersner*, 91 U. S. 594. But if the non-Federal ground was not sufficient to sustain the decision, it will be presumed that the Federal question was decided. Id. But when a decision of the Federal question is necessary to any final judgment in the case, or no non-Federal question is decided by the State court broad enough to sustain the judgment, it will be reversed if error is found. *Murdock v. Memphis*, 20 Wall. 636; *Minnesota v. Bachelder*, 1 Id. 109. The Supreme Court is not obliged to consider non-Federal decisions involved in the decision of the State court. *Murdock v. Memphis*, *supra*.

"Where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity." — Although a treaty or an act of Congress need not be pleaded, the record must disclose a complete title under it, and a decision against its validity. *Hickie v. Starke*, 1 Pet. 94.

"Or where is drawn in question the validity of a statute of, or an authority exercised under any State," &c. — When the question is whether an amendment to a State constitution, as construed by the court below and applied to the facts of the case, impairs the obligation of a contract, this court has jurisdiction. *Williams v. Louisiana*, 103 U. S. 637. The judgment of a State court is not reviewable here unless in terms or by its necessary operation it gives effect to some provision of the State constitution, or some legislative enactment of the State, which is claimed by the unsuccessful party to impair the obligation of the contract in question. *Lehigh Water Co. v. Easton*, 121 U. S. 388; citing *Railroad Co. v. Rock*, 4 Wall. 177, 181; *Railroad Co. v. McClure*, 10 Id. 511, 515; *Knox v. Exchange Bank*, 12 Id. 379, 383; *Delmas v. Insurance Co.*, 14 Id. 661, 665; *University v. People*, 99 U. S. 309, 319; *Chicago Ins. Co. v. Needles*, 113 Id. 574, 582. The record must show, though not necessarily in terms, that the constitutionality of a State law was drawn in



question (*Chicago Ins. Co. v. Needles*, *supra*; *Willson v. Marsh Co.*, 2 Pet. 245; *Harris v. Dennie*, 3 Id. 292; *Craig v. Missouri*, 4 Id. 410; *Davis v. Packard*, 6 Id. 41); and the Supreme Court has no appellate jurisdiction when the record does not show that the question of the validity of the statute was raised, and when the court may have decided without passing on that question. *Mills v. Brown*, 16 Pet. 525. The Supreme Court can review the decision of the State court, when a statute of, or authority exercised under, a State is drawn in question as repugnant to the Constitution or laws of Congress, and the decision is in favor of their validity. *Insurance Co. v. Augusta*, 93 U. S. 116; *McGuire v. Commonwealth*, 3 Wall. 387; *Cohens v. Virginia*, 6 Wheat. 264; *Railroad Co. v. Maryland*, 21 Wall. 456. And the pleadings as well as the judgment may be consulted to determine the existence of a Federal question. *Craig v. Missouri*, 4 Pet. 410. The laws of a State include acts passed by bodies to whom certain legislative power is delegated. See *New Orleans Waterworks v. Louisiana Sugar Co.*, 125 U. S. 31, and cases there cited. An enactment of the Confederate States enforced as the law of one of the States composing that Confederation, is a statute of such State within this section. *Williams v. Bruffy*, 96 U. S. 176; *Ford v. Surget*, 97 Id. 594. When the judgment necessarily involves an adjudication that a State statute does not impair the obligation of a contract, although the State court did not in terms pass on the claim, a Federal question arises. And the jurisdiction is not defeated because it appears that the statute does not impair the obligation. *Chicago Ins. Co. v. Needles*, 113 U. S. 574. But, for a reversal, the record must show that a State statute is invalid as repugnant to the United States Constitution or laws. *Kansas Endowment Assoc. v. Kansas*, 120 U. S. 103. When a writ of error is asked on the ground that a State law impairs the obligation of a contract, this court must determine whether a contract exists, and what is its construction and obligation. *State Bank of Ohio v. Knoop*, 16 How. 369. A Federal question arises when the allegation is that by a statute a State made a contract and by another violated it, and the State court holds the later statute valid. *The Binghampton Bridge*, 3 Wall. 51; *Jefferson Bank v. Skelly*, 1 Black. 436; *Bridge Proprietors v. Hoboken Co.*, 1 Wall. 116; *Delmas v. Insurance Co.*, 14 Id. 661; *University v. People*, 99 U. S. 309. A decision that a contract is not a maritime contract, and that a statute giving a remedy thereon is constitutional, involves a Federal question. *Edwards v. Elliott*, 21 Wall. 532. As to a right claimed under the Fourteenth Amendment on account of a statute validating a void assessment, see *Spencer v. Merchant*, 125 U. S. 352. For a suit involving a right claimed under the Fourteenth Amendment, see *Southern Pacific R. Co. v. California*, 118 U. S. 109. For a Federal question arising from the action of the State court in refusing to consider a defence under the Constitution, &c., see *Des Moines Nav. Co. v. Iowa Homestead Co.*, 123 U. S. 555. For cases where a State court has not given full faith and credit to the decrees of a Federal court, see *Stryker v. Goodnow*, 123 U. S. 538; *Chapman v. Goodnow*, Id. 548; *Des Moines Nav. Co. v. Iowa Homestead Co.*, Id. 559. For a case as to the authority of a sheriff under a State stay law, see *Daniels v. Tearney*, 102 U. S. 415; and for a case involving the right of a licensee under the United States to do an act prohibited by a State, see *McGuire v. Commonwealth*, 3 Wall. 287. The laws of Mississippi as to improvement of navigation are not in conflict with the act of Congress admitting it as a State. *Withers v. Buckley*, 20 How. 84.

The Supreme Court cannot review questions of general law (*United States v. Thompson*, 93 U. S. 586; *Old Dominion Bank v. McVeigh*, 98 Id. 332; *Allen v. McVeigh*, 107 Id. 433; *Lytle v. Arkansas*, 22 How. 193; *Steines v. Franklin County*, 14 Wall. 15; *Tarver v. Keach*, 15 Id. 67; *Delmas v. Insurance Co.*, 14 Id. 661; *Aicardi v. Alabama*, 19 Id. 635; *Insurance Co. v. Hendren*, 92 U. S. 286; *Wolf v. Stix*, 96 Id. 541; *Grame v. Assurance Co.*, 112 Id. 273); nor can it review questions of local law. *Poppe v. Langford*, 104 U. S. 770. The Supreme Court cannot declare a State statute within the general scope of



the State's constitutional power void, even because against natural justice (*Calder v. Bull*, 3 Dall. 386); nor can it review a decision holding a contract void as against public policy. *Tarver v. Keach*, 15 Wall. 67. The Supreme Court cannot review a decision that a State law is not in conflict with the State constitution. *Withers v. Buckley*, 20 How. 84; *Medberry v. Ohio*, 24 Id. 413; *Porter v. Foley*, Id. 415; *Salomons v. Graham*, 15 Wall. 208; *Hart v. Lampshire*, 3 Pet. 280; *Watson v. Mercer*, 8 Id. 88; *Mitchell v. Clark*, 110 U. S. 633. Where a party objects to a State law as being "unconstitutional and void," the court properly construes it to mean contrary to the State constitution, and no writ of error will lie from such a decision. *Porter v. Foley*, 24 How. 415. Where a State constitution subsequent to a contract embodies principles adjudicated by its highest court, and the decision declares the contract void both on provisions of its constitution and its previous adjudications, a Federal question is not involved (*West Tennessee Bank v. Citizens' Bank*, 13 Wall. 432); *a fortiori*, not, when the decision is expressly put on prior adjudications. *Palmer v. Marston*, 14 Wall. 10; *Delmas v. Insurance Co.*, Id. 661. No Federal question arises where the validity of State statute is admitted (*Commercial Bank v. Buckingham*, 5 How. 317; *Banking Co. v. Marshall*, 12 Id. 165); or where the decision is against the validity of the State statute (*Bank of Kentucky v. Griffith*, 14 Pet. 56; *Walker v. Taylor*, 5 How. 64); or where the judgment does not involve the statute assailed (*Railroad Co. v. New York*, 12 Wall. 384); or where the court finds that there was no contract to be impaired (*Railroad Co. v. McClure*, 10 Wall. 511); or where the statute was in existence when the contract was made (*Railroad Co. v. McClure*, 10 Wall. 511); or where the question is as to the construction and not the validity of the State statute. *Commercial Bank v. Buckingham*, 5 How. 317. That a State court holds a contract void which the Supreme Court may consider valid, gives the Supreme Court no jurisdiction. *Railroad Co. v. Rock*, 4 Wall. 177. A claim that one decree of a State court is in collision with another of the same court in another suit concerning the same subject-matter, involves no Federal question, as Art. 4, § 1, of the Constitution does not apply to such cases. *Mitchell v. Lenox*, 14 Pet. 49. As the consent of a State, by constitution or statute, to be sued is not a contract, a statute passed after a suit is brought prescribing certain requirements in suits against the State impairs no contract. *Beers v. Arkansas*, 20 How. 527. A decision holding that a Federal judge is not liable for damages for false imprisonment, as acting in his judicial capacity, although the United States Supreme Court had decided the imprisonment to be illegal, involves no Federal question (*Lange v. Benedict*, 99 U. S. 71); nor does a decision that a trustee under a State statute of a banking corporation has not a certain power (*Robertson v. Coulter*, 16 How. 106); nor does a decision holding that a statute of a Territory is valid (*Scott v. Jones*, 5 How. 375; *Messenger v. Mason*, 10 Wall. 510); nor a decision that a judgment of the State court impairs a contract, as the constitution or a statute of the State must impair it. *Knox v. Exchange Bank*, 12 Wall. 379. The Supreme Court has no jurisdiction where judgments of a State court in their effect impair the obligation of contracts. *Knox v. Exchange Bank*, 12 Wall. 379; *New Orleans Waterworks v. Louisiana Sugar Co.*, 125 U. S. 30.

"Or where any title, right, privilege, or immunity is claimed," &c. — Where the highest court of a State is reviewing the decision of the trial court, it must appear that the right, &c., was specially set up or claimed in the latter court. *Spies v. Illinois*, 123 U. S. 181; *French v. Hopkins*, 124 Id. 524; *Brooks v. Missouri*, Id. 394. For a right claimed under the Constitution, see *Insurance Co. v. Augusta*, 93 U. S. 116; *Bonahan v. Nebraska*, 118 Id. 231. Under this section the Supreme Court can review a decision that a Federal statute is constitutional (*Trebilcock v. Wilson*, 12 Wall. 687); and a decision in favor of legal tender acts. *Trebilcock v. Wilson*, 12 Wall. 687; *Dooley v. Smith*, 13 Id. 604. It is sufficient if the record shows a case necessarily within the Constitution, and the particular clause relied on need not be expressly set forth. *Bridge Proprietors v. Hoboken Co.*, 1 Wall. 116; *Furman*



*v. Nichol*, 8 Id. 44; *Murray v. Charlestown*, 96 U. S. 432; *Farney v. Towle*, 1 Black, 350; *Hoyt v. Sheldon*, Id. 518. The Supreme Court can review a decision against rights, &c., claimed under the act of the executive in inaugurating war (*Mathews v. McStea*, 20 Wall. 646); and one against an authority alleged to have been exercised by the Secretary of the Treasury in behalf of the United States (*Neilson v. Lagow*, 7 How. 772); and one against the power of the Secretary of the Interior under various acts of Congress to set aside a survey of a Spanish grant, and to order a new one (*Magwire v. Tyler*, 1 Black, 195); and a decision in favor of the priority of an attachment under a State statute over a mortgage recorded under an act of Congress (*Aldrich v. Ætna Co.*, 8 Wall. 491); and one against the priority of assignment in one State over an attachment in another (*Green v. Van Buskirk*, 5 Wall. 307; *Crapo v. Kelly*, 16 Id. 610) — but the record of the State court of another State must be duly authenticated (*Caperton v. Ballard*, 14 Wall. 238); and one against a privilege claimed under the Constitution where the judgment was rendered by a judge appointed by a military governor of Louisiana (*Pennywit v. Eaton*, 15 Wall. 380); and one against the validity of a patent (*Bell v. Hearne*, 19 How. 252); and one admitting a deed objected to as not properly stamped under the acts of Congress. *Hall v. Jordan*, 15 Wall. 393. The Supreme Court can review decisions against rights claimed under acts of Congress (*Lessieur v. Price*, 12 How. 59; *Rector v. Ashley*, 6 Wall. 142; *Buel v. Van Ness*, 8 Wheat. 312; *Ross v. Barland*, 1 Pet. 655; *Carondelet v. St. Louis*, 1 Black, 179; *Matthews v. Zane*, 4 Cranch, 382; *Mackay v. Dillon*, 4 How. 421; *McGuire v. Commonwealth*, 3 Wall. 382; *Aldrich v. Ætna Co.*, 8 Id. 491; *Railroads v. Richmond*, 15 Id. 3; *Murdock v. Memphis*, 20 Id. 590); although such rights depend in part upon Spanish law. *Chouteau v. Eckhart*, 2 How. 344. The title must depend on the statute drawn in question. *Williams v. Norris*, 12 Wheat. 117; *Montgomery v. Hernandez*, Id. 129; *Fisher v. Cockerell*, 5 Pet. 248. A decision that a consul-general is not exempt from suit in a State Court may be reviewed by the Supreme Court (*Davis v. Packard*, 6 Pet. 41); and so may a decision against exempting Federal securities from taxation. *Banks v. Mayor*, 7 Wall. 16. For questions involving the duty of a cashier of a national bank, see *Waite v. Dowley*, 94 U. S. 532; and for one involving the rights of national banks, see *Swope v. Leffingwell*, 105 U. S. 3. The Supreme Court may review a decision refusing to allow a petition to remove a cause (*Kanouse v. Martin*, 14 How. 23; *Oakley v. Goodnow*, 118 U. S. 43); and one that a title to land from the United States is invalid (*Bell v. Hearne*, 19 How. 252; *Reichart v. Felps*, 6 Wall. 160; *Berthold v. McDonald*, 22 How. 334; *Silver v. Ladd*, 6 Wall. 440); and one against the validity of an entry of land allowed by the proper officers, based on fraud in procuring the certificate of pre-emption (*Lytle v. Arkansas*, 22 How. 193); and one that a person holding title to land under one who claimed under a patent of the United States holds in trust for another. *Johnson v. Towsley*, 13 Wall. 72; *Marquez v. Frisbie*, 101 U. S. 473; *Morrison v. Stalnaker*, 104 Id. 213; *Baldwin v. Stark*, 107 Id. 463. Decisions of State courts denying a right, title, &c., claimed under the acts of a Federal court may be reviewed by the Supreme Court (*Dupasseur v. Rochereau*, 21 Wall. 130; *Gregory v. McVeigh*, 23 Id. 294; *O'Brien v. Weld*, 92 U. S. 81; *Clements v. Berry*, 11 How. 398; *Ableman v. Booth*, 21 Id. 506; *Collier v. Stanbrough*, 6 Id. 14; *Buck v. Colbath*, 3 Wall. 334; *Day v. Gallup*, 2 Id. 97; *Sharpe v. Doyle*, 102 U. S. 686; *Crescent City Co. v. Butchers' Union*, 120 Id. 141); and so may a decision against the right of a bankrupt to have a suit stayed (*Hill v. Harding*, 107 U. S. 631); and a denial of a right under a sale by order of the district court in bankruptcy. *Insurance Co. v. Murphy*, 111 U. S. 738; *Railroad Co. v. Delamore*, 114 Id. 501. A decision that a debt was contracted in a fiduciary capacity so as not to be discharged by a discharge in bankruptcy is a Federal question. *Palmer v. Hussey*, 119 U. S. 96.

As to questions arising under treaties, see *Owings v. Norwood*, 5 Cranch, 344; *Smith*



*v. Maryland*, 6 Id. 286; *Martin v. Hunter*, 1 Wheat. 304; *Moreland v. Page*, 20 How. 522; *Mining Co. v. Boggs*, 3 Wall. 304; *Magwire v. Tyler*, 8 Id. 650.

The Supreme Court cannot review a decision where the right is claimed in opposition to an act of Congress (*Congdon v. Goodman*, 2 Black, 574); nor where the decision of the State court is in favor of the validity of the claim (*Ryan v. Thomas*, 4 Wall. 603); nor where the right is specially claimed for the first time in the United States Supreme Court. *Worthy v. Comm'rs*, 9 Wall. 611. Whether or not the defendant's conduct was in fraud of an act of Congress will not be re-examined by the Supreme Court at his instance. *Udell v. Davidson*, 7 How. 769; *Walworth v. Kneeland*, 15 Id. 348. An allegation that a treaty has been misconstrued in refusing to sanction a claim is not sufficient to give the Supreme Court jurisdiction. *Choteau v. Marguerite*, 12 Pet. 507. The Supreme Court cannot review a decision that a court, established by military authority in conquered territory in time of war, and invested with power to try civil causes, acted within its jurisdiction. *Mechanics' Bank v. Union Bank*, 22 Wall. 276.

A decision granting a removal does not involve a Federal question (*Gordon v. Caldcleugh*, 3 Cranch, 268); nor does a question as to the force of a judgment in a State court and a sale of property thereunder, to defeat liens on the property in another State (*Maxwell v. Newbold*, 18 How. 511); nor does a decision that private property may be taken for public use without compensation, as the Fifth Amendment is merely a restriction on Federal power (*Withers v. Buckley*, 20 How. 84); nor does a decision against the constitutionality of a statute of the Territory out of which the State was created (*Miners' Bank v. Iowa*, 12 How. 1); nor does a decision of the State court of California upon the question whether an alcade in San Francisco, after the conquest and before the incorporation of the city, and before the adoption of a State constitution by California, could make a valid grant of pueblo lands. *San Francisco v. Scott*, 111 U. S. 768. The Supreme Court cannot review a decree dismissing a bill by an assignee in bankruptcy to set aside a discharge, as no decision on the bankrupt act was necessary, or if made was favorable to the right claimed. *Calcote v. Stanton*, 18 How. 243. Where a decree was made reversing a decree of the court below dismissing a bill filed to recover a debt and set aside a sale as fraudulent, and entering judgment for the plaintiff, and thereupon the defendant below, who three years before had received a discharge in bankruptcy, petitioned the Supreme Court to set aside its decree, and either permit him to plead his discharge there, or remand the cause, so that he might plead it in the inferior courts, the court, on the ground that a new defence could not be raised in the State court, refused the petition as involving no Federal question. *Wolf v. Stix*, 96 U. S. 541. A decision that a bankrupt had no title cannot be reviewed (*Scott v. Kelly*, 22 Wall. 57); nor can a decision on the question whether rights of an insolvent in a contract claimed to be invalid under an act of Congress, passed to an assignee. *Gill v. Oliver*, 11 How. 529; *Williams v. Oliver*, 12 Id. 111, 125; *Williams v. Gibbes*, 17 Id. 239. An action of trespass against a marshal does not necessarily raise a Federal question. *Day v. Gallop*, 2 Wall. 97.

A decision annulling a judgment on the ground that certain notes were given for a loan of Confederate money, and that the transactions were between enemies during the war, cannot be reviewed (*Stevenson v. Williams*, 19 Wall. 572); nor can a decision sustaining a demurrer to a bill to set aside a sale paid for in Confederate notes taken in the usual course of business, and in Confederate bonds taken under circumstances amounting to coercion. *Dugger v. Boccock*, 104 U. S. 596. For other cases involving Confederate currency, see *Bethell v. Demaret*, 10 Wall. 537; *West Tennessee Bank v. Citizens' Bank*, 13 Id. 432; s. c. 14 Id. 9. A decision adjudging a slave entitled to her freedom under the ordinance of 1787 for the government of the Northwestern Territory, involves no Federal question (*Menard v. Aspasia*, 5 Pet. 505); nor does a decision on a claim made that slaves



were made free by occasionally going into a free State formed out of the Northwestern Territory, as laws of such Territory did not apply to States formed out of it (*Strader v. Graham*, 10 How. 82); nor does a decision whether a person was lawfully held as a slave in Missouri at the time of the cession of Louisiana (*Choteau v. Marguerite*, 12 Pet. 507); nor a decision holding void a note given for a slave. *Palmer v. Marston*, 14 Wall. 10.

The Supreme Court cannot review a decision of a State court as to the power to tax lands formerly belonging to the United States (*Stryker v. Goodnow*, 123 U. S. 535); or a decision as to a right of one in possession under a deed from a collector of the United States, admitted below by the plaintiff in error to be invalid, to redeem the land sold for non-payment of taxes (*McBride v. Hoey*, 11 Pet. 167); or a decision against a man in possession without title (*Wynn v. Morris*, 20 How. 3); or a decision that sufficient revenue stamps were attached to a deed, the only question being as to the value of the land. *Lewis v. Campau*, 3 Wall. 106; see *Hall v. Jordan*, 15 Id. 393. A decision that a survey under Federal authority did not act as an eviction presents no Federal question (*Keene v. Clark*, 10 Pet. 291); nor does a decision on the question whether an instrument was on file in the general land office at a certain time (*Martin v. Marks*, 97 U. S. 345); nor a decision as to the right of alluvion when one party claims adjoining land under an act of Congress (*Kennedy v. Hunt*, 7 How. 586); nor where the issue is simply as to the identity of a person to whom a recorder intended to confirm the land (*Carpenter v. Williams*, 9 Wall. 785); nor a decision as to whether rights of one holding land under a patent have been impaired by an oppressive use of the right of eminent domain under a State law. *Mills v. St. Clair County*, 8 How. 569. Whether a decision against a claim for possession of mineral lands by a license can be inferred from the general policy of the United States, *quære* (*Mining Co. v. Boggs*, 3 Wall. 310); but as the decision was on a question of fact that no license existed, it was held that no Federal question was involved. *Id.* The Supreme Court cannot review a decision when the plaintiff in error sets up an outstanding title in a third person under whom he does not claim. *Owings v. Norwood*, 5 Cranch, 344; *Henderson v. Tennessee*, 10 How. 311. The title, &c., of the plaintiff in error must be drawn in question, and the Supreme Court has no jurisdiction where both parties claim of a common grantor whose title is not disputed, but which if questioned might involve a Federal question (*Romie v. Casanova*, 91 U. S. 379; *McStay v. Friedman*, 92 Id. 723; *California v. Jackson*, 112 Id. 233); nor when both parties claimed under patents from the State which derived it from one of two acts of Congress. *Shaffer v. Scudday*, 19 How. 16. The Supreme Court cannot review decisions on questions of boundary, although the plaintiff in error claims under an act of Congress, if his title is acknowledged, and the question is merely one of locating it and fixing boundaries (*Lanfear v. Hunley*, 4 Wall. 204; *Almonester v. Kenton*, 9 How. 1; *Barbarie v. Mobile*, Id. 451; *McDonogh v. Millaudon*, 3 Id. 693. Nor can it review decisions on questions of boundary between lands claimed under patents from the United States (*Moreland v. Page*, 20 How. 522); or on partition of lands taken by patent as tenants in common (*Downes v. Scott*, 4 How. 500); or a decision dismissing a bill to annul in part a patent of land, although both parties claimed under the United States. *Semple v. Hagar*, 4 Wall. 431. As to other cases involving questions as to lands, see *Magwire v. Tyler*, 1 Black, 195; *Attorney-General v. Meeting House*, Id. 262; *Lewis v. Campau*, 3 Wall. 106; *Boggs v. Mining Co.*, Id. 304; *Carpenter v. Williams*, 9 Id. 785; *Poppe v. Langford*, 104 U. S. 770; *Baldwin v. Stark*, 107 Id. 463; *Mace v. Merrill*, 119 Id. 581.

A decision allowing an action on a marshal's bond in the name of a person injured cannot be reviewed (*Montgomery v. Hernandez*, 12 Wheat. 129); but a decision against an exemption claimed under a statute of limitations presents a Federal question. *Id.* As to the effect of error committed in assessing national bank shares, see *Williams v. Weaver*,



100 U. S. 547; and as to the liability of a judge for an unauthorized act, see *Lange v. Benedict*, 99 U. S. 68. Something more than a bare assertion of an authority exercised under the United States seems essential to the jurisdiction of this court. The authority intended by the act is one having a real existence, derived from competent governmental power. If a different construction had been intended Congress would doubtless have used fitting words. The act would have given jurisdiction in cases of decisions against claims of authority under the United States. *Millingar v. Hartupée*, 6 Wall. 258. But in many cases the question of the existence of an authority is so closely connected with the question of its validity that the court will not undertake to separate them, and in such cases the question of jurisdiction will not be considered apart from the question upon the merits, or except upon hearing in regular order. But where the single question is not of the validity but of the existence of an authority, and the court is fully satisfied that there was and could have been no decision in the State court against any authority under the United States existing in fact, the case will be dismissed upon motion. *Id.* The authority of a State court to hear causes is not an authority within the meaning of this section. *Bethell v. Demaret*, 10 Wall. 540. A decision that an authority exercised under the United States did not exist where the Supreme Court is fully satisfied thereof from the record, presents no Federal question (*Millingar v. Hartupée*, 6 Wall. 262); nor does an injunction restraining the prosecution of an action of replevin in a court established under the authority of the United States (*In re Craft*, 124 U. S. 370); nor a judgment of a State court recognizing as valid the decree of a foreign court annulling a marriage (*Roth v. Ehman*, 107 U. S. 319); nor a decision in accordance with the practice of the State court (*Commercial Bank v. Rochester*, 15 Wall. 639); nor a decision put on the ground that the owner of land out of possession cannot recover the crops from one in possession holding adversely by a claim of title (*Martin v. Thompson*, 120 U. S. 376); nor do decisions on questions as to the limits of a cross-examination. *Spies v. Illinois*, 123 U. S. 131. In a sale claimed to be in violation of an act of Congress, what amounts to a trust, or out of what facts a trust may spring, is not a Federal question. *Smith v. Adsit*, 23 Wall. 373. For a suit dismissed as not presenting a question under a treaty or act of Congress, see *Maney v. Porter*, 4 How. 55. For a case not arising under the National Banking Act, see *La Sassier v. Kennedy*, 123 U. S. 521. As to the power of a court of a State to decide on its own jurisdiction, see *Davis v. Packard*, 8 Pet. 321. As to what is a Federal question, see *Hannibal R. Co. v. Missouri R. P. Co.*, 125 U. S. 260; *Hoadley v. San Francisco*, 124 Id. 645; *Pennywit v. Eaton*, 15 Wall. 380; *Tyler v. Magwire*, 17 Id. 253; *New Orleans R. Co. v. Delamore*, 114 U. S. 501. As to what is not a Federal question, see *Hannibal R. Co. v. Missouri R. P. Co.*, 125 U. S. 260; *Phillips v. Mound City Assoc.*, 124 Id. 605; *Ker v. Illinois*, 119 Id. 436; *Mace v. Merrill*, Id. 581; *McStay v. Friedman*, 92 Id. 723; *Romie v. Casanova*, 91 Id. 379; *Louisiana v. New Orleans*, 108 Id. 568; *Grame v. Assurance Co.*, 112 U. S. 273; *Boatmen's Bank v. State Bank*, 114 Id. 265; *Richmond Mining Co. v. Rose*, Id. 576; *Renaud v. Abbott*, 116 Id. 277.

Under § 25 of the judiciary act containing the words, "if the cause shall have been once remanded before," it was held that final process was never issued except where a State had once refused to execute the mandate of the court. *Cook v. Burnley*, 11 Wall. 672. But in this section the above quoted words were omitted, and are not now in force. See *Stewart v. Kahn*, 11 Wall. 501. In *Tyler v. Magwire*, 17 Id. 253, the Supreme Court on a second writ of error to a State court issued an execution.



## CHAPTER XII.

## PROVISIONS COMMON TO MORE THAN ONE COURT OR JUDGE.

SECT. 711. — See notes, §§ 563, 629. The opening paragraph of this section was not in the statutes of the United States prior to the Revision. The provision of the judiciary act relating to the jurisdiction of the circuit courts made the jurisdiction of those courts exclusive of all others, Federal as well as State, except as otherwise provided. This applies to all the courts of the United States, and expressly excludes the jurisdiction of State courts. *Ex parte Houghton*, 8 F. R. 897, 900.

Exclusive jurisdiction may be bestowed on the Federal courts, in cases within the judicial power of the United States, although such jurisdiction may not be made exclusive by the Constitution. But, if exclusive jurisdiction is neither express or implied, the State courts will have concurrent jurisdiction wherever by their own constitution they are competent to take it. *Claffin v. Houseman*, 93 U. S. 136. The Constitution, Art. 3, § 2, does not make the jurisdiction of the Federal courts exclusive in those branches of jurisdiction in which the word "all" occurs. *Id.* The State courts can exercise concurrent jurisdiction with Federal courts in cases arising under the Constitution, laws, and treaties of the United States, when not excluded by express provision, or by incompatibility in its exercise arising from the nature of the particular case. *Id.* On subjects legislated upon by Congress the State legislatures cannot legislate. *Houston v. Moore*, 5 Wheat. 24. The State courts have jurisdiction to determine whether a case is within the exclusive jurisdiction of the Federal courts. *Slocum v. Mayberry*, 2 Wheat. 9; *Teal v. Felton*, 12 How. 284.

CL. 1. Crimes and offences against the United States are cognizable solely in the Federal courts; and the State courts, therefore, can exercise no jurisdiction whatever over such offences, except where, in particular cases, other laws of the United States may provide. Such laws operate, not by way of grant to the State court, but by way of removal of a disability before imposed upon the State courts. *Houston v. Moore*, 5 Wheat. 28. Military offences are not included in the grant of jurisdiction to the circuit and district courts; and State authorities have concurrent jurisdiction with courts-martial over offences of disobedience to the President's call for militia. *Id.* A State court cannot punish for an embezzlement of the funds of a national bank. *People v. Fonda*, 62 Mich. 401; *Commonwealth v. Ketner*, 92 Penn. St. 372. The Federal courts have exclusive jurisdiction of the crime of murder by an Indian against a white man in Indian territory. *United States v. Monte*, 3 Pac. Rep. 45; *s. p.* *United States v. Berry*, 4 F. R. 779. This section, notwithstanding § 5328, does not deprive State courts of power to punish for counterfeiting United States coin. *Ex parte Houghton*, 7 F. R. 657; *contra*, *Dashing v. State*, 78 Ind. 357. State courts have jurisdiction under the laws of the United States (see Rev. Stats. §§ 5457, 5328) to punish the passing, &c., of counterfeit coin with intent to defraud. *Ex parte Geisler*, 4 Woods, 381. Perjury committed in a judicial proceeding carried on by authority of a statute of the United States is not cognizable by a State court. *Ex parte Bridges*, 2 Woods, 428. If an act is an offence against the laws of a State and against those of the United States, it is punishable in the courts of either. *Moore v. People*, 14 How. 13. See also note, cl. 2.

CL. 2. See § 563, cl. 3. It seems that no part of the Federal criminal jurisdiction can, consistently with the Constitution, be delegated to State tribunals; that the jurisdiction of penalties and forfeitures and the criminal jurisdiction offered to the State courts by several acts of Congress have been declined by almost every State in which such suits



have been attempted. *Martin v. Hunter*, 1 Wheat. 304; *Houston v. Moore*, 5 Id. 27; *Prigg's Case*, 16 Pet. 539; *Ely v. Peck*, 7 Conn. 239; *Ammidown v. Freeland*, 101 Mass. 312; *State v. Adams*, 4 Blackf. 146; *Haney v. Sharp*, 1 Dana, 442; *United States v. Lathrop*, 17 Johns. 4; *United States v. Campbell*, Tappan, 29; *State v. M'Bride*, Rice, 400; *Comm. v. Feely*, 1 Va. Cas. 321; *Jackson v. Rose*, 2 Id. 34. Yet State courts which have declined a grant of jurisdiction from Congress, have exercised, under the laws of their own States, jurisdiction to punish acts which were at the same time Federal offences. *Chess v. State*, 1 Blackf. 198; *State v. Young*, 1 Overton, 230; *Peek v. State*, 2 Humph. 78; *Rasnick v. Comm.*, 2 Va. Cas. 356; *State v. Collins*, 3 Hawks, 191; *State v. Bowman*, 6 Vt. 594; *Miller v. People*, 2 Scam. 233. If the jurisdiction were exercised by the State courts, the exercise of the pardoning power might be a matter of practical difficulty. 1 Com. D. 415. The decree for or against a forfeiture is conclusive as to the fact. *Gelston v. Hoyt*, 3 Wheat. 302. The act of March 3, 1875, (p. 94, *ante*), did not affect the exclusive jurisdiction of the district court. *United States v. Mooney*, 116 U. S. 104; see *Talmage v. National Bank*, 91 N. Y. 531.

CL 3. It is not competent for a State statute to give to State courts the power to issue attachments *in rem*, on a cause of action clearly maritime, either of contract or tort, against a vessel engaged in commerce on navigable waters, either specifically as debtor or offender, though the attachment, under the law, is in a pending suit. *Stewart v. Potomac Ferry Co.*, 12 F. R. 296.

"*Saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it.*" — These words were not intended to provide that admiralty causes might be tried in common-law courts in every case in which the subject of admiralty jurisdiction could be reached by common-law process, and the issues of fact and law arising in them could be tried under the common-law practice. *Stewart v. Potomac Ferry Co.*, 12 F. R. 296, 301. The common law affords an ample remedy for the enforcement of a suit *in personam* for a mariner's wages. A State court may exercise jurisdiction of such a suit, though process of sequestration or attachment has been employed to bring the vessel on which the plaintiff rendered the services sued for under the dominion of the court, for the purpose of subjecting it to its judgment. A bond given to release such vessel may be sued upon in the State court. *Leon v. Galceran*, 11 Wall. 185. If the wrong which a vessel is alleged to have done was consummated on land, and not on navigable water, and the cause of action was not completed on the latter, the remedy for the wrong may be pursued in a State court according to the statutory method prescribed by State law, even though that law gives a lien on the vessel, if it be done by a suit *in personam*. *Johnson v. Chicago Elevator Co.*, 119 U. S. 388. The original jurisdiction of the district court in admiralty, under § 563, cl. 8, is exclusive of the other Federal courts as well as of the State courts. *The Hine v. Trevor*, 4 Wall. 569; *The Belfast*, 7 Id. 638. See also note, on cl. 8, p. 69, *ante*.

CL 4. See note, § 563, cl. 8. This jurisdiction, being stated at the beginning of the section to be exclusive of the State courts, does not take away such jurisdiction as previously existed in certain Territorial courts to forfeit goods seized within their limits. 1 Com. D. 413. The State courts can take cognizance of suits instituted for property in possession of a United States officer not detained under a law of the United States. *Slocum v. Mayberry*, 2 Wheat. 9; *Gelston v. Hoyt*, 3 Id. 246. If an officer has a right under a law of the United States to seize for a supposed forfeiture, the question whether a forfeiture has actually occurred belongs exclusively to the Federal courts. *Gelston v. Hoyt*, *supra*.

CL 5. See note, § 699, cl. 1. A bill in equity can be maintained in a State court to compel an insolvent debtor to make an assignment of letters-patent to an assignee in insolvency. *Barton v. White*, 144 Mass. 281; see *Wilch v. Phelps*, 14 Neb. 134.



For actions held not to arise under the patent laws of the United States, see *Wilson v. Sandford*, 10 How. 99; *Brown v. Shannon*, 20 Id. 55; *Hartell v. Tilghman*, 99 U. S. 547; *Albright v. Teas*, 106 Id. 613; *Dale Tile Co. v. Hyatt*, 125 Id. 52; *M'Carty Trading Co. v. Glaenger*, 30 F. R. 387. A suit may be maintained in the Court of Claims against the United States to recover for the use of a patented invention by an officer of the government for its benefit, if the right of the patentee is acknowledged, and it seems even when the exclusive right of the patentee is disputed. *Hollister v. Benedict Manuf. Co.*, 113 U. S. 59. The Court of Claims will take jurisdiction of a suit against the government to enforce contract rights growing out of a patent, and will retain it notwithstanding it is pleaded that the patent is void for want of novelty. *Morse Arms Manuf. Co. v. United States*, 16 Ct. Cl. 296.

CL. 6. The bankrupt act was repealed in 1878. See note, Title 61; 18 St. 178, ch. 390; 20 St. 99, ch. 160.

CL. 7. This includes controversies relating to title, boundary, jurisdiction, and sovereignty. *Rhode Island v. Massachusetts*, 12 Pet. 723. By the Eleventh Amendment, the Federal courts have no jurisdiction of suits against a State by citizens of another State, or by citizens and subjects of any foreign State; but States may sue in the Federal courts. *Clark v. Barnard*, 108 U. S. 447. By Rev. Stats. § 687, the Supreme Court has original, but not exclusive jurisdiction of controversies within the exceptions. To a suit between citizens claiming land under grant from different States, the States are not parties. *New York v. Connecticut*, 4 Dall. 1. See note § 687.

CL. 8. This clause was repealed by the act of Feb. 18, 1875 (18 St. 318), so that by the existing law there is no statutory provision which, in terms, makes the jurisdiction of the United States exclusive of the State courts in suits against consuls and vice-consuls (*Börs v. Preston*, 111 U. S. 261); but the act of 1875 did not affect the jurisdiction under § 563, cl. 17. *Froment v. Duclos*, 30 F. R. 385.

SECT. 712. — The words "the circuit judges" are new here. 1 Com. D. 416.

SECT. 714. — See note, § 554. By later acts, this section is made applicable to certain judges who are given permission to retire on account of physical disability, although not having served ten years. 19 St. 57; 22 St. 2, 563; 23 St. 193, 425. A decree made by a judge after his resignation upon conditions, but before its acceptance and the appointment of his successor, is valid. *Northrop v. Gregory*, 2 Abb. U. S. 503.

SECT. 715. — See note, § 555.

SECT. 716. — As to writs of assistance, see Supreme Court Rules, 7, 8, 9; *Terrell v. Allison*, 21 Wall. 289; *Howard v. Railway Co.*, 101 U. S. 837; *Thompson v. Smith*, 1 Dill. 458. For writs of attachment, see *Voss v. Luke*, 1 Cranch, C. C. 331; *United States v. Williams*, 4 Id. 377; *United States v. Four Pieces of Woollen Cloth*, 1 Paine, 435; *Craig v. Leitensdorfer*, 127 U. S. 764. As to writs of *certiorari*, see *United States v. Young*, 94 U. S. 208; *Ex parte Lange*, 18 Wall. 163; *Ex parte Yerger*, 8 Id. 85; *Ex parte Vallandigham*, 1 Id. 243; *Patterson v. United States*, 2 Wheat. 221; *Ex parte Bollman*, 4 Cranch, 75; *Ex parte Buford*, 3 Id. 75; *Ex parte Stupp*, 12 Blatch. 501; *Ex parte Martin*, 5 Id. 303; *Ex parte Van Orden*, 3 Id. 166; *Russell v. Thomas*, 31 Leg. Int. 189; *Broadnax v. Eisner*, 13 Blatch. 366. As to *certiorari* by the Supreme Court to supply omissions, see Supreme Court Rules, No. 14; *Fowler v. Lindsey*, 3 Dall. 411; *The Rio Grande*, 19 Wall. 178; *United States v. Gomez*, 1 Id. 690; *Holmes v. Trout*, 8 Pet. 171; *Field v. Milton*, 3 Cranch, 514; *Elmore v. Grymes*, 1 Pet. 469; *Parsons v. Armour*, 3 Id. 413; *Woodward v. Brown*, 13 Id. 1; *Stimpson v. Railway Co.*, 3 How. 553; *Gayler v. Wilder*, 10 Id. 510; *Hudgins v. Kemp*, 18 Id. 530; *Morgan v. Curtenius*, 19 Id. 8; *Stearns v. United States*, 4 Wall. 1; *Sweeney v. Lomme*, 22 Id. 208; *Missouri R. Co. v. Dinsmore*, 108 U. S. 30; *United States v. Adams*, 9 Wall. 661; *McGuire v. Commonwealth*, 3 Id. 382; *Ex parte Hitz*, 111 U. S. 766. It will not lie in a criminal case. *Ex parte Gordon*,



1 Black, 503. As to writs of execution, see *Wayman v. Southard*, 10 Wheat. 1; *U. S. Bank v. Halstead*, Id. 51; and notes, §§ 701, 709, 791, 792, 962, 985, 986, 987, 988, 989, 991, 993, 994, 1041, 1628, 3014, 3470, 4098, 5242. As to writs of *habeas corpus*, see notes, §§ 751, 752. For a writ of inhibition, see *Penhallow v. Doane*, 3 Dall. 54; see note, § 688. As to writs of *supersedeas*, see *French v. Shoemaker*, 12 Wall. 100; *Adams v. Low*, 16 How. 144; *Saltmarsh v. Tuthill*, 12 Id. 387; *Hogan v. Ross*, 11 Id. 294; *Goddard v. Ordway*, 94 U. S. 672; *Railroad Co. v. Bradleys*, 7 Wall. 575; *Slaughter-House Cases*, 10 Id. 273; *Green v. Van Buskerk*, 3 Id. 448; *Ex parte Railroad Co.*, 5 Id. 188; *Hardeman v. Anderson*, 4 How. 640; see also note, § 1007.

*Injunctions.* — See notes, §§ 719, 720. Property in the hands of a State court will not be interfered with by injunction from a Federal court (*Hutchinson v. Green*, 2 McCrary, 471); nor will property in the hands of a sheriff (*Watson v. Jones*, 13 Wall. 679); or property in the hands of a receiver appointed by a State court. *Mercantile Trust Co. v. Lamaille R. Co.*, 16 Blatch. 324. A party cannot be restrained from taking possession of property which the judgment of a State court requires to be delivered to him. *Watson v. Jones*, *supra*. Neither a circuit court nor a judge thereof will grant an injunction to prevent the execution of a judgment rendered by a State court after a *supersedeas* has been taken on an appeal to the Supreme Court, or to restrain State officers from disregarding such *supersedeas*. *Murray v. Overstoltz*, 8 F. R. 110. An injunction will issue to restrain State officers from executing a State law which has been held to be unconstitutional. *Claybrook v. Owensboro*, 16 F. R. 297. When an injunction is necessary for the proper exercise of the jurisdiction of a circuit court, there is power to issue it. *Re Dudley*, 1 Penn. L. J. 302. It may be issued to restrain a corporation defendant from taking proceedings looking to its dissolution. *Fisk v. Union P. R. Co.*, 10 Blatch. 518. Courts of equity will grant, as part of their general jurisdiction, injunctions which are mandatory in their character. *Parsons v. Marye*, 23 F. R. 113. See *Coe v. Louisville R. Co.*, 3 Id. 775; *Denver R. Co. v. Atchison R. Co.*, 15 Id. 650. These courts have no power to interfere by injunction with the punishment of offences against the criminal laws of either the State or the United States. *Suess v. Noble*, 31 F. R. 855.

*Mandamus.* — See p. 138, *ante*. The act of March 3, 1875 (p. 94, *ante*), did not enlarge the power of the circuit courts to issue writs of *mandamus*. *American Telegraph Co. v. Bell Telephone Co.*, 1 F. R. 698. For writs of *mandamus*, see *Heine v. Comm'rs*, 19 Wall. 655; *Comm'rs v. Sellew*, 99 U. S. 624; *United States v. New Orleans*, 98 Id. 381; *Graham v. Norton*, 15 Wall. 427; *Riggs v. Johnson*, 6 Id. 166; *Supervisors v. United States*, 4 Id. 435; *Galena v. Amy*, 24 How. 376; *Wheeling v. Mayor*, 1 Hughes, 90; *United States v. Hutten*, 10 Ben. 268. As to *mandamus* to district courts, see *Ex parte Hoyt*, 13 Pet. 279; *Smith v. Allen*, 1 Paine, 453; *The New England*, 3 Sumner, 495; *The Enterprise*, 3 Wall. Jr. 58. And to State courts, see *Ladd v. Tudor*, 3 Wood. & M. 325; *Fisk v. Railroad Co.*, 6 Blatch. 362; *Hough v. Transp. Co.*, 1 Biss. 425. Under § 629, cl. 4, and § 716, a circuit court has no jurisdiction to issue a writ of *mandamus* as an original proceeding, to compel a postmaster to enter and transmit through the mails a certain publication as second, and not as third class matter. *United States v. Pearson*, 24 Blatch. 453; 32 F. R. 309. A circuit court cannot issue a *mandamus* as an original proceeding, but only as ancillary to some other proceeding or right of which it has jurisdiction. *McIntire v. Wood*, 7 Cranch, 504; *McCluny v. Silliman*, 6 Wheat. 598; *Bath Co. v. Amy*, 13 Wall. 244; *Graham v. Norton*, 15 Id. 427; *Greene County v. Daniel*, 102 U. S. 187; *Davenport v. Dodge County*, 105 Id. 237; *United States v. Smallwood*, 1 Chi. Leg. News, 321; *United States v. Pearson*, 24 Blatch. 453; 32 F. R. 309; *Rosenbaum v. Supervisors*, 28 Id. 223; 120 U. S. 450; *Smith v. Bourbon County*, 127 Id. 112. A circuit court can issue a *mandamus* to enforce a judgment which it has rendered. *United States v. County Court*, 15 F. R. 704; *Blair v. West Point*, 5 Id. 265; *United States v. Mobile*, 12 Id. 768. And the



writ may be enforced against persons not parties to the judgment. *Labette County Commrs v. Moulton*, 112 U. S. 221; *Krippendorf v. Hyde*, 110 Id. 276. A State law forbidding the issuing of a *mandamus* against a city cannot affect the power of a circuit court to enforce its judgments by *mandamus*. *Hart v. New Orleans*, 12 F. R. 292.

*Prohibition*.—See p. 138, *ante*. The Supreme Court is authorized to issue writs of prohibition to a district court only when the latter court is proceeding as a court of admiralty jurisdiction. *Ex parte Christy*, 3 How. 292. A circuit court can issue the writ of prohibition only when it is necessary to the exercise of its jurisdiction. Where co-partners were adjudged bankrupt in a district court, and the decree being brought to the circuit court for review, one of the co-partners was prosecuting a suit in a State court against the other concerning the partnership property which was involved in the district court proceedings, a writ prohibiting the State court from entertaining the suit was denied. *Re Bining*, 7 Blatch. 159. The writ of prohibition is never used to control the conduct of a ministerial officer, such as a commissioner acting as an examining magistrate. *United States v. Berry*, 2 McCrary, 58.

*Scire facias*.—This writ will be issued to revive a judgment against an extinct municipal corporation, the inhabitants and territory of which have been organized into a municipality by another name. *Grantland v. Memphis*, 12 F. R. 287.

*Subpœna duces tecum*.—The court will not grant a *subpœna duces tecum* to compel a person who is not a party to the suit to attend court and bring with him personal property, other than books, papers, &c., to be used as evidence. *Re Shephard*, 3 F. R. 12; 18 Blatch. 226.

*Subpœna*.—It is within the jurisdiction of Federal courts to issue a writ of *subpœna*. *United States v. Williams*, 4 Cranch C. C. 372.

*Writ of error coram vobis*.—There is no authority in the circuit or district court to issue a writ of error *coram vobis* in a criminal case. *United States v. Plumer*, 3 Cliff. 28.

SECT. 717.—See *Patterson v. McLaughlin*, 1 Cranch C. C. 352. This section relates to the several judges as distinguished from the courts over which they preside. *Lewis v. Shainwald*, 7 Sawyer, 403. A district judge has no power to award a writ of *ne exeat*. *Gernon v. Boecaline*, 2 Wash. C. C. 130. It cannot issue on an allegation that the defendant designs to depart from the judicial district only, without stating a proposed departure from the United States. *Lowenstein v. Biernbaum*, 8 W. N. Cas. 163. See *Patterson v. McLaughlin*, 1 Cranch C. C. 352; *Union Ins. Co. v. Kellogg*, 5 W. N. Cas. 477. The party must swear positively to a debt, or to a belief that a certain balance is due him. *Gernon v. Boecaline*, *supra*. The demand must be an equitable debt or pecuniary claim, and be certain, or capable of being reduced to a certainty. And a general unliquidated demand, or one in the nature of a claim for damages, is not sufficient. *Graham v. Stucken*, 4 Blatch. 50.

SECT. 718.—Under the act of 1793 (1 St. 334, 335, § 5) a court could not grant an injunction, unless reasonable notice had been given (*New York v. Connecticut*, 4 Dall. 1; *Mowrey v. Indianapolis*, R. Co. 4 Biss. 78; *Perry v. Parker*, 1 Wood. & M. 280; *Lawrence v. Bowman*, McAll. 419); but notice was waived by an appearance. *Marsh v. Bennett*, 5 McLean, 117. Under ordinary circumstances one day's notice was held not sufficient; but each case was determined according to its facts (*Lawrence v. Bowman*, McAll. 419); and what was reasonable notice depended on the circumstances of the case. *New York v. Conn.*, 4 Dall. 1; *Wynn v. Wilson*, Hempst. 698; *Lawrence v. Bowman*, McAll. 419; *Perry v. Parker*, 1 Wood. & M. 280. See also on notice, *Morse v. O'Reilly*, 6 Penn. L. J. 501; *Mowrey v. Railroad Co.*, 4 Biss. 78; *Wilson v. Stolley*, 4 McLean, 272; *Love v. Fendall*, 1 Cranch C. C. 34; *Brown v. Pacific Co.*, 5 Blatch. 525; *Bartlett v. Sultan*, 19 F. R. 346; *Metropolitan Co. v. Telegraph Co.*, 11 Biss. 531; *Walworth v. Cook County*, 5



Id. 133. The voluntary appearance of a party raises a presumption that he had regular and timely notice. *Marsh v. Bennett*, 5 McLean, 117; *Bradley v. Reed*, 12 Pitts. L. J. 65; *Thayer v. Wales*, 9 Blatch. 170. The clause of the above act of 1793, providing "nor shall a writ of injunction be granted in any case without reasonable previous notice to the adverse party, or his attorney, of the time and place of moving the same," which is not now in the statutes, is said to be repealed by Rev. Stats. § 5596, and a preliminary injunction may be granted without notice. *Yuengling v. Johnson*, 1 Hughes, 607. *Ex parte* applications made without notice to the adverse party will be considered as exceptions to the general rule, and an injunction denied, unless it is made to appear, by affidavits or otherwise, that irreparable mischief will happen before a hearing can be had, if notice is required to be given. *Central Trust Co. v. Wabash R. Co.*, 25 F. R. 1. If some of the defendants have not been served with notice and have not appeared, and danger of irreparable injury from delay is shown, the court will grant a restraining order as to them, and provide for its service. *Chicago R. Co. v. Burlington R. Co.*, 34 F. R. 481. An injunction will be granted to prevent trespasses, as well as to stay waste, where the mischief would be irreparable, and also to prevent a multiplicity of suits. *Nichols v. Jones*, 19 F. R. 855. An injunction may issue to restrain the supervisors of a municipality from passing an ordinance which they are not authorized to pass, if it would work irreparable injury. *Spring Valley Water Works v. Bartlett*, 16 F. R. 615. Any act of a municipal corporation which would deprive a citizen of the power to exercise his lawful trade or privileges must be considered as working an irreparable injury, particularly when the act which is threatened is clearly forbidden by the State and Federal constitutions. *Barthet v. New Orleans*, 24 F. R. 563. For definitions of irreparable injury, see *Commonwealth v. Pittsburgh R. Co.*, 24 Penn. St. 160; *Wilson v. Mineral Point*, 39 Wis. 160; *Wahle v. Reinbach*, 76 Ill. 322; *Gause v. Perkins*, 3 Jones Eq. (N. C.) 177; *Jerome v. Ross*, 11 Am. Dec. 500, note.

If a contract for personal services is so peculiar in its nature that damages for its violation cannot be definitely ascertained, an injunction will issue to restrain such violation. *McCaull v. Braham*, 16 F. R. 37. A court of equity will grant an injunction to prevent the waste of a trust estate, the throwing of clouds on the complainant's equitable title, and the obstruction of his rights. *Preston v. Walsh*, 10 F. R. 315. The complainant in a suit to enforce a forfeiture will be granted an injunction to prevent the defendant from selling, disposing of, incumbering, or removing the property from the jurisdiction of the court, until a court of law has determined the right as to the forfeiture. *Fletcher v. New Orleans R. Co.*, 20 F. R. 345. For an injunction restraining the crossing of one railroad by another, see *Missouri R. Co. v. Texas R. Co.*, 10 F. R. 497.

SECT. 719. — If it appears from an affidavit accompanying the application for an injunction that the judges of the district and circuit courts and the justice of the Supreme Court allotted to the circuit in which the cause is pending, are all absent from and without that circuit, a justice of the Supreme Court may hear a motion for an injunction in another circuit. *United States v. Louisville Canal Co.*, 4 Dillon, 601. Prior to the act of 1872 (incorporated in this section) a justice of the Supreme Court could grant an injunction anywhere. *Searles v. Jacksonville R. Co.*, 2 Woods, 621, and note. The clause limiting the powers of the justices of the Supreme Court is to be liberally construed in aid of the convenience of suitors and the exigencies of justice. Id.

The limitation imposed by this section upon the powers of the district judge is as to writs issued in vacation when the circuit court is sitting or can be applied to. Under the Supreme Court Rule, 55, and this section, a circuit judge cannot issue the writ at a distance from the clerk's office when the circuit court is sitting. *Goodyear Dental V. Co. v. Folsom*, 3 F. R. 509. See *Ex parte Dudley*, 1 Penn. L. J. R. 116. An injunction granted by a district judge, if not continued at the next term of the circuit court,



expires ; but a refusal by such court to dissolve it may be regarded as a reinstatement of it. *Parker v. Judges*, 12 Wheat. 561 ; *Gray v. Railroad Co.*, Woolw. 63. A district judge cannot issue an injunction beyond his jurisdiction further than to the next term of court. *Re Dudley, supra*.

SECT. 720. — See notes, §§ 716, 717, 718, 719. The exception is new in this provision. The 55th Rule in equity prescribed by the Supreme Court makes no distinction as to the judge who may have granted the injunction, and seems to give the same duration to an injunction allowed by a district judge, as to one allowed by either of the other members of the court. 1 Com. D. 419.

This section is to be construed with § 716, giving the courts power to issue all writs necessary for the exercise of their respective jurisdictions. *Fisk v. Union P. R. Co.*, 10 Blatch. 518. The circuit court can release a person from process issued by a State court in violation of the privileges of the circuit court. *Hurst's Case*, 4 Dall. 387 ; *Bridges v. Sheldon*, 7 F. R. 45 ; 18 Blatch. 517. This section applies only to cases where the jurisdiction of the Federal court is originally invoked to stay proceedings. *Perry v. Sharpe*, 8 F. R. 24. The words "writ of injunction" include every process or order, irrespective of its form, the office of which is to stay proceedings in a State court. *Ex parte Schulenburg*, 25 F. R. 211. They are not merely an inhibition against an injunction in the form of a writ of injunction, but against preventing a party from conducting proceedings in a State court. *Fisk v. Union P. R. Co.*, 6 Blatch. 362. See *Domestic Missionary Society v. Hinman*, 13 F. R. 161. The word "proceedings" includes all steps taken by a State court, or by its officers, by virtue of its process, from the commencement of a suit until the return of execution. *United States v. Collins*, 4 Blatch. 142. See *Hamilton v. Walsh*, 23 F. R. 420. The prohibition applies to injunctions issued to parties before the State courts. *Wagner v. Drake*, 31 F. R. 851 ; citing *Peck v. Jenness*, 7 How. 625 ; *Diggs v. Wolcott*, 4 Cranch, 179 ; *Haines v. Carpenter*, 91 U. S. 254 ; *Dial v. Reynolds*, 96 Id. 340. A sale by a public officer under power given in a chattel mortgage is not a proceeding within this statute. *Carpenter v. Talbot*, 33 F. R. 537. An officer who is judge of a State court, or who holds such court, is not exempt from the service of an injunction under this section in performing duties which are not judicial, as in determining the result of an election by examining the returns and counting the votes, such duty being imposed by a special statute. *Weil v. Calhoun*, 25 F. R. 865. It was held that this section did not prevent a Federal court from enjoining, at the instance of a *cestui que trust*, an inequitable use of a trust judgment in a State court by execution and levy, prosecuted by the trustee in violation of the trust and in fraud of the rights of the *cestui que trust*. *Linton v. Mosgrove*, 14 F. R. 543. The district court, after a transfer of ship and freight under the Limited Liability Act (Rev. Stats. § 4285), may restrain the prosecution of any suit growing out of the disaster, previously commenced and then pending in a State court. *Re Transportation Co.*, 5 F. R. 627. See *Providence S. Co. v. Hill Manuf. Co.*, 109 U. S. 578. If the Supreme Court has such power, it will not grant an injunction when it appears that both courts below decided against the petitioner's right, and no cause is shown for granting it except the expense. *The Mamie*, 110 U. S. 742.

This section applies only to suits over which the State court has jurisdiction. *Re Transportation Co.*, *supra* ; *McLean v. Lafayette Bank*, 3 McLean, 185. Since on a removal the State court loses jurisdiction of the suit, this prohibition does not apply to such cases, but an injunction in such cases will not be issued when the jurisdiction of the United States court over the case removed is doubtful. *Wagner v. Drake*, 31 F. R. 851 ; relying upon *French v. Hay*, 22 Wall. 250 ; *Dietzsch v. Huidekoper*, 103 U. S. 494. But this prohibition does apply when the injunction has not been granted by the State court before a petition for a removal. *Bondurant v. Watson*, 103 U. S. 288 ; *Lawrence v. Railroad Co.*, 121 Id. 634. Under § 4 of the act of March 3, 1875 (p. 124, *ante*), a preliminary



injunction granted by a State court before a removal remains in force in the Federal court. *Bondurant v. Watson*, 103 U. S. 281, 287; *Smith v. Schwed*, 6 F. R. 455; *Hunt v. Fisher*, 29 Id. 805.

This prohibition does not apply where the jurisdiction of the Federal court has first attached. *Fisk v. Union P. R. Co.*, 10 Blatch. 518; *Wagner v. Drake*, 31 F. R. 851; *Sharon v. Terry*, 36 Id. 338; *French v. Hay*, 22 Wall. 253; *Dietzsch v. Huidekoper*, 103 U. S. 494. A Federal court can enforce its own judgment in a replevin suit removed from a State court by enjoining the defeated party from proceeding in the State court on the replevin bond, the condition of which was satisfied by the judgment of the Federal court in favor of the obligor. Such bill is merely ancillary to the replevin suit. *Dietzsch v. Huidekoper*, 103 U. S. 494; *Sargent v. Helton*, 115 Id. 348. If a corporation which is defendant in an action pending in a Federal court, subsequent to the institution thereof takes proceedings in a State court, looking to its dissolution, the former court will restrain it. *Fisk v. Union P. R. Co.*, 10 Blatch. 518. Injunctions may be issued restraining a person from commencing a suit, civil or criminal, in a State court. *Live Stock Association v. Crescent City Co.*, 1 Abb. U. S. 388; *State Lottery Co. v. Fitzpatrick*, 3 Woods, 255. A circuit court may declare a State law unconstitutional, and may enjoin State officers from obeying it. *Claybrook v. Owensboro*, 16 F. R. 297, citing *Osborn v. U. S. Bank*, 9 Wheat. 738; *Davis v. Gray*, 16 Wall. 203; *Board of Liquidation v. McComb*, 92 U. S. 531; *United States v. Lee*, 106 Id. 196; *Hancock v. Walsh*, 3 Woods, 351; *Bertonneau v. Board of Directors*, Id. 177; *Evansville National Bank v. Britton*, 8 F. R. 867. A Federal court will not dismiss a case for want of jurisdiction because the bill prays for an injunction against a State court as a mere incident of the suit, if such prayer can be stricken out without affecting the main object of the bill. *Woodfin v. Phœbus*, 30 F. R. 289. Ordinarily an injunction to restrain State courts from proceeding with suits to collect taxes will be denied. *Moore v. Holliday*, 4 Dillon, 52, where, however, a temporary injunction was granted upon the facts.

That a United States court cannot enjoin proceedings in a State court, see *Diggs v. Wolcott*, 4 Cranch, 179; *Rogers v. City*, 5 McLean, 337. The Supreme Court cannot enjoin proceedings in a subordinate State court, although it has allowed a writ of error to the judgment of the appellate court. The Slaughter House Cases, 10 Wall. 273. And a circuit court cannot enjoin the execution of a judgment of a State court on the ground that it has been superseded by an appeal to the United States Supreme Court, nor can it enjoin State officials from disregarding such *supersedeas*. *Murray v. Overstoltz*, 8 F. R. 110. The circuit court cannot enjoin the proceedings of a State court. *Diggs v. Walcott*, 4 Cranch, 179; *Peck v. Jenness*, 7 How. 625; *Watson v. Jones*, 13 Wall. 719; *Bridges v. Sheldon*, 18 Blatch. 517; *Haines v. Carpenter*, 91 U. S. 254; *Dial v. Reynolds*, 96 Id. 340. If the State court first acquired jurisdiction and the question is disputed as to whether its jurisdiction has terminated, if it claims that it has not, an injunction will be refused. *Missouri R. Co. v. Scott*, 13 F. R. 793. A State court will not be enjoined because a suit therein is founded upon an alleged unconstitutional statute. *Rensselaer Co. v. Bennington R. Co.*, 18 F. R. 617. An injunction cannot be issued to prevent an officer of a city from serving warrants of arrest issued by a State court for violation of city ordinances claimed to be unconstitutional and void. *Yick Wo v. Crowley*, 26 F. R. 207; 11 Sawyer, 422; s. p. *Rensselaer R. Co. v. Bennington R. Co.*, 18 F. R. 617. If a State court has jurisdiction of a cause of action and of the parties, a Federal court will not in a case involving the same cause of action compel one of the defendants in the State court to interplead with the plaintiffs in the action before it. *City Bank v. Skelton*, 2 Blatch. 14, 19. A plaintiff causing a writ of garnishment to be served on a person in attendance as a witness upon a Federal court, cannot be restrained from proceeding with his suit in the State court. *Ex parte Schulenburg*, 25 F. R. 211. An executor appointed by a



probate court will not be restrained from proceeding with his duties, nor will such court be enjoined from proceeding further. *Freney v. Plattsmouth Nat. Bank*, 3 McCrary, 622; 16 F. R. 433. A suit on a replevin bond is merely a continuation of the original suit, and cannot be restrained if the original suit was begun before proceedings in the Federal court. *Hamilton v. Walsh*, 23 F. R. 420.

An injunction will not be granted to prevent parties from taking possession of property in the custody of an officer of a State under an unexecuted decree of such court. *Watson v. Jones*, 13 Wall. 679, 719. A circuit court cannot issue an injunction to restrain a party from claiming, using, &c., property which a State court has directed its officers to place in his hands (*Domestic Missionary Society v. Hinman*, 13 F. R. 161; *s. p. Hutchinson v. Green*, 6 Id. 833; *Mercantile Trust Co. v. Lamoille R. Co.*, 16 Blatch. 324); or to enjoin a receiver under a State court. *McCoy v. Railroad Co.*, 28 Int. Rev. Rec. 81; *Mercantile Trust Co. v. Lamoille R. Co.*, 16 Blatch. 324. If, while a receiver is in possession of property by virtue of an order of a State court, a fraudulent assignment thereof is made, a Federal court will not issue an injunction restraining the assignee from receiving it, if the State court orders that it be delivered to him. *Hutchinson v. Green*, 6 F. R. 833. An injunction cannot issue to restrain a sale under execution. *Watson v. Bondurant*, 2 Woods, 166; *Daly v. Sheriff*, 1 Id. 175; *Perry v. Sharpe*, 8 F. R. 23; *Ruggles v. Simonton*, 3 Biss. 325; *contra*, *Cropper v. Coburn*, 2 Curtis, 465. Nor can it issue to restrain a sheriff from proceeding under an execution on the ground that a State statute has not been complied with. *White v. Crow*, 17 F. R. 98. A State cannot be enjoined in the prosecution of an action of trespass against a United States marshal for seizing the property of a third person under execution. *Evans v. Pack*, 2 Flippin, 267, disapproving *Kellogg v. Russell*, 11 N. B. R. 121.

SECT. 721. — "*The laws of the several States.*" — For the rule as to the force of this section, see *Burgess v. Seligman*, 107 U. S. 20; *Pana v. Bowler*, Id. 529. This section applies only to cases where the Federal courts obtain jurisdiction by reason of the citizenship of the parties, and not where their jurisdiction arises out of the cause of action. *Schreiber v. Sharpless*, 17 F. R. 589. It is limited strictly to local laws; *i. e.*, to the positive statute of the State. *Swift v. Tyson*, 16 Pet. 1; *Williamson v. Berry*, 8 How. 495. It does not include private statutes. *Williamson v. Berry*, *supra*; *Maxwell v. Moore*, 22 How. 191. A course of decisions, whether founded on statutes or not, which have become rules of property; *i. e.*, rules governing the descent, transfer, or sale of property, or rules affecting the title and possession thereto, are laws of the State. *Bucher v. Railroad Co.*, 125 U. S. 583; *Hazard v. Railroad Co.*, 17 F. R. 753; *Turner v. Ferry Co.*, 21 Id. 94; *Jackson v. Chew*, 12 Wheat. 153; *Suydam v. Williamson*, 24 How. 427; *Williamson v. Suydam*, 6 Wall. 723; *Henderson v. Griffin*, 5 Pet. 151; *Waring v. Jackson*, 1 Id. 570; *Beauregard v. New Orleans*, 18 How. 497; *League v. Egery*, 24 Id. 264; *United States v. Crosby*, 7 Cranch, 115; *Clark v. Graham*, 6 Wheat. 577; *McCormick v. Sullivant*, 10 Id. 192; *Watts v. Waddell*, 6 Pet. 389; *McGoon v. Scales*, 9 Wall. 23; *Brine v. Insurance Co.*, 96 U. S. 627; *Miles v. Caldwell*, 2 Wall. 35, 43. See *Williams v. Kirtland*, 13 Id. 306; *M'Dowell v. Peyton*, 10 Wheat. 454; *Ross v. M'Lung*, 6 Pet. 283; *Van Rensselaer v. Kearney*, 11 How. 297. This section does not apply to the mere construction of a will unless such construction has been so long acquiesced in as to become a rule of property. *Lane v. Vick*, 3 How. 464. A local law or custom established by repeated decisions of the highest court of the State, such as the effect of a Sunday law, becomes the law of that State within this section. *Bucher v. Railroad Co.*, 125 U. S. 584.

The Federal courts follow the settled decisions of the courts of last resort in the State. *Mutual Assur. Co. v. Watts*, 1 Wheat. 279; *Shipp v. Miller*, 2 Id. 316; *Jackson v. Chew*, 12 Id. 153; *Fullerton v. Bank*, 1 Pet. 604; *Green v. Neal*, 6 Id. 291; *Rowan v. Runnels*, 5 How. 134; *Beauregard v. New Orleans*, 18 Id. 497; *Doswell v. De La Lanza*, 20 Id.



29; *Parker v. Kane*, 22 Id. 1; *League v. Egery*, 24 Id. 264; *Taylor v. Ypsilanti*, 105 U. S. 71. This is true only of decisions on the point in issue, and incidental expressions of opinion, not necessary to the decision of the question, are not binding. *Carroll v. Carroll*, 16 How. 275; *Bennett v. Boggs*, Bald. 60. They will follow the latest settled adjudications of a State, but not oscillations in the process of settlement. *Myrick v. Heard*, 31 F. R. 241. They will not reverse their decisions as to the meaning of the State constitution to follow later ones of the State (*King v. Investment Co.*, 28 F. R. 33); and if, when the circuit court construes a State statute, no decision on the question has been made by the State courts, and thereafter such court makes a decision giving it a different construction, the Supreme Court will not consider itself bound to reverse the decision of the circuit court. *Burgess v. Seligman*, 107 U. S. 20. The Supreme Court will change its decision construing a State constitution when no rights have been acquired under it, and when it appears that, prior to its decision, the highest State court had interpreted the constitution differently, and its interpretation fixed a rule of property which had not been abandoned. *Fairfield v. Gallatin County*, 100 U. S. 47. If the circuit court decides a case according to the rule announced by the appellate State court, and the latter court subsequently overrules the former case, it will not affect the decision of the circuit court. *Morgan v. Curtenius*, 20 How. 1. If the decisions of a State court are inconsistent, the last will not be followed if it is contrary to the views of the Federal court; and this is especially true where a long course of consistent decisions is overthrown. And a Federal court does not feel bound, in any case in which a question is first raised in and has been decided by a circuit court, to reverse that decision, contrary to its convictions, so as to conform to a decision made by a State court in the mean time. *Pease v. Peck*, 18 How. 595, 599; *Roberts v. Bolles*, 101 U. S. 119. The Federal courts will follow State laws as judicially declared at the time the contract obligations and rights accrued (*Taylor v. Ypsilanti*, 105 U. S. 71); hence a decision making void a contract declared valid by a previous decision will not be followed. *Mitchell v. Burlington*, 4 Wall. 270; *Gelpcke v. Dubuque*, 1 Id. 206; *Lee County v. Rogers*, 7 Id. 181; *City v. Lamson*, 9 Id. 477; *Olcott v. Supervisors*, 16 Id. 678; *Thomson v. Lee County*, 3 Id. 327. The Federal courts will follow decisions of the State court, whatever may be their opinion as to their original soundness. *McDowell v. Peyton*, 10 Wheat. 454; *Conway v. Taylor*, 1 Black, 604. The Federal courts cannot entertain the objection that the case in the State court was not genuinely contested. *East Oakland v. Skinner*, 94 U. S. 255. State laws passed after a suit is begun are not binding. *Lawrence v. Wickware*, 4 McLean, 56. Nor are decisions when the State court has no jurisdiction. *Schreiber v. Sharpless*, 17 F. R. 589. Nor are decisions on questions of a general nature (*Boyce v. Tabb*, 18 Wall. 546; *Olcott v. Supervisors*, 16 Id. 678; *Hough v. Railway Co.*, 100 U. S. 226), such as contracts of a commercial nature (*Swift v. Tyson*, 16 Pet. 1; *Watson v. Tarpley*, 18 How. 517; *Railroad Co. v. Bank*, 102 U. S. 14; *Oates v. Bank*, 100 Id. 239; *Bucher v. Railroad Co.*, 125 Id. 583), except under special circumstances. *Sonstiby v. Keeley*, 11 F. R. 578. As to the validity and binding effect of State statutes on commercial law, see *Bank of Sherman v. Apperson*, 4 F. R. 25; *Prentice v. Zane*, 11 Law Rep. 204; *Gregg v. Weston*, 7 Biss. 360.

The following decisions are of a general or commercial nature, and are not binding on the Federal courts: The refusal of a State court to enforce contracts on the ground that they are void because against public policy (*Boyce v. Tabb*, 18 Wall. 546); a decision on the question whether or not the construction and maintenance of a railroad by a corporation, under authority of a State statute, is a matter of such public interest as to support municipal taxation in its aid (*Olcott v. Supervisors*, 16 Wall. 678); a decision on the subject of the duties and responsibilities growing out of the relation of master and servant (*Hough v. Railway Co.*, 100 U. S. 213, 226), and on the negotiability of a promissory note (*Bradley v. Lill*, 4 Biss. 473); and decisions as to the interpretation of insurance



policies (*Carpenter v. Providence Ins. Co.*, 16 Pet. 495, 511), and on the power of an insurance company to make a parol contract of insurance (*Hening v. Ins. Co.*, 2 Dill. 26); a decision on the rights of the holder of a negotiable note who has taken it as security for a pre-existing debt (*Wood v. Seitzinger*, 2 F. R. 284, 843); a decision on the construction of a will, unless such construction has been acquiesced in as a rule of property (*Jackson v. Chew*, 12 Wheat. 167; *Lane v. Vick*, 3 How. 464); decisions on the construction of a deed, as to matters and language belonging to the common law, and not to any local statute (*Foxcroft v. Mallett*, 4 How. 353, 379; *Shipp v. Miller*, 2 Wheat. 316); decisions on the presumptions which are to be given the acts of superior courts and the circumstances under which they may be attacked (*Galpin v. Page*, 3 Sawyer, 93, 106); decisions on private rights which are to be determined by the application of common-law principles (*Chicago v. Robbins*, 2 Black, 418, 428); a decision as to what powers are granted by a State statute, and as to the materiality of the execution of a power given (*Venice v. Murdock*, 92 U. S. 494, 501); decisions on questions concerning municipal bonds issued in a negotiable form under an act of a State legislature (*Pine Grove v. Talcott*, 19 Wall. 666), and on the validity of municipal bonds in the hands of a *bona fide* holder when the election which authorized their issue was illegal, if such bonds recite that such election was held according to law (*Pana v. Bowler*, 107 U. S. 529, 541); decisions on the rights and liabilities of common carriers. *Myrick v. Michigan R. Co.*, 107 U. S. 102.

State laws as to evidence must be followed. See § 858, note. *Hausknecht v. Claypool*, 1 Black, 431; *Vance v. Campbell*, Id. 427; *Davis v. Mason*, 1 Pet. 503; *Owings v. Hull*, 9 Id. 607; *M'Niel v. Holbrook*, 12 Id. 84; *Wright v. Bales*, 2 Black, 535; *United States v. Dunham*, 21 Law Rep. 591; *Fowler v. Hecker*, 4 Blatch. 426; *Ryan v. Bindley*, 1 Wall. 66; *King v. Worthington*, 104 U. S. 44; *Potter v. Nat. Bank*, 102 Id. 163; *Gravelle v. Railway Co.*, 16 F. R. 435; *Ex parte Fisk*, 113 U. S. 720; *Wilcox v. Hunt*, 13 Pet. 378; *Ryan v. Bindley*, 1 Wall. 61; *Bucher v. Railroad Co.*, 125 U. S. 583. This section and §§ 858, 914, relate to the nature and principles of evidence as well as the competency of witnesses. *Connecticut Ins. Co. v. Trust Co.*, 112 U. S. 250. A State statute making privileged professional communications to a physician is binding on the Federal courts. Id. In the absence of a Federal statute on the subject, State statutes concerning the admissibility of evidence are controlling upon Federal courts in civil cases at common law. *M'Niel v. Holbrook*, 12 Pet. 84; *Vance v. Campbell*, 1 Black, 427. And so, under the same circumstances, are decisions as to the competency of witnesses. *Ryan v. Bindley*, 1 Wall. 66; *Vance v. Campbell*, *supra*; *Wright v. Bales*, 2 Black, 535; *Lucas v. Brooks*, 18 Wall. 436. The effect to be given the certificate of a register of a land office as evidence (*Best v. Polk*, 18 Wall. 112), and a notary's certificate of protest (*Sims v. Hundley*, 6 How. 1; *Brandon v. Loftus*, 4 Id. 127), and an indorsement transferring a note (*M'Niel v. Holbrook*, 12 Pet. 84), and the public record of grants of land, are to be determined according to State laws. *Palmer v. Low*, 98 U. S. 1. A State statute providing under what circumstances members of a grand jury may be compelled to disclose the names of witnesses who have appeared before it and the evidence given in the grand jury room, will be enforced by a Federal court. *Fotheringham v. Adams Express Co.*, 34 F. R. 646. So the rule of evidence prevailing in State courts in actions of ejectment, which allows the admission of declarations of deceased persons touching the boundary of the lands in dispute, will be observed by a Federal court sitting in such State. *Clement v. Packer*, 125 U. S. 309. So a State statute making depositions taken in one suit admissible in another will be followed. *Gravelle v. Railway Co.*, 16 F. R. 435; 3 McCrary, 385. But State laws regulating proceedings in execution and other process are not binding. *Wayman v. Southard*, 10 Wheat. 1; *Ross v. Duval*, 13 Pet. 45; *Thompson v. Phillips*, Bald. 246. Nor are all rules governing procedure and practice. *Brown v. Van Braam*, 3 Dall. 344; *Golden v. Prince*, 3 Wash. 313; *United States v. Wonson*, 1 Gall. 5, 18; *Tobey v. Clafin*, 3 Sumner, 379. See now § 914, *et seq.*



"*Except where the Constitution, treaties, or statutes of the United States otherwise require or provide.*" — State laws are not followed where the Constitution, treaties, or statutes of the United States otherwise provide. *Amis v. Smith*, 16 Pet. 303; *Gibbons v. Ogden*, 9 Wheat. 1, 210; *Dobbins v. Erie Co.*, 16 Pet. 435; *Barbarie v. Eslava*, 9 How. 421; *McGuire v. Commonwealth*, 3 Wall. 387; *Ex parte Fisk*, 113 U. S. 713; *Hughes v. Dundee Co.*, 28 F. R. 45; *United States v. Mundell*, 1 Hughes, 415. State laws are not followed whenever the adoption of a State law would deprive a complaining party of a remedy essential to the vindication of a right derived from or protected by the United States Constitution (*Virginia Coupon Cases*, 114 U. S. 303); or when the question is whether the State law is in conflict with the Constitution, treaties, or laws of the United States (*Bridge Proprs. v. Hoboken Co.*, 1 Wall. 116; *Delmas v. Insurance Co.*, 14 Id. 661; *Virginia Coupon Cases*, *supra*; *Bronson v. Kinzie*, 1 How. 311; *Bank v. Dudley*, 2 Pet. 492; *Wright v. Nagle*, 101 U. S. 791; *Chicago v. Sheldon*, 9 Wall. 50); or when the question is whether a municipal ordinance so conflicts. *Yick Wo v. Hopkins*, 118 U. S. 356. Federal courts cannot pronounce a State statute void because interfering with vested rights, unless it impairs the obligation of contracts, or is an *ex post facto* law. *Satterlee v. Matthewson*, 2 Pet. 380; *Watson v. Mercer*, 8 Id. 88; *Baltimore R. Co. v. Nesbit*, 18 How. 395; *Bennett v. Boggs*, *Baldw.* 74; *Griffing v. Gibb*, *McAll.* 220.

State laws are not binding in patent cases. *Sayles v. Railroad Co.*, 9 F. R. 513; *Johnston v. Roe*, 1 F. R. 695; *Ross v. Duval*, 13 Pet. 45; *Anthony v. Carroll*, 9 O. G. 199; *s. p. Read v. Miller*, 2 Biss. 12. And a State limitation law has no application to actions arising out of infringements of patents. *May v. Buchanan County*, 29 F. R. 469; *May v. Logan County*, 30 Id. 257, citing the cases *pro* and *con*. See also *Arnson v. Murphy*, 109 U. S. 238. State limitation laws are not binding in equity. *Johnston v. Roe*, 1 F. R. 692. In Louisiana possession by a foreign citizen under an attachment holds against the syndic who claims merely by the declaratory force of a State insolvent law. *Mississippi Mills Co. v. Ranlett*, 19 F. R. 197. A State statute as to survival of actions does not apply to an action for the penalty provided by § 4965 for infringement of a copyright. *Schreiber v. Sharpless*, 17 F. R. 589. A State law cannot affect the right of a receiver of a national bank to sue. *Stanton v. Wilkeson*, 8 Ben. 357; see § 4 of St. March 3, 1887 (p. 126, *ante*). Proceedings to restore lost records in a United States court must conform to the acts of Congress, and not to State statutes. *Turner v. Newman*, 3 Biss. 307. As Congress has taken away the common-law right of action against a collector to recover back duties illegally collected, and substituted an exclusive statutory liability, a State limitation law has no application. *Arnson v. Murphy*, 109 U. S. 238. State statutes as to costs will not be followed, as § 823 provides that costs shall be taxed in favor of the prevailing party in all cases except where otherwise expressly provided by law. *United States v. Treadwell*, 15 F. R. 532; but see *Pentlarge v. Kirby*, 20 Id. 898. As to the rule before the Rev. Stat., see *Ethridge v. Jackson*, 2 Sawyer, 598; *Hathaway v. Roach*, 2 Wood. & M. 63. State laws are not in force on territory over which jurisdiction has been ceded to the United States. *United States v. Ames*, 1 Wood. & M. 76. Decisions of a State court concerning a compact between two States are not binding (*Marlatt v. Silk*, 11 Pet. 1); nor are decisions construing grants from and to the British crown. *Martin v. Waddell*, 16 Pet. 367.

"*Shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.*" — State laws are adopted when not in conflict with the Constitution, laws, or treaties of the United States, or with the fundamental principles of justice and common right. *Murray v. Gibson*, 15 How. 421; *McKeen v. Delancy*, 5 Cranch, 22; *Polk v. Wendal*, 9 Id. 87; *Preston v. Browder*, 1 Wheat. 115; *Assurance Co. v. Watts*, Id. 279; *Shipp v. Miller*, 2 Id. 316; *Thatcher v. Powell*, 6 Id. 119; *Elmendorf v. Taylor*, 10 Id. 152; *Shelby v. Guy*, 11 Id. 361; *Jackson v. Chew*, 12



Id. 153; *Bell v. Morrison*, 1 Pet. 351; *Gardner v. Collins*, 2 Id. 58; *Inglis v. Sailor's Harbor*, 3 Id. 127; *United States v. Morrison*, 4 Id. 124; *Henderson v. Griffin*, 5 Id. 151; *Green v. Neal*, 6 Id. 291; *Marlatt v. Silk*, 11 Id. 1; *Bank of U. S. v. Daniel*, 12 Id. 32; *Harpending v. Church*, 16 Id. 455; *Porterfield v. Clark*, 2 How. 76; *Nesmith v. Sheldon*, 7 Id. 812; *State Bank v. Knoop*, 16 Id. 369; *Pease v. Peck*, 18 Id. 595; *Sumner v. Hicks*, 2 Black, 532; *Leffingwell v. Warren*, Id. 599; *Nichols v. Levy*, 5 Wall. 433; *Coolidge v. Curtis*, 1 Bond, 222; *Springer v. Foster*, 2 Story, 383; *Woolsey v. Dodge*, 6 McLean, 142; *Ex parte Robinson*, Id. 355; *Bogle v. Arledge*, Hempst. 620; *Griffing v. Gibb*, McAll. 212; *Wick v. The Samuel Strong*, 6 McLean, 587; *State v. Railway Co.*, 22 Alb. L. J. 493; *Van Bokelen v. Railroad Co.*, 5 Blatch. 379; *National Bank v. Bennington*, 16 Id. 53.

The Federal courts cannot revise a State statute on any grounds of justice, policy, or consistency with the State Constitution. *Carpenter v. Pennsylvania*, 17 How. 456; *Falconer v. Campbell*, 2 McLean, 195. Questions of public policy, unless the question is whether the obligation of a contract is impaired, are to be determined by the State laws. *Delmas v. Insurance Co.*, 14 Wall. 661; *Bridge Proprietors v. Hoboken Co.*, 1 Id. 145. The decisions of the highest court of a State as to the validity or meaning of the Constitution of that State, or its statutes, are the law of that State. *Bucher v. Railroad Co.*, 125 U. S. 582; *Leffingwell v. Warren*, 2 Black, 599; *Luther v. Borden*, 7 How. 1, 40; *Post v. Supervisors*, 105 U. S. 667.

The following decisions of the State courts are binding on the Federal courts: Decisions concerning the constitution of a State (*Luther v. Borden*, 7 How. 1; *Nesmith v. Sheldon*, Id. 812; *Webster v. Cooper*, 14 Id. 488; *State Bank v. Knoop*, 16 Id. 369; *Amey v. City*, 24 Id. 364; *Jefferson Bank v. Skelly*, 1 Black, 436; *Gelpcke v. Dubuque*, 1 Wall. 175; *South Ottawa v. Perkins*, 94 U. S. 260; *Mayer v. Cahalin*, 7 Repr. 327; *Railroad Co. v. Orton*, 6 Sawyer, 157; *Reclamation District v. Hager*, Id. 567; 4 F. R. 366); and concerning the statutes of the State (*Luther v. Borden*, *supra*; *Morgan v. Curtenius*, 20 How. 1; *Jefferson Bank v. Skelly*, *supra*; *Bank v. Dalton*, 9 How. 522; *Ennis v. Smith*, 14 Id. 400; *Clark v. Sohler*, 1 Wood. & M. 368; *Mayer v. Foulkrod*, 4 Wash. 349; *Lorman v. Clarke*, 2 McLean, 568; *Livingston v. Moore*, 7 Pet. 469; *Pennington v. Gibson*, 16 How. 65; *M'Niel v. Holbrook*, 12 Pet. 84; *United States v. Mundel*, 6 Call, 245; *Union Works v. Lewis*, 1 Abb. U. S. 518; *Mayhew v. Davis*, 4 McLean, 213); and the interpretation given such statutes (*Christy v. Pidgeon*, 4 Wall. 196; *Flash v. Conn*, 109 U. S. 378; *Shelby v. Guy*, 11 Wheat. 367; *Leffingwell v. Warren*, 2 Black, 603; *Lavin v. Bank*, 1 F. R. 641; *Van Rensselaer v. Kearney*, 11 How. 297; *Carroll v. Carroll*, 16 Id. 275); on questions of property (*Suydam v. Williamson*, 24 How. 427; *Chicago City v. Robbins*, 2 Black, 418; *Green v. Neal*, 6 Pet. 291; *Ross v. Duval*, 13 Id. 45; *Lauriat v. Stratton*, 6 Sawyer, 339; 11 F. R. 107; *Polk v. Wendal*, 9 Cranch, 98; *Jackson v. Chew*, 12 Wheat. 162; *Nichols v. Levy*, 5 Wall. 433; *Lamb v. Farrell*, 21 F. R. 5; *Swann v. Swann*, Id. 299; *Brine v. Insurance Co.*, 96 U. S. 627; *Society v. Wheeler*, 2 Gall. 105; *Hazard v. Railroad Co.*, 17 F. R. 753; *Sims v. Irvine*, 3 Dall. 425; *Waring v. Jackson*, 1 Pet. 570; *Bank v. Dudley*, 2 Id. 492; *Hinde v. Vattier*, 5 Id. 398; *Clark v. Smith*, 13 Id. 195; *Amis v. Smith*, 16 Id. 303; *Fisher v. Haldeman*, 20 How. 186; *Miles v. Caldwell*, 2 Wall. 35; *New England Co. v. Bliven*, 3 Blatch. 240); a decision that a statute was constitutionally passed (*Leavenworth County v. Barnes*, 94 U. S. 70; *South Ottawa v. Perkins*, Id. 260; *Railroad Co. v. Georgia*, 98 Id. 359), or was not (*South Ottawa v. Perkins*, 94 U. S. 260; *Post v. Supervisors*, 105 Id. 667); a decision on the consistency of a statute with the State Constitution (*Gut v. State*, 9 Wall. 35; *King v. Wilson*, 1 Dillon, 555; *Kimball v. Mobile*, 3 Woods, 555; *Taylor v. Secor*, 92 U. S. 575; *Boyd v. Alabama*, 94 Id. 645; *Bank v. Dudley*, 2 Pet. 492); and while the Federal court must decide on such consistency, if the question had not been decided by the State court, it will not unless the



case imperatively demands it (*Pelton v. Bank*, 101 U. S. 143); and only in a very clear case will it declare an inconsistency. *Id.*; *Smith v. Fond du Lac*, 8 F. R. 289; 10 Biss. 418. A decision that a State government has not been legally organized is binding (*Luther v. Borden*, 7 How. 1); so is one on the validity of a State statute under the State laws (*South Ottawa v. Perkins*, *supra*; *The J. H. Starin*, 15 Blatch. 473; *Hawes v. Water Co.*, 7 Repr. 100); and one as to the repeal of a statute (*Peik v. Railway Co.*, 94 U. S. 164; *Springer v. Foster*, 2 Story, 383); and a decision that judgments on negotiable instruments carry interest at a certain rate (*Ohio v. Frank*, 103 U. S. 697); and on statutes allowing equitable defences in an action at law (*Chouteau v. Gibson*, 111 U. S. 200); and on the jurisdiction of inferior courts of the State, though such decision was by a divided court (*Lavin v. Bank*, 1 F. R. 641; *Williamson v. Berry*, 8 How. 495; *Jeter v. Hewitt*, 22 Id. 352); and on the authority of the legislature (*Wright v. Nagle*, 101 U. S. 791); and on the existence of subordinate State tribunals, the eligibility and election of their officers, and the passage of State laws (*Norton v. Shelby County*, 118 U. S. 425); and on political and municipal organizations (*Claiborne County v. Brooks*, 111 U. S. 400; *Thomas v. Scotland County*, 3 Dillon, 7; 94 U. S. 682; *Goodrich v. Chicago*, 4 Biss. 18); and on the constitutionality of township aid acts (*Cass County v. Johnston*, 95 U. S. 360, 373, 375); and on the construction of such acts. *Scipio v. Wright*, 101 U. S. 665. Decisions on tax acts are binding (*Machine Co. v. Gage*, 100 U. S. 676); although thereby the United States Supreme Court is obliged to hold a statute void. *Hall v. De Cuir*, 95 U. S. 485. Decisions on statutes authorizing municipal aid will be followed (*Gelpcke v. Dubuque*, 1 Wall. 175; *East Oakland v. Skinner*, 94 U. S. 255; *Elmwood v. Marcy*, 92 Id. 289); and on the validity of municipal bonds (*Mitchell v. Burlington*, 4 Wall. 270; *Elmwood v. Marcy*, 92 U. S. 239); but after such bonds are once declared valid by a State decision, a subsequent opposite decision will not be followed. *Id.* State decisions as to the construction of a ferry franchise are binding (*Conway v. Taylor*, 1 Black, 603); and decisions on tax statutes (*Gaines v. Stiles*, 14 Pet. 322; *Adams v. Nashville*, 95 U. S. 19; *Paine v. Wright*, 6 McLean, 395; *Oliver v. Omaha*, 3 Dill. 368; *Raymond v. Longworth*, 14 How. 76; *Hodgdon v. Burleigh*, 4 F. R. 111; *Taylor v. Secor*, 92 U. S. 575; *Gage v. Pumpelly*, 115 Id. 454); and decisions as to the powers of a corporation (*Secombe v. Railroad Co.*, 23 Wall. 108; *Venner v. Atchison R. Co.*, 28 F. R. 587); and as to the time such a corporation was organized (*Stone v. Wisconsin*, 94 U. S. 181); and as to the liability of a municipal corporation for negligence (*Edgerton v. Mayor*, 27 F. R. 230), or for buildings destroyed to prevent the spread of fire. *Bowditch v. Boston*, 101 U. S. 16.

The following decisions of the State courts must be followed by the Federal courts: Decisions on the Statute of Frauds (*D'Wolf v. Rabaud*, 1 Pet. 476; *Caldwell v. Carrington*, 9 Id. 86); and on the Statute of Limitations, but not as against the United States. *United States v. Thompson*, 98 U. S. 486; *Bell v. Morrison*, 1 Pet. 351; *Railroad Co. v. Railroad Co.*, 20 Wall. 137; *Chemung Bank v. Lowery*, 93 U. S. 72; *Amy v. Dubuque*, 98 Id. 470; *Davie v. Briggs*, 97 Id. 628; *Mills v. Scott*, 99 Id. 25; *Barrett v. Holmes*, 102 Id. 651; *Leffingwell v. Warren*, 2 Black, 599; *Amory v. Lawrence*, 3 Cliff. 523; *Kirby v. Railroad Co.*, 14 F. R. 261; *Sayles v. Railroad Co.*, 6 Sawyer, 31; 9 F. R. 512; *Moore v. Bank*, 11 Id. 624, note; *McCluny v. Silliman*, 3 Pet. 270; *Bank v. Dalton*, 9 How. 522. See *Hall v. Hudson*, 2 Sprague, 65. But they will not follow the decisions of a State court as to the effect of war upon a statute of limitations, as between their own citizens, when their courts were not suppressed. *Lockhart v. Horn*, 1 Woods, 635. Federal courts will follow the State decisions, though contrary to their own decisions made before any decision in the State court. *Moore v. Bank*, 104 U. S. 625. Decisions on foreign attachment are binding (*Beach v. Viles*, 2 Pet. 675); and on letters-patent (*Martin v. Waddell*, 16 Pet. 367); and on State statutes regulating assignments for creditors (*Clapp v. Dittman*, 21 F. R. 15); and decisions as to the validity of deeds of assignment (*Parker v.*



Phetteplace, 2 Cliff. 70; *Moulton v. Chaffee*, 22 F. R. 26; *Rice v. Frayser*, 24 Id. 460; *Sumner v. Hicks*, 2 Black, 532; *Lloyd v. Fulton*, 91 U. S. 479, and as to the rights of parties where a conveyance is set aside as fraudulent (*Claffin v. Lisso*, 27 F. R. 420), and as to the validity of a sale, where the vendor remains in possession (*Allen v. Massey*, 17 Wall. 351); and a decision allowing a simple contract creditor, before obtaining a judgment, to come into equity to reach property fraudulently transferred. *Buford v. Holley*, 28 F. R. 680.

The circuit court will follow the ruling of the district court of another State as to the construction of a State statute. *White v. The Cynthia*, 10 Repr. 232. As to adoption of peculiar or novel remedies, see *Brown v. Van Braam*, 3 Dall. 344; *Palmer v. Allen*, 7 Cranch, 550; *Ross v. Barland*, 1 Pet. 656; *McFaul v. Ramsey*, 20 How. 525; *Ex parte Biddle*, 2 Mason, 472; *Ex parte Kaine*, 3 Blatch. 1; *Campbell v. Claudius*, Pet. C. C. 484; *Strachen v. Clyburn*, 3 McLean, 174; *Lanmon v. Clark*, 4 Id. 18; *Hacker v. Stevens*, Id. 535. As to ejectment, see *Britton v. Thornton*, 112 U. S. 526; *Gibson v. Lyon*, 115 Id. 439. That certain conditions of State law may not be adopted, see *United States v. Humphreys*, 3 Hughes, 201. State decisions as to the validity of marriage must be followed (*Meister v. Moore*, 96 U. S. 76); and on a married woman's deed (*Slaughter v. Glenn*, 98 U. S. 242), or rights (*Bank v. Partee*, 99 U. S. 325; *Mitchell v. Lippincott*, 2 Woods, 467); on the right of foreign guardians to sue (*Curtis v. Smith*, 6 Blatch. 537); on a will's act (*United States v. Fox*, 94 U. S. 315), and on the probate of wills (*Davis v. Mason*, 1 Pet. 503); on laws providing for the settlement of the estates of deceased persons (*Dodd v. Ghiselin*, 27 F. R. 405), and on the right of the administrator to prosecute an action (*Barker v. Ladd*, 3 Sawyer, 44); on laws abolishing entails (*Van Rensselaer v. Kearney*, 11 How. 318; *Barker v. Jackson*, 1 Paine, 559); decisions on the construction of a will or deed (*Jackson v. Chew*, 12 Wheat. 167; *Henderson v. Griffin*, 5 Pet. 151; *Lane v. Vick*, 3 How. 464; *Foxcroft v. Mallett*, 4 Id. 353; *Smith v. Shriver*, 3 Wall. Jr. 219), though such decisions are irreconcilable with English decisions on a similar statute. *Ball v. Morrison*, 1 Pet. 351. Decisions on State statutes as to removing clouds from title to land are binding (*Lamb v. Farrell*, 21 F. R. 5); and decisions on tide lands (*Walker v. Commissioners*, 17 Wall. 648; *Supervisors v. United States*, 18 Id. 71); and as to liens on vessels (*Wick v. The Samuel Strong*, 6 McLean, 587); and as to the priority of liens. *Stapp v. The Swallow*, 1 Bond, 169; *Clements v. Berry*, 11 How. 411; *Ward v. Chamberlain*, 2 Black, 430. Decisions on a mortgage are followed (*Pioneer Co. v. Baker*, 23 F. R. 258; *Orvis v. Powell*, 98 U. S. 176; *Brine v. Insurance Co.*, 96 Id. 627; *Jackson County v. Railway Co.*, 29 F. R. 474); and on registry acts (*Townsend v. Todd*, 91 U. S. 452; *Bondurant v. Watson*, 103 Id. 281); and on the validity of a survey. *Doswell v. De La Lanza*, 20 How. 29.

Sect. 17 of the judiciary act (now Rev. Sts. § 726), authorizing Federal courts to grant new trials "where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law," seems to warrant such courts in granting a new trial of such a case, though the laws of the State prohibit it. *Picquet v. Swan*, 5 Mason, 35, 39; *Clark v. Sohier*, 1 Wood. & M. 368, 372. But if, in other classes of cases, State laws give merely other and additional remedies, they must be regarded as not conflicting nor inconsistent, but in harmony with the remedy given as stated above. In such cases, by adopting the new form and right, Federal courts only conform to State statutes. *Clark v. Sohier*, 1 Wood. & M. 368. A State statute giving the defendant in an ejectment suit the right to a new trial upon the payment of costs binds the Federal courts in such actions. *Hiller v. Shattuck*, 1 Flippin, 272; 5 Chi. Leg. News, 289; *Equator Co. v. Hall*, 106 U. S. 86.

"Trials at common law" means trials in a court of common-law jurisdiction, when exercising that authority, as contrasted with the courts of admiralty, and maritime or of equity jurisdiction. An action of debt on a statute is a common-law action, and will be



tried in a common-law manner. *United States v. Mundell*, 1 Hughes, 415, 428. "Common law" refers to the law of the State as it has been adopted by statute, or recognized by the courts as the foundation of legal rights. *Bucher v. Railroad Co.*, 125 U. S. 584. New rights given by the State will be enforced. *Lorman v. Clarke*, 2 McLean, 568; *Clark v. Smith*, 13 Pet. 195; *Wilkinson v. Yale*, 6 McLean, 16; *Ex parte McNiel*, 13 Wall. 236; *Van Norden v. Morton*, 99 U. S. 378; *Cummings v. Bank*, 101 Id. 153; *Holmes v. Railroad Co.*, 5 F. R. 75; *Smith v. Railroad Co.*, 99 U. S. 398; *Holland v. Challen*, 110 Id. 15; *Buford v. Holley*, 28 F. R. 680. This section does not apply to equity. *Neves v. Scott*, 13 How. 270; *Boyle v. Turner*, 6 Pet. 658; *Robinson v. Campbell*, 3 Wheat. 323; *Noonan v. Black*, 2 Black, 509; *Fenn v. Holme*, 21 How. 481; *Sheirburn v. Cordova*, 24 Id. 423; *Fitch v. Creighton*, 24 Id. 159; *Gordon v. Hobart*, 2 Sumner, 401; *Flagg v. Mann*, Id. 486; *Fletcher v. Morey*, 2 Story, 555; *Mayer v. Foulkrod*, 4 Wash. 349; *Lanmon v. Clark*, 4 McLean, 18; *United States v. Parrott*, McAll. 447; *Smith v. Railroad Co.*, 99 U. S. 398; *M'Farlane v. Griffith*, 4 Wash. 585; *Burt v. Keyes*, 3 West. L. Mo. 290; *Taylor v. Life Association*, 13 F. R. 493; *Johnston v. Roe*, 1 Id. 695; *Butler v. Douglass*, 3 Id. 612. That State statutes cannot affect equity in the Federal courts, see note, § 629 (pp. 95, 98, *ante*). And this section does not apply to admiralty cases nor to criminal offences against the United States. *United States v. Reid*, 12 How. 361; *Bucher v. Railroad Co.*, 125 U. S. 584. Federal courts will not follow a State law radically changing the mode of proceeding therein, as by requiring the appointment of commissioners for the decision of questions which a common-law court must send to a jury. *Bank v. Dudley*, 2 Pet. 492, 526. While Federal courts will enforce rights arising under State laws they may pursue their own forms and modes. Hence where a State statute allows the defendant in a foreclosure proceeding twelve months after the confirmation of the sale to redeem, a decree which orders the master to deliver a certificate which provided for a redemption within twelve months after the sale, was upheld. *Allis v. Insurance Co.*, 97 U. S. 144. A rule of a Federal court which requires a judgment creditor to pay the money received on redemption after a sale on foreclosure to the clerk thereof, and not to the officer holding the execution, is good. *Connecticut Mut. Life Ins. Co. v. Cushman*, 108 U. S. 51. A statute authorizing courts of equity to wind up insolvent corporations and distribute their assets among their creditors within the State, does not give such creditors a special right to such assets, or constitute a rule of property which must be enforced by a Federal court. *Taylor v. Life Association*, 13 F. R. 493.

18 St. 50, ch. 200, provides:—

"That when an occupant of land, having color of title, in good faith has made valuable improvements thereon, and is, in the proper action, found not to be the rightful owner thereof, such occupant shall be entitled in the Federal courts to all the rights and remedies, and, upon instituting the proper proceedings, such relief as may be given or secured to him by the statutes of the State or Territory where the land lies, although the title of the plaintiff in the action may have been granted by the United States after said improvements were so made."

**SECT. 722.**—If for the same offence against civil rights a variable punishment may be inflicted, according to the common law, as modified by statute, of the State where the offence is committed, a constitutional question may arise as to whether complete and uniform Federal rules are provided for the protection of such rights. 1 Com. D. 421.

This section is not affected by the act of March 3, 1887 (see p. 127, *ante*). It relates to the forms of process and remedy, and not to the extent or scope of the jurisdiction, or to the rules of decision. *Re Stupp*, 12 Blatch. 509. As there are no acts of Congress regulating challenges to grand jurors, the Federal courts follow the practice of the State courts with reference to objections to indictments, on the ground of irregularity in the method of selecting the members of the grand jury. *United States v. Eagan*, 30 F. R. 608.



SECT. 723. — As to what is a suit in equity, see note, § 629 (p. 98, *ante*). This refers to the remedy to be had at common law, and supplementary statutes, giving new legal remedies, do not disturb the original equitable jurisdiction, or supplant it. *Grand Rapids Railroad Co. v. Sparrow*, 36 F. R. 210; *s. p.* *Colgate v. Compagnie Française*, 23 Id. 82. Whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate, and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury. *Hipp v. Babin*, 19 How. 271, 278; *Insurance Co. v. Bailey*, 13 Wall. 621; *Grand Chute v. Winegar*, 15 Id. 373; *Lewis v. Cocks*, 23 Id. 470; *Root v. Railway Co.*, 105 U. S. 212; *Killian v. Ebbinghaus*, 110 Id. 573; *Buzard v. Houston*, 119 Id. 351. This section is merely declaratory, being intended to emphasize the rule, and to impress it upon the attention of the courts. *Lewis v. Cocks*, 23 Wall. 470; *New York Co. v. Water Co.*, 107 U. S. 214; *Buzard v. Houston*, 119 Id. 352. The objection that the remedy is at law will be taken by the court *sua sponte*, though not raised by the pleadings or suggested by counsel. *Parker v. Manufacturing Co.*, 2 Black. 545; *Lewis v. Cocks*, 23 Wall. 466; *Killian v. Ebbinghaus*, 110 U. S. 574. A court of equity cannot interfere by injunction with the prosecution and punishment of crimes and offences in the courts of common law. *Suess v. Noble*, 31 F. R. 855. The adequate remedy at law which is the test of equitable jurisdiction in the Federal courts, is that which existed when the judiciary act of 1789 was adopted, unless subsequently changed by act of Congress. *McConihay v. Wright*, 121 U. S. 201.

SECT. 724. — For an explanation of this section, see *Merchants' Bank v. State Bank*, 3 Cliff. 201; and for a statement of the proper practice under it, see *Lowenstein v. Carey*, 12 F. R. 812. See also *Brewster v. Spring Co.*, 34 Id. 769; *Schmieder v. Barney*, 32 Id. 657. Federal courts in actions at law have no other powers as to the production of books and papers than are granted by this provision, which is not affected by § 914 adopting the State practice. *Bryant v. Leyland*, 6 F. R. 125; *Gregory v. Chicago R. Co.*, 10 Id. 529; 3 McCrary, 374. In *United States v. Hutton*, 10 Ben. 268; 25 Int. Rev. Rec. 57, it was held that the remedy given by this section was cumulative, and was not intended to impair other remedies. This section does not apply where a *subpoena duces tecum* is sufficient. *United States v. Babcock*, 3 Dill. 566; *Merchants' Bank v. State Bank*, 3 Cliff. 201. But a *subpoena duces tecum* cannot issue to compel the defendant to produce his books and papers and plates, to be used in evidence for the plaintiff. *Johnson v. Donaldson*, 18 Blatch. 287; 3 F. R. 22. See § 869. An order made in a State court for the production of books or papers should be enforced, on a removal, in the circuit court. *Williams Mower Co. v. Raynor*, 7 Biss. 245.

"*In the trial of actions at law.*" — This statute refers to civil cases at common law only (*United States v. Babcock*, 3 Dillon, 566); and does not apply to equity cases (*Bischoffheim v. Brown*, 24 Blatch. 175; 29 F. R. 341; *contra*, *Coit v. North Carolina G. A. Co.*, 9 Id. 577); or to suits in admiralty. *United States v. 28 Packages*, Gilpin, 306. It was held to apply to cases under revenue laws (*United States v. Hughes*, 12 Blatch. 553; *United States v. Distillery*, 6 Biss. 483; see § 860); and under forfeiture proceedings. *United States v. 469 Barrels*, 10 Int. Rev. Rec. 205; *United States v. Mason*, 6 Biss. 350. But see as to such laws, *United States v. 28 Packages*, Gilpin, 306; *Finch v. Rikeman*, 2 Blatch. 301; *Boyd v. United States*, 116 U. S. 616. It applied to cases in bankruptcy. *Re Mendenhall*, 9 N. B. R. 285. As the books, &c., are to be produced at the trial, the application to the court and the order thereon must be made before the trial. *Iasigi v. Brown*, 1 Curtis, 401; *Sampson v. Johnson*, 2 Cranch C. C. 107; *United States Bank v. Kurtz*, Id. 342. The order must require the production of the books at the trial. *Merchants' Bank v. State Bank*, 3 Cliff. 201; *Iasigi v. Brown*, 1 Curtis, 401; but see *Central Bank v. Tayloe*, 2 Cranch C. C. 427. The party asking for such books, &c., has



no right to examine them before trial. *Triplett v. Bank*, 3 Cranch C. C. 646; *Merchants' Bank v. State Bank*, 3 Cliff. 204; *Iasigi v. Brown*, 1 Curtis, 401; and see § 861; *contra*, *United States v. Youngs*, 10 Ben. 264; citing *Central Bank v. Tayloe*, 2 Cranch C. C. 427; *Jacques v. Collins*, 2 Blatch. 23; *Finch v. Rikeman*, Id. 301. It is premature before the jury are sworn and the trial commenced for either party to call on the other to produce a paper which he has been notified to produce on the trial. *Hylton v. Brown*, 1 Wash. 298. The books must be produced at the trial by the party, or an excuse given under oath. *United States v. 469 Barrels*, 10 Int. Rev. Rec. 205. He may take oath that they are not in his possession (*United States v. 28 Packages*, Gilpin, 306; *Macomber v. Clarke*, 3 Cranch C. C. 347); and such oath may be met by contrary proof. *Bas v. Steele*, 3 Wash. 381. On an omission by oversight to produce, the case may be postponed to allow time to procure the affidavit of the party. *United States v. 469 Barrels*, 10 Int. Rev. Rec. 205. The court may order an affidavit explaining possession of the paper to be put in evidence with the paper. *United States Bank v. Wilson*, 3 Cranch C. C. 213. A book inspected by a party after its production, may be used by the adverse party. *Wallar v. Stewart*, 4 Cranch C. C. 532.

"*On motion.*" — A motion is requisite (*Thompson v. Selden*, 20 How. 194; *Maye v. Carbery*, 2 Cranch C. C. 336; *United States Bank v. Kurtz*, Id. 342; *Macomber v. Clarke*, 3 Id. 347; *Bas v. Steele*, 3 Wash. 381); and must be made before the day of trial. *Central Bank v. Tayloe*, 2 Cranch C. C. 427; *Iasigi v. Brown*, 1 Curtis, 401; *Sampson v. Johnson*, 2 Cranch C. C. 107; *United States Bank v. Kurtz*, Id. 342. The power to grant a motion for the production of books, &c., is discretionary, but should be firmly exercised in a proper case. *Merchants' Bank v. State Bank*, 3 Cliff. 201. The court may at once refuse the motion, or make the rule absolute. *Dunham v. Riley*, 4 Wash. 126. Where an intent to conceal or destroy the books or papers is shown, the rule should be made absolute without delay; but in the absence of fraudulent intent, and of certainty as to their pertinency, an order *nisi* should be made. *Merchants' Bank v. State Bank*, 3 Cliff. 201. This order *nisi* leaves the party to show cause at the trial for not producing. *Merchants' Bank v. State Bank*, *supra*; *Iasigi v. Brown*, 1 Curtis, 401; *Dunham v. Riley*, 4 Wash. 126. The order may require the party to produce the documents and leave them with the clerk, or furnish copies to the adverse party. *Jacques v. Collins*, 2 Blatch. 23.

"*And due notice thereof.*" — Due notice is requisite. *Thompson v. Selden*, 20 How. 194; *Maye v. Carbery*, 2 Cranch C. C. 336; *Bas v. Steele*, 3 Wash. 381; *Merchants' Bank v. State Bank*, 3 Cliff. 201. It may be given to the party or his attorney. *Geyger v. Geyger*, 2 Dall. 332; *United States v. 469 Barrels*, 10 Int. Rev. Rec. 205. It must be served a reasonable time before the production of the paper is required (*Macomber v. Clarke*, 3 Cranch C. C. 347); and must contain information that a motion will be made for a nonsuit, or for a judgment by default. *Bas v. Steele*, *supra*. An order will not be made at the trial without notice. *Sampson v. Johnson*, 2 Cranch C. C. 107; *U. S. Bank v. Kurtz*, Id. 342. If the notice is not reasonable the trial may be postponed to give the party an opportunity to procure the evidence. *Geyger v. Geyger*, 2 Dall. 332; *U. S. Bank v. Kurtz*, 2 Cranch C. C. 342. See, also, on affidavit and notice, *Lowenstein v. Carey*, 12 F. R. 811, 813, note. A court is not authorized to render a judgment of nonsuit upon the failure of the party to comply with the notice. The notice is merely a preliminary proceeding to enable the party to bring before the court the motion for the order to produce; and when that motion is made the party called on has a right to be heard, and he is not bound to produce the books called for until the court shall order him to do so. *Thompson v. Selden*, 20 How. 194, 198. A demand for all the letter-books of a bank from the time of its organization is too general. Only such will be included in the order as the court is satisfied are pertinent to the issue. *Triplett v. Bank*, 3 Cranch C. C. 646. The notice is sufficiently specific if it requests the production of all the letters relating to a specified



subject in the possession of the party to whom it is given. *Vasse v. Mifflin*, 4 Wash. 519. Under St. June 22, 1874, ch. 391, § 5 (18 St. 186), providing that a notice by the government attorney to the defendant in a proceeding under the revenue laws to produce his books and papers, shall particularly describe them, it was ruled that a description which specified those used and kept in the defendant's business as distiller or rectifier between certain dates given was sufficient. *United States v. Three Tons of Coal*, 6 Biss. 379. Section 5 of the act of 1874, as applied to suits for penalties, or to establish a forfeiture of a party's goods, was held to be repugnant to the Fourth and Fifth Amendments, in *Boyd v. United States*, 116 U. S. 616.

*"Require the parties to produce books or writings in their possession or power,"* &c.—The court cannot compel compliance, as the penalty for a failure is nonsuit or default. *Merchants' Bank v. State Bank*, 3 Cliff. 201; *Iasigi v. Brown*, 1 Curtis, 401. The applicant must show that the paper exists, that it is in the possession or control of the party, and that it is pertinent to the issue. *Triplett v. Bank*, 3 Cranch C. C. 646; *Jacques v. Collins*, 2 Blatch. 23; *Iasigi v. Brown*, *supra*; *Bas v. Steele*, 3 Wash. 381. These facts may be shown by an *ex parte* affidavit of the applicant (*United States v. 28 Packages*, Gilpin, 306); but not by affidavit of his attorney. *Buell v. Conn. Ins. Co.*, 1 Cin. Law Bul. 51. The remedy is limited to cases where issue is joined. *Jacques v. Collins*, 2 Blatch. 23; *United States v. Hutton*, 10 Ben. 268; 25 Int. Rev. Rec. 57; *Paine v. Warren*, 33 F. R. 357.

*"In cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery."*—This section applies only where relief might have been had by bill of discovery. *Finch v. Rikeman*, 2 Blatch. 301. Bills of discovery are not abolished by this section (*Colgate v. Compagnie Française*, 23 F. R. 82; 23 Blatch. 86; *Beardsley v. Littell*, 14 Blatch. 105; *Paine v. Warren*, 33 F. R. 358); and the right to relief by bill of discovery is taken away only where a complete remedy is given by this section. *United States v. Hutton*, 10 Ben. 269; 25 Int. Rev. Rec. 57; *Bryant v. Leyland*, 6 F. R. 127. That a bill of discovery has been filed is no bar, nor is the fact that a copy of the paper has been filed in answer to the bill of discovery, unless the discovery has been completely effectual. *Iasigi v. Brown*, 1 Curtis, 401. This section should not be so construed as to authorize a motion for production only when the documents have been described in the pleadings. *Paine v. Warren*, 33 F. R. 358. Although a bill of discovery will not lie against the United States, yet this section applies to the United States in a suit brought by it. *United States v. Youngs*, 10 Ben. 264. The formalities of a bill of discovery are not requisite; a mere motion with notice to the opposite party, and a description of the books or papers with sufficient certainty, are sufficient. *Jacques v. Collins*, 2 Blatch. 23. Where letters are described by their subject-matter it is sufficiently explicit. *Vasse v. Mifflin*, 4 Wash. 519. The time, place, and manner of the production is in the discretion of the court, which is governed by the practice in chancery. *Gregory v. Railroad Co.*, 10 F. R. 529; 3 McCrary, 374. The production of deeds on record will not be ordered except in special cases. *Geyger v. Geyger*, 2 Dall. 332; *U. S. Bank v. Kurtz*, 2 Cranch C. C. 342. A party who claims title to land will not be compelled to produce his deed for the purpose of defeating that title unless the other party shows title in himself. A court of chancery will not grant its aid in such a case when all that the moving party shows to be in himself is the possession. *Hylton v. Brown*, 1 Wash. 298.

*"If a plaintiff fails to comply,"* &c.—A motion for a *nol. pros.* may be made even after the jury is sworn. *Wallar v. Stewart*, 4 Cranch C. C. 532.

SECT. 725. — For a discussion of the subject of contempt, see *United States v. Anonymous*, 21 F. R. 761. Although this section, in terms, applies to all the Federal courts, yet it is doubtful whether it limits the authority of the Supreme Court, which derives its existence and powers from the Constitution. It certainly applies to the circuit and



district courts. *Ex parte* Robinson, 19 Wall. 505, 510. No statute of the United States confers upon court commissioners the right to impose punishment for contempt. *Ex parte* Perkins, 29 F. R. 900, 910; *Re* Steward, Id. 813. The State practice cannot be followed. *Kirk v. Milwaukee Manuf. Co.*, 26 F. R. 505. To constitute a contempt for which the circuit or district courts are authorized to impose punishment, the act must fall within one of the three classes specified in this section, which contains the sole power to punish for contempt of its authority, both at law and in equity. *Ex parte* Robinson, *supra*; *Kirk v. Milwaukee Manuf. Co.*, 26 F. R. 505. See *Hendryx v. Fitzpatrick*, 19 Id. 812. Prescribing these modes of punishment is a limitation upon the powers of the circuit and district courts, and negatives all other modes, and a judgment disbarring a member of the bar as a punishment for contempt is unauthorized and void. *Ex parte* Robinson, 19 Wall. 505. The power to inflict punishment is to be viewed in a two-fold aspect: First, the proper punishment of the guilty party for his disrespect to the court or its order; and second, to compel the performance of some act or duty required of him by the court, which he refuses to perform. In the former case, the court must judge for itself of the nature and extent of the punishment, with reference to the gravity of the offence. In the latter case, the party refusing to obey should be fined and imprisoned until he performs the act required of him, or shows that it is not in his power so to do. *Re* Graves, 29 F. R. 60; *Re* Chiles, 22 Wall. 157, 168. It is competent for the court, when it imposes a fine as punishment, to order that the party stand committed until it is paid. *Fischer v. Hayes*, 6 F. R. 63. That this section does not apply to the courts of a Territory, see *Territory v. Murray*, 15 Pac. Rep. 145.

Proceedings to punish contempts have been held to be purely criminal (*Re* Ellerbe, 13 F. R. 530; 4 McCrary, 449; *United States v. Berry*, 24 F. R. 783); and to be governed by the strict rule of construction applicable to criminal cases. *United States v. Railway Co.*, 16 F. R. 853; *Fischer v. Hayes*, 6 Id. 63. But that some are civil and some criminal, see *Re* Graves, 29 F. R. 60; *Worden v. Searls*, 121 U. S. 26; and civil contempts and criminal contempts were distinguished in *Re* Graves, *supra*. In common-law actions proceedings for contempt are properly in the name of the government, but the practice is otherwise in equity. *Hendryx v. Fitzpatrick*, 19 F. R. 812; *Sharon v. Hill*, 24 Id. 726. In patent cases it is usual to embrace in one proceeding both civil and criminal remedies, *i. e.*, to punish the defendant if found guilty, and, at the same time, or, as an alternative, to assess damages and costs for the benefit of the plaintiff. *Hendryx v. Fitzpatrick*, 19 F. R. 813. For cases to the effect that the courts cannot impose punishment by way of damages or compensation to the other party, see *United States v. Railway Co.*, 16 F. R. 853; *Van Zandt v. Mining Co.*, 2 McCrary, 642; 8 F. R. 725; *Re* Chiles, 22 Wall. 163; *Durant v. Supervisors*, Woolw. 377; *New Orleans v. Steamship Co.*, 20 Wall. 392; *Kirk v. Milwaukee Manuf. Co.*, 26 F. R. 508; *contra*, *Re* Mullee, 7 Blatch. 23; *Doubleday v. Sherman*, 8 Id. 45; *Searls v. Worden*, 13 F. R. 716; 121 U. S. 14; *Re* Graves, 29 F. R. 60; *Hendryx v. Fitzpatrick*, 19 Id. 810; *Schillinger v. Gunther*, 14 Blatch. 152; *Phillips v. Detroit*, 3 Ban. & A. 150; *Dunks v. Grey*, 3 F. R. 862; *Matthews v. Spangenberg*, 15 Id. 813; *Wells v. Railway Co.*, 19 Id. 20. That in proceedings for contempt the court cannot make an order in the nature of further directions for the enforcement of its previous decrees, see *United States v. Railway Co.*, 16 F. R. 853; *Fischer v. Hayes*, 6 Id. 63. Contempt is a crime against the United States within § 33 of the Judiciary Act of 1789 (Rev. Stats. § 1017) (*United States v. Jacobi*, 1 Flippin, 108; *United States v. Railway Co.*, 16 F. R. 853; *United States v. Berry*, 24 Id. 783; *Re* Mullee, 7 Blatch. 23; *Kirk v. Milwaukee Manuf. Co.*, 26 F. R. 506); and the fine goes to the United States (*Fanshawe v. Tracy*, 4 Biss. 497; *Kirk v. Milwaukee Manuf. Co.*, *supra*); but this is true only in criminal proceedings. *Re* Graves, 29 F. R. 68. A contempt is an offence against the United States within the terms of the Constitution which authorizes the pardon of offenders.



Dixon's Case, 3 A. G. Op. 622; Conger's Case, 4 Id. 317; Rowan's Case, Id. 458. A corporation may be fined for contempt. *United States v. Railroad Co.*, 6 F. R. 240; *Wells v. Railway Co.*, 19 Id. 20. Contempt of an order to pay money may be punished by an order of attachment, in spite of statutes prohibiting imprisonment for debt. *Bogart v. Supply Co.*, 23 Blatch. 552; *Jeffries v. Laurie*, 27 F. R. 193. Commitment until the payment of a fine is not imprisonment within the statute. *Fischer v. Hayes*, 19 Blatch. 21; 6 F. R. 63.

The court in which it was committed can alone punish it, and the act of March 3, 1875 (p. 124, *ante*), did not enable the circuit court in a case removed to punish contempts in a State court. *Kirk v. Milwaukee Manuf. Co.*, 26 F. R. 502; *Ex parte Bradley*, 7 Wall. 372. One court cannot punish a contempt against the authority of another. *Re Litchfield*, 13 F. R. 863, 868; *Ex parte Bradley, supra*. *Quære*, whether the offence is not local in its character, and triable only in the jurisdiction where committed, which must also be within the jurisdiction of the contemned court. *Id.* But if the defendant appears he may be punished, though the injunction was violated by acts done in another circuit. *Macaulay v. White S. M. Co.*, 9 F. R. 698. See *Williams v. Hintermeister*, 26 Id. 889. This section does not confer authority upon the judges of district courts to cause the arrest of a citizen of the State and district in which any one of them may reside, and order his removal to another State, under Rev. Stats. § 1014, so that he may be imprisoned there until he complies with an order made in a civil case pending in a Federal court therein. *Re Graves*, 29 F. R. 60. If a person refuses to obey a *subpœna* requiring him to attend a Federal court as a witness, and departs into another district, any Federal judge having jurisdiction in the district in which he may be found may order his arrest and removal to the district in which he was summoned, in accordance with Rev. Stats. § 1014. *Re Ellerbe*, 4 McCrary, 449; 13 F. R. 530; *United States v. Jacobi*, 4 Am. L. T. (U. S.) 148. A proceeding to impose punishment for interfering with the management of a railroad operated by a receiver under authority of a Federal court is criminal in its character, and cannot be heard in a division of a district other than that in which the offence was committed. *United States v. Berry*, 24 F. R. 780.

If a party is committed for contempt in refusing to comply with an order of court requiring him to pay a sum of money, the court which granted the order of commitment may release the party if he is unable to comply with it. The proceeding is civil in its nature. *Hendryx v. Fitzpatrick*, 19 F. R. 810. See *United States v. Sowles*, 16 Id. 536. A refusal by one *subpœnaed* as a witness to obey the process is an attempt to obstruct the administration of justice, and is an offence against the United States. The proceeding to punish therefor may be prosecuted in the name of the government. *Re Ellerbe, supra*; *Durant v. Supervisors*, Woolw. 377; *Ex parte Kearney*, 7 Wheat. 38; *New Orleans v. Steamship Co.*, 20 Wall. 387; *United States v. Jacobi*, 4 Am. L. T. (U. S.) 148. It is not essential to the validity of an order adjudging a party guilty of contempt that it should state the offence, if that is sufficiently set out in the affidavits and other papers in the proceedings, and the order clearly refers thereto; or to state that the injunction violated was a lawful one. *Fischer v. Hayes*, 6 F. R. 63. The court does not exhaust its power to fix the amount of the fine it will impose as a penalty, because it has previously made an order finding the contempt and taken proceedings to determine the amount to be imposed as a fine. *Fischer v. Hayes*, 6 F. R. 63. If a party to a cause of which the court has jurisdiction violates an injunction made therein, and conceals himself to avoid the service of process, the court may direct that service of an order to show cause be made on his attorney of record, and on its being made may proceed to adjudge the same. *Eureka Lake Co. v. Yuba County*, 116 U. S. 410. If the alleged contempt was committed by violating a decree, and its terms were ambiguous, or if men of equal intelligence might honestly differ as to their meaning, the defendant will be presumed innocent until



the decree is made more certain. The guilt of the accused must be clearly and explicitly established. *United States v. Atchison R. Co.*, 16 F. R. 853. If an order made in the course of the trial of an equity cause is violated by one of the parties, a fine for the contempt may be imposed by an order made in the cause. *Fischer v. Hayes*, 6 F. R. 63. That the act was done in good faith under the belief that it was not prohibited, or is done under advice, makes it none the less a contempt. *Atlantic Powder Co. v. Dittmar Co.*, 9 F. R. 316. In case of doubt as to its meaning, the party should apply to the court for a modification or construction of the order. *Wells v. Railroad Co.*, 19 F. R. 20. See also, on § 725, *Iowa Barb Wire Co. v. Southern Barbed Wire Co.*, 30 F. R. 615; *Wirt v. Brown*, Id. 187; *Burr v. Kimbark*, 29 Id. 428; *Celluloid Manuf. Co. v. Chrolithian Co.*, 24 Id. 585; *Re North Bloomington Mining Co.*, 27 Id. 795; *Denver R. Co. v. Topeka R. Co.*, 5 McCrary, 291; *Bate R. Co. v. Gilett*, 24 F. R. 696; *Temple Pump Co. v. Goss Pump Co.*, 31 Id. 292.

*"Except the misbehavior of any person in their presence,"* &c. — These words refer to riotous or unseemly conduct in the court room, or so near as to interrupt the sessions of the court or the orderly conduct of business therein, and do not embrace constructive contempts of its authority. *Ex parte Schulenburg*, 25 F. R. 211. See also *Kirk v. Milwaukee Manuf. Co.*, 26 F. R. 501; *United States v. Patterson*, Id. 509; *Sharon v. Hill*, 24 Id. 726; *United States v. Anonymous*, 21 Id. 761; *United States v. Emerson*, 4 Cranch C. C. 188; *United States v. Carter*, 3 Id. 423; *Blight v. Fisher*, Pet. C. C. 41; *United States v. Holmes*, 1 Wall. Jr. 1; *Re Terry*, 36 F. R. 428; 128 U. S. 289.

*"The misbehavior of any of the officers of said courts in their official transactions."* — See *United States v. Mann*, 2 Brock. 1; *The Bark Laurens*, 1 Abb. Adm. 508; *Re Pitman*, 1 Curtis, 186; *Jeffries v. Laurie*, 27 F. R. 198; *Re Paschal*, 10 Wall. 483; *Southern Development Co. v. Railway Co.*, 27 F. R. 344.

*"And the disobedience or resistance by any such officer,"* &c. — See *Bogart v. Supply Co.*, 27 F. R. 722; *Senior v. Pierce*, 31 Id. 625; *Re Wabash R. Co.*, 24 Id. 217; *Norris v. Hassler*, 23 Id. 581; *Re Doolittle*, Id. 544; *United States v. Kane*, Id. 748; *Re Higgins*, 27 Id. 443; *Re Cary*, 10 Id. 622; *Re Schwarz*, 14 Id. 787; *Re May*, 1 Id. 737; 2 Flippin, 568; *Offut v. Parrott*, 1 Cranch C. C. 154; *United States v. De Vaughan*, 3 Id. 84; *United States v. Coolidge*, 2 Gall. 364; *United States v. Caton*, 1 Cranch C. C. 150; *Vose v. Luke*, Id. 346; *Woods v. Young*, Id. 346; *Hodgson v. Butt*, Id. 447; *Somerville v. French*, Id. 474; *Ex parte Pleasants*, 4 Id. 314; *Lewis v. Mandeville*, 1 Id. 360; *United States v. Williams*, 4 Id. 372; *Steam Stone Cutter Co. v. Manuf. Co.*, 3 F. R. 298; *Bridges v. Sheldon*, 7 Id. 45; *Re Chiles*, 22 Wall. 157; *Ex parte Beebes*, 2 Wall. Jr. 127; *Re Roelker*, 1 Sprague, 276; *United States v. Caldwell*, 2 Dall. 333; *Re Atlantic Ins. Co.*, 17 N. B. R. 368; *Mallory Manuf. Co. v. Fox*, 20 F. R. 409; *The Blanche Page*, 16 Blatch. 1; *Atlantic Powder Co. v. Dittmar Co.*, 9 F. R. 316; *Macaulay v. White Co.*, Id. 698; *Clark v. Wilson*, 33 Id. 331; *Howard v. Mast*, Id. 867; *United States v. Justices*, 10 Id. 460.

If a circuit court, in an equity suit, by orders entitled therein finds one of the parties to it guilty of contempt, imposes a fine, and directs that he be imprisoned until it is paid, the costs of the proceeding being added to the amount of the fine, and also the amount which the court found to be due to the other party, the Supreme Court, on reversing a final money decree for such party and dismissing the bill, will also reverse the order punishing for contempt, but without prejudice to the right of the court below to punish it in a proper proceeding. *Worden v. Searls*, 121 U. S. 14. If the proceedings are civil in their nature, no review lies except on the final judgment or decree. *Hayes v. Fischer*, 102 U. S. 121. The Supreme Court has no power to reverse, on appeal, an order of a circuit court imposing a fine as punishment for a contempt. *New Orleans v. Steamship Co.*, 20 Wall. 387. *Habeas corpus* will not be granted to release one who has been committed for a contempt by a court of competent jurisdiction. *Ex parte Kearney*, 7 Wheat. 38.



SECT. 726. — See *Ives v. Grand Trunk R. Co.*, 35 F. R. 176; *United States v. Bags of Merchandise*, 2 Sprague, 85, for a discussion of this section. The provision of the Seventh Amendment that "no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of common law," has been held to apply to cases coming into Federal courts from State courts, and to protect the verdicts rendered therein. *Justices v. Murray*, 9 Wall. 274. Congress cannot confer authority to grant a new trial except to redress errors of law. *Parsons v. Bedford*, 3 Pet. 433; *Bank of Hamilton v. Dudley*, 2 Id. 492. It is not settled whether under the Seventh Amendment a motion to set aside the verdict of a jury can be heard before any other than the trial judge. *Ives v. Railway Co.*, 35 F. R. 176. But, at least, suitors cannot, as of right, ask for a review, before a full bench, of a trial before a single judge. *Id.*; *Adams v. Spangler*, 17 F. R. 133. An argument before a justice for a new trial may be held out of the circuit to which he is allotted, but he cannot grant one out of such circuit. *Hynes v. Railway Co.*, 23 F. R. 18. This section relates only to cases tried before a jury; in other cases State laws may provide additional remedies. *Clark v. Sohier*, 1 Wood. & M. 368. A new trial may be granted under this section, although a new trial is prohibited by the laws of the State in which the court is sitting. *Clark v. Sohier, supra*. That motions for a new trial are addressed to the discretion of the lower courts and cannot be reviewed is a rule of law, which State laws cannot affect by virtue of § 914, Rev. Stats. *Indianapolis R. Co. v. Horst*, 93 U. S. 301; *Newcomb v. Wood*, 97 Id. 581. But under Rev. Stats. § 721, Federal courts must follow a State law granting one new trial as a matter of right in actions of ejectment. *Equator Co. v. Hall*, 106 U. S. 86. See also *Clark v. Sohier, supra*. A new trial was granted by a circuit court after a trial by consent before a referee in *Robinson v. Insurance Co.*, 8 Repr. 613. A new trial was refused after a judgment on a report of a referee under the wording of his appointment, in *Neafie v. Cheesebrough*, 14 Blatch. 313. A Federal court of equity may decree a new trial after the expiration of the time allowed to courts of law by a State statute, especially in case of fraud. *Tice v. School District*, 17 F. R. 283. A motion for a new trial is not a waiver of a writ of error, unless it is so provided by the rules of the circuit court. *Brown v. Evans*, 18 F. R. 56; 8 Sawyer, 502; *United States v. Hodge*, 6 How. 283. Sect. 987, as to the mode of procedure on a motion for a new trial, does not affect the right to ask for a new trial under this section. *Rutherford v. Insurance Co.*, 1 F. R. 456. After two concurring trials on substantially the same testimony, the court will not grant another new trial unless the jury has manifestly disregarded the law as given them by the court. *Milliken v. Ross*, 9 F. R. 855. The question of granting a new trial is one of usage in the common-law courts. *Id.* As to new trials in the Court of Claims, see notes, §§ 1087, 1088. As to new trials in criminal cases, see *United States v. Fries*, 3 Dall. 515; *United States v. Gibert*, 2 Sumner, 19; *United States v. Battiste*, Id. 240; *United States v. Harding*, 1 Wall. Jr. 127; *United States v. Conner*, 3 McLean, 573; *United States v. Keen*, 1 Id. 429; *United States v. Macomb*, 5 Id. 286; *United States v. Campbell*, 4 Cranch C. C. 658; *United States v. Smith*, 3 Blatch. 255; *United States v. De Quilfeldt*, 5 F. R. 276; *United States v. Beaty*, Hempst. 487; *United States v. Daubner*, 17 F. R. 793; *United States v. Salentine*, 8 Biss. 404; *United States v. Smith*, 1 Sawyer, 277; *United States v. Potter*, 6 McLean, 182; *United States v. Simmons*, 14 Blatch. 473. See also note § 987.

SECT. 727. — See note, § 1014. See note, § 629, as to Utah. If there is probable cause to believe that the accused is guilty of treason, he may be required to give security to keep the peace. *United States v. Greiner*, 4 Phila. 396. Under this section a judge of the United States may, if there are just grounds for suspicion, require bail for the observance of the neutrality laws. *United States v. Quitman*, 2 Am. L. Reg. 645, 652. As to taking bail, a United States commissioner has the same power as a State magistrate, and no greater. *United States v. Horton*, 2 Dillon, 94.



SECT. 728. — This provision, construed with Rev. Stats. §§ 4079, 4080, 4081, limits the authority conferred to such officers of foreign nations as are entitled thereto under treaties with the United States, and then only when similar privileges are accorded to our consular officers. *Re Aubrey*, 26 F. R. 848.

SECT. 729. — As it is no longer necessary to draw the jury from the county, the place of trial is less important than formerly. 1 Com. D. 423. *United States v. Cornell*, 2 Mason, 91; *United States v. Wilson*, Bald. 78.

SECT. 730. — It is the place, and not the crime, which is required to be within the sole jurisdiction of the United States. *United States v. Terrel*, Hempst. 415. Whether the place is, within the boundaries of a State is a question of fact for the jury. *United States v. Jackalow*, 1 Black, 484. The latter part of this section is in the alternative, and, under it, an offender may be tried in the district into which he is first brought, or in that in which he is apprehended, under lawful authority, for trial for the offence. *United States v. Thompson*, 1 Sumner, 168; *United States v. Baker*, 5 Blatch. 6; *United States v. Arwo*, 19 Wall. 486. As to "the high seas," see note, § 5339. See also *United States v. Alberty*, Hempst. 444; *Ex parte Bollman*, 4 Cranch, 75; *United States v. Mingo*, 2 Curtis, 1; *United States v. Bird*, 1 Sprague, 299.

SECT. 731. — Depositing an obscene letter in the post-office completes the offence, and the trial of an indictment therefor can be only in one district. *United States v. Comerford*, 25 F. R. 902. This section does not apply to a prosecution for libel which was written in one district and published in another. *Re Buell*, 3 Dillon, 116, 123. If false papers are prepared and transmitted to the pension office in support of a claim for a pension, the offence is completed at the place where they are prepared and despatched. *United States v. Bickford*, 4 Blatch. 337, 339. The offence of attempting to bribe a public officer may be tried by the court of the jurisdiction in which the letter offering the bribe was mailed. *United States v. Worrall*, 2 Dall. 384.

SECT. 732. — *United States v. Craig*, 28 F. R. 795. This provision does not apply to suits under § 4901, imposing a penalty for a false use of the word "patented," because of the provision contained in the latter section. *Pentlarge v. Kirby*, 19 F. R. 501. This section is generalized from the cited provision of 1839, treating the internal revenue provisions of the cited act of 1866, though general in terms, as originally intended as an exception to and not a repeal of the general rule of St. 1839. 1 Com. D. 424.

SECT. 733. — This does not authorize the suit to be brought in the district in which the delinquent is found and served with process, if he does not there reside or liability for the tax does not there accrue. *United States v. New York R. Co.*, 10 Ben. 144.

SECT. 734. — The district court of the district where the seizure is made has exclusive jurisdiction. § 563, cl. 8, (p. 69, *ante*); *The Brig Little Ann*, 1 Paine, 40; *The Merino*, 9 Wheat. 402. The seizure is a jurisdictional fact. *The Washington*, 4 Blatch. 101. In revenue causes the court has jurisdiction, although the seized property may never have come into possession of the court officers. *The Bolina*, 1 Gall. 75. And in case of abandonment, no jurisdiction attaches to any court unless there is a new seizure. *The Abby*, 1 Mason, 360. Executive seizures are for forfeiture under any law of the United States. *The Joshua Leviness*, 9 Ben. 339. If a domestic vessel is seized by a United States war-vessel within the territorial jurisdiction of a foreign friendly power, for violating our Federal laws, that seizure is not to be connected with a subsequent seizure under the civil process of the district court so as to annul that court's proceedings against the vessel. *The Richmond v. United States*, 9 Cranch, 102. As to "the high seas," see note, § 5339. If the seizure was made within a district, the court thereof has jurisdiction regardless of where the forfeiture occurred. *Keene v. United States*, 5 Cranch, 304; *The Reindeer*, 2 Wall. 383.

SECT. 735. — 18 St. 318, ch. 80, strikes out the words "as prize" in the second line.



The cited act of 1861 extended to both real and personal property on land or on water, the proceedings being in general conformity to the practice in admiralty. *Union Ins. Co. v. United States*, 6 Wall. 759.

SECT. 736. — As the Revised Statutes were first adopted, the proviso of § 57 of the original act was here re-enacted, while the rest of the original section was left out, — an omission which was supplied by 18 St. 320, ch. 80, which re-enacted it as part of § 5198. *Pacific National Bank v. Mixer*, 124 U. S. 726. See note, § 5242. See also § 629, cl. 11.

SECT. 737. — This act was passed to supersede the decision in *Strawbridge v. Curtiss*, 3 Cranch, 267 (*Railroad Co. v. Letson*, 2 How. 497; *Ober v. Gallagher*, 93 U. S. 199); and, as it is remedial, it should be liberally construed to accomplish the end in view. *McBurney v. Carson*, 99 U. S. 567. That an absent defendant is of the same State as the plaintiff does not oust the jurisdiction (*Clearwater v. Meredith*, 21 How. 489; *Doremas v. Bennet*, 4 McLean, 224); unless such defendant is an indispensable party. *Ober v. Gallagher*, 93 U. S. 199. This section does not apply when the defendant is an inhabitant of the district or is found therein. *Froment v. Duclos*, 30 F. R. 385.

The plaintiff may sue any of the defendants who are parties to a joint contract without making citizens of another State, who are also such parties, defendants. *Clearwater v. Meredith*, 21 How. 489; *Inbusch v. Farwell*, 1 Black, 566. If the parties to a joint contract are served with process, and one of them is not a resident of the district in which suit is brought, the court has jurisdiction, although it does not appear that the non-resident was served within the district. *McCloskey v. Cobb*, 2 Bond, 16. In such a case jurisdiction is not lost because the non-resident defendant voluntarily appears. *Id.*; *Taylor v. Cook*, 2 McLean, 516. The declaration must show the citizenship of a joint promisor who was not served. *Bargh v. Page*, 4 McLean, 10. A plaintiff who resides in the same State as one of the joint makers of a note may sue the other joint maker in the State of his residence, although no service has been made on the other. *Doremas v. Bennet*, 4 McLean, 224. This section applies as well to persons who are jointly liable as executors as to others. *United States v. Backus*, 6 McLean, 443.

This section is only an affirmance of the rule in equity. *Shields v. Barrow*, 17 How. 130; *Barney v. Baltimore*, 6 Wall. 285. It does not permit a decree in the absence of one indispensable party. *Id.*; *Conolly v. Wells*, 33 F. R. 208; *Kendig v. Dean*, 97 U. S. 423; *Goodman v. Niblack*, 102 Id. 556. For different classes of parties, see above cases, and note on § 1 of St. 1875, p. 94, *ante*. Jurisdiction can be conferred by voluntary appearance. *Jones v. Andrews*, 10 Wall. 327; *Cooper v. Gordon*, 4 McLean, 6.

For suits which can be maintained under this section where some of the defendants are non-residents, see *Horn v. Lockhart*, 17 Wall. 570; *Payne v. Hook*, 7 Id. 425; *Stewart v. Railroad Co.*, 1 F. R. 361; *Heriot v. Davis*, 2 Wood. & M. 229; *Hazard v. Durant*, 19 F. R. 471; *Robertson v. Carson*, 19 Wall. 104; *Elmendorf v. Taylor*, 10 Wheat. 167; *Wormley v. Wormley*, 8 Wheat. 421; *Goldsmith v. Gilliland*, 24 F. R. 157; *Pond v. Sibley*, 7 Id. 137; 19 Blatch. 198.

For suits which cannot be maintained where certain defendants are non-residents, see *Bell v. Donohue*, 17 F. R. 710; *Beach v. Mosgrove*, 16 Id. 307; *Shields v. Barrow*, 17 How. 130; *Williams v. Bankhead*, 19 Wall. 563; *Robertson v. Carson*, Id. 105; *Coiron v. Millaudon*, 19 How. 113; *Kendig v. Dean*, 97 U. S. 423; *Morgan v. Railway Co.*, 15 F. R. 55; 21 Blatch. 134; *Taylor v. Holmes*, 14 F. R. 514; *Florence S. M. Co. v. Singer Manuf. Co.*, 8 Blatch. 113; *Parsons v. Howard*, 2 Woods, 1; *Tobin v. Walkinshaw*, McAll. 26; *Brigham v. Luddington*, 12 Blatch. 237; *Greene v. Sisson*, 2 Curtis, 171; *Barney v. Baltimore*, 6 Wall. 280; *Young v. Cushing*, 4 Biss. 456; *Dormitzer v. Illinois Bridge Co.*, 6 F. R. 217; *First National Bank v. Smith*, Id. 215; *Conolly v. Wells*, 33 Id. 205.

SECT. 738. — See note, § 737. This section is so stated that in suits where the object is to subject property within the district, a non-resident defendant, whether sole defendant



or one of several, may be brought into court by service anywhere, or by publication. 1 Com. D. 427. Sect. 8 of St. March 3, 1875, ch. 137 (18 St. 470), which was expressly saved by § 5 of St. 1887 (see p. 127, *ante*; *American F. L. M. Co. v. Benson*, 33 F. R. 456), and which was intended as a substitute for § 738 (see *Shainwald v. Lewis*, 5 F. R. 517), provides —

“SECT. 8. That when in any suit commenced in any circuit court of the United States, to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of, or found within, the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur, by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; Or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks; And in case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon proof of the service or publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district. But said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district, And when a part of the said real or personal property against which such proceedings shall be taken shall be within another district, but within the same State, said suit may be brought in either district in said State: *Provided, however,* That any defendant or defendants not actually personally notified as above provided may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said circuit court, and thereupon the said court shall make an order setting aside the judgment therein, and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just; and thereupon said suit shall be proceeded with to final judgment according to law.”

*Sleppy v. Bank of Commerce*, 17 F. R. 712; *Black v. Scott*, 9 Id. 189; *Carpenter v. Talbot*, 33 Id. 537. Sect. 13 of the act of 1872, incorporated in § 738, neither enlarged nor affected the jurisdiction of the court over the action. Its sole design was to furnish a means of obtaining jurisdiction of the person of a defendant not found within the district, in actions whereof the court, under the Constitution and existing statutes, would have jurisdiction if all the defendants were personally served with process within the district, or voluntarily appeared. *Brigham v. Luddington*, 12 Blatch. 237. Prior to the act of 1872, the Federal courts had no power to make a constructive service of process on non-residents. *Parsons v. Howard*, 2 Woods, 1. Under the act of March 3, 1887 (p. 127, *ante*), a suit by a citizen of Ohio against citizens of Vermont, New York, and Maine, to enforce a claim to property in Vermont, is properly brought in the district of Vermont. *Carpenter v. Talbot*, 33 F. R. 537.

The act of 1875 does not apply to removed causes, since the removal act contemplates an appearance in the circuit court voluntarily of the removing defendant, and process is unnecessary. *Woolridge v. M'Kenna*, 8 F. R. 650, 673. The act of 1875 applies only to circuit courts. *Shainwald v. Lewis*, 5 F. R. 510, 517. This act is a remedial statute, and should be liberally construed to accomplish the end in view. It was properly applied where a supplemental bill was filed after its passage, the original suit having been begun prior thereto. *McBurney v. Carson*, 99 U. S. 567.

“*To enforce any legal or equitable lien.*” — A suit, the main object of which is to have the court adjudge that, notwithstanding certain proceedings in a State court, a lien created by a deed of trust executed to secure the payment of bonds still subsists and can be enforced, is within this section. *Massachusetts L. Ins. Co. v. Chicago R. Co.*, 13 F. R.



857. So is a bill to foreclose a mortgage upon real estate. *Black v. Scott*, 9 F. R. 186. This clause contemplates only a lien or title existing anterior to the suit, and not one caused by the institution of the suit itself, as by attaching the property of a foreign defendant. *Dormitzer v. Illinois Bridge Co.*, 6 F. R. 217. The intention of § 738, independently of the act of 1875, was only to reach those suits in equity in which it was sought to enforce some pre-existing lien or claim, legal or equitable, upon or to specific property, real or personal, and not cases in which it is sought to reach and appropriate the general property of a defendant to the payment of his debts. By the words "legal or equitable lien or claim against real or personal property," Congress intended to reach every case in which there was a charge upon specific property capable of enforcement by a court of equity. Sect. 8 of the act of 1875 made this clearer. It does not include a suit by a receiver to apply the general property of a defendant to the payment of his debts. *Shainwald v. Lewis*, 5 F. R. 510; 6 Sawyer, 585. A suit to set aside a decree of foreclosure and sale is not within this clause. *Pacific R. Co. v. Missouri P. R. Co.*, 3 F. R. 772. This section does not apply where the bill prays for an account of lumber, &c., taken from demised premises, and for damages for breach of covenant. *Ellis v. Reynolds*, 35 F. R. 394. A decree on a bill against absent defendants cancelling a mortgage made to secure certain notes which are not within the district, is void as to the notes, and, if the service was merely by publication, it is void as to the mortgage because made without proper proof. *Beach v. Mosgrove*, 16 F. R. 305. Jurisdiction cannot be acquired by the circuit court of an action to cancel a purely personal contract unless the defendant is personally served within the district or voluntarily appears. *Insurance Co. v. Bangs*, 103 U. S. 435. It is doubtful whether a bill requiring a personal injunction, where the injunction is the chief relief sought, can be brought under § 8 of the act of 1875. *Stevens v. The Railroads*, 4 F. R. 97, 105. If the wife of an intestate alleges in her bill that, through deceit and fraud, she was induced to sign an instrument which purported to bind her to receive less than her legal share of her husband's estate, and that the estate was being distributed under such agreement, the suit is to remove a cloud upon title to personal property, within the meaning of § 8 of St. 1875. *Castello v. Castello*, 14 F. R. 207.

*"Or personal property within the district."* — This means a legal or equitable claim or lien on personal property. A claim to shares of stock not yet designated or ascertained is not property within the meaning of this section, and as shares of stock in a corporation which are held and claimed by a non-resident of the jurisdiction in which the corporation has its domicile, are not "personal property within the district," proceedings to bring the holder of them in as a party cannot be taken under this section. *Kilgour v. New Orleans Gas Light Co.*, 2 Woods, 144.

*"One or more of the defendants therein shall not be an inhabitant,"* &c. This section dispenses with the requirement of personal service as well in the case of infants as other defendants. *Insurance Co. v. Bangs*, 103 U. S. 435; *Mohr v. Manierre*, 101 Id. 421; *Woolridge v. McKenna*, 8 F. R. 670. A decree under this section affects indispensable parties who are parties to the bill, to the extent of their property within such district, although they do not appear. *Goodman v. Niblack*, 102 U. S. 562. This constructive service applies only to such defendants as are citizens of different States; and it therefore does not apply to inhabitants of Territories, or of the District of Columbia. *Horsford v. Gudger*, 35 F. R. 392. If such inhabitants are indispensable parties, no suit can be maintained under this section. *Ellis v. Reynolds*, 35 F. R. 394.

*"It shall be lawful for the court to make an order,"* &c. — The order must be made by the court in term. The proper practice is for the bill to aver the citizenship and residence of the respective defendants, and for the *subpoena* to issue against all, and if the marshal returns some of them not found, and they do not voluntarily



appear, the court on a showing of these facts and the fact that the absent defendants are not known, and cannot by reasonable diligence be ascertained, will make the order to appear and plead, and direct the mode of serving the same. *Bronson v. Keokuk*, 2 Dillon, 498. A marshal's return of "not found" is not a condition precedent to an order for substituted service; but such absence may be shown by affidavit. The court may in such order fix any day certain for the appearance of the non-resident defendant, and is not limited to the usual rule days in equity. Such order is not a *subpœna* or process within equity Rule 15 or 17, and no particular mode of service or proof thereof is prescribed by the act. Service by the marshal, or his deputy, of the district whereof the non-resident defendant is an inhabitant, or wherein he is found, and the return thereof in the usual form or by affidavit, are sufficient. *Forsythe v. Pierson*, 9 F. R. 801; 11 Biss. 133. And possibly the court could make a special order directing or authorizing service by some other officer. *Bronson v. Keokuk*, 2 Dillon, 500. Sect. 8 of St. 1875 authorizes the court to bring in parties to a suit who are residents of other districts than that in which the cause is pending. *Castello v. Castello*, 14 F. R. 207. If the State practice requires that there shall be served with the order a copy of the writ and petition, such service is to be preferred; but it is not ruled that it is necessary. *Id.* One who has succeeded another as trustee in a deed executed to secure the payment of bonds is a necessary party to a suit for an adjudication that the lien created thereby still subsists and can be enforced, and such trustee can be brought in by an order under St. 1875. *Massachusetts Mut. L. Ins. Co. v. Chicago R. Co.*, 13 F. R. 857. Under the proviso of § 8 of St. 1875, a decree made against absent defendants is not final until after the expiration of one year. *Beach v. Mosgrove*, 16 F. R. 308.

SECT. 739. — See note, § 629 (p. 112, *ante*). "*In any civil action.*"—This section applies to writs in equity under Rev. Stats. § 4915, to procure the issue of letters-patent after an application has been refused by the patent office authorities. *Butterworth v. Hill*, 114 U. S. 128. Neither the statute relating to process nor that giving the circuit courts jurisdiction in patent cases, regardless of the citizenship of the parties, takes such cases out of the operation of this section. *Chaffee v. Hayward*, 20 How. 208. Suits by an assignee, appointed by the bankruptcy court of another district to recover assets belonging to the bankrupt's estate, are within this section, although the defendant may have assets in the district. To give jurisdiction, the writ must be served on the defendant. *Shainwald v. Lewis*, 5 F. R. 510. Suits for relief against the owners of interfering patents under Rev. Stats. § 4918, are within this statute. *Liggett T. Co. v. Miller*, 1 F. R. 203.

"*No civil suit shall be brought.*"—Civil suit does not include a cause within the admiralty jurisdiction; hence a district court can proceed *in personam* against an inhabitant of the United States, not a resident of the district, by attaching his goods or property found therein. *Atkins v. Disintegrating Co.*, 18 Wall. 272. The cases in the circuit and district courts which agree or disagree with this rule are stated in the opinion. This section does not apply to Territorial courts (*Salisbury v. Sands*, 2 Dillon, 270), or to final process or process of execution. *Picquet v. Swan*, 5 Mason, 35, 40.

"*In any other district,*" &c. — A person who resides in a State in which there are two judicial districts may be sued in either, if he is served therein. *M'Micken v. Webb*, 11 Pet. 25, 38. This section does not distinguish between those who are inhabitants of, or found within the district, and persons domiciled abroad, so as to protect the first and leave the others not within the protection. Persons within the United States are not liable to the process of the circuit courts, unless in one or the other predicament stated in the statute, and any one who is not within the United States is not subject, as defendant, to the process of the circuit courts, which, by reason of his being in a foreign jurisdiction, could not be served upon him. *Toland v. Sprague*, 12 Pet. 300, 328; *Picquet v. Swan*,



5 Mason, 35. By the general provisions of the laws of the United States, the circuit courts can issue no process beyond the limits of their districts. Independently of positive legislation, process can only be served upon persons within the same districts. The acts of Congress adopting the State process, adopt the form and modes of service only so far as the persons are rightfully within the reach of such process, and do not enlarge the sphere of jurisdiction of the circuit courts. *Id.* The court cannot take jurisdiction of a bill of interpleader if some of the parties are non-residents, and have not been served and decline to appear. *Herndon v. Ridgway*, 17 How. 424.

*"Or in which he is found at the time of serving the writ."*—If a person has been brought into a jurisdiction by force, or been induced to come into it through fraud, for the purpose of obtaining service of civil process upon him, and service is made, it will be quashed. *Blair v. Turtle*, 5 F. R. 394; *Union Sugar Refinery v. Mathiesson*, 2 Cliff. 304; *Steiger v. Bonn*, 4 F. R. 17.

*Corporations.*—It has never been held by the Supreme Court that a corporation is found and is amenable to suit wherever it is doing business, independently of any local law providing for suits against it, or that the mere fact of carrying on its business in a State other than that of its creation will make it "found" there, irrespective of any law or statute of such State authorizing suit against it, or against foreign corporations generally, by service upon their agent. *United States v. American Bell T. Co.*, 29 F. R. 17, 34. It is settled by the decisions of the Supreme Court that, in the absence of a voluntary appearance, three conditions must concur or co-exist in order to give the Federal courts jurisdiction *in personam* over a corporation created without the territorial limits of the State in which the court is held, viz.: It must appear as a matter of fact (1) that the corporation is carrying on its business in such foreign State or district; (2) that such business is transacted or managed by some agent or officer appointed by and representing the corporation in such State; and (3) that there is some local law making such corporation, or foreign corporations generally, amenable to suit there as a condition, express or implied, of doing business in the State. When the local law, expressly or by comity, permits foreign corporations to do business in the State, and provides for suit against them in a reasonable, proper, and constitutional manner, and when a foreign corporation thereafter enters the State and transacts its corporate business by means of resident agents coming within the terms of the local statute, it may be "found," and is liable to suit there, in either the State or Federal courts, by service of process on such agents. *Id.*, citing *La Fayette Ins. Co. v. French*, 18 How. 404; *Railroad Co. v. Harris*, 12 Wall. 65; *Ex parte Schollenberger*, 96 U. S. 369; *Railroad Co. v. Koontz*, 104 Id. 5; *St. Clair v. Cox*, 106 Id. 350; *New England Mut. L. Ins. Co. v. Woodworth*, 111 Id. 138; *Boston Electric Co. v. Electric Gas-Lighting Co.*, 23 F. R. 838. A Federal court has no jurisdiction *in personam* over a foreign corporation because it has property rights and pecuniary interests within its territorial boundaries, these being managed by others. *United States v. American Bell T. Co.*, *supra*. It is the use which a corporation has made, or is making, of its powers which determines whether it is doing business in a State other than that of its domicile. A licensee is not a "managing agent." By allowing its patent to be used in a foreign State a corporation does not become domesticated therein. *Id.* A corporation is not "found" in a State in which it never kept an office, or carried on any part of its business operations, or engaged in any business which required it to invoke the comity of its laws. Service made upon the president of a corporation, under such circumstances, when he was in the State on business for it, does not give jurisdiction. *Good Hope Co. v. Railway Barb Fencing Co.*, 22 F. R. 635. If service is made upon the agent of a foreign corporation, who represented it in the transaction out of which the suit arose, it is enough to give jurisdiction under the laws of New York. *Estes v. Belford*, 22 F. R. 275. The validity of service upon a corporation is to



be determined according to the local law. If such law, in designating upon whom service may be made, uses the word "county," the Federal court will substitute for it the word "district." *Lung Chung v. Northern P. R. Co.*, 19 F. R. 254. If a foreign insurance company makes contracts in a State without complying with the laws thereof, service of process, made in an action to recover for a loss on the agent, who delivered the policy sued upon and collected the premium will bind the company. *Funk v. Anglo-American Ins. Co.*, 27 F. R. 336. If the action must be brought in the district where the act complained of was done, a corporation having an agent in such district who is invested with the direction, management, and control of its business therein, out of which the suit arose, and who so far represents the corporation as to make his acts incurring penalties in that business its acts, such agent is a "managing agent," and the corporation is sufficiently "found" within the district in his person. *Hat-Sweat Manuf. Co. v. Davis S. M. Co.*, 31 F. R. 294. If a corporation has an office in a State other than that in which it was organized and no other office, if all competent to represent it are in such State, and in no other, it will be assumed that it is transacting business there, and service made upon its treasurer, vice-president, and two of its directors, will give jurisdiction. *Hunter v. International R. Imp. Co.*, 26 F. R. 299. If a foreign corporation does business in a State, the laws of which authorize service to be made upon agents of such corporations, it assents to that mode of service, and is found there when such service as the State laws provide for is made upon its agent. *Merchants' Manuf. Co. v. Grand Trunk R. Co.*, 13 F. R. 358; *McCoy v. C. I., St. L., & C. R. Co.*, Id. 3; *Mohr Distilling Co. v. Insurance Cos.*, 12 Id. 474; *Robinson v. National Stock-Yard Co.*, Id. 361; *Runkle v. Lamar Ins. Co.*, 2 Id. 9. If a State statute provides that the lessee of a railroad within the State, who was not a resident thereof, shall appoint an agent residing in the State upon whom service of process may be made, and that process served upon him shall be valid as to the lessee, service so made confers jurisdiction of an action against the lessee upon a Federal court sitting in such State, although he has not filed an agreement to that effect. *Brownell v. Troy R. Co.*, 3 F. R. 761. See, generally, *Eureka Lake Co. v. Yuba County*, 116 U. S. 410. Jurisdiction cannot be acquired over a foreign railway company by serving process against it upon one of its passenger agents who is found in another State than that in which it has its domicile, although he was in such State for the purpose of settling a claim against the company. *Maxwell v. Atchison R. Co.*, 34 F. R. 286. If it appears from depositions taken in the matter that the person who was served as the agent of a corporation was not such agent, the service will be set aside. *American Bell T. Co. v. Pan Electric T. Co.*, 28 F. R. 625. If a foreign corporation does business in a State which makes it a condition precedent to its right to do so that it shall stipulate in writing that legal process against it may be served on a designated State officer with the same effect as if served on it, service so made confers jurisdiction, if the company has transacted business in the State, though the required stipulation was not filed. *Ehrman v. Teutonia Ins. Co.*, 1 F. R. 471. Jurisdiction over a national bank is not obtained by serving process on its cashier in the district in which suit is brought, the corporation being located in another State. *Main v. Second Nat. Bank*, 6 Biss. 26. This view is supported, as to corporations generally, by *Day v. Newark Manuf. Co.*, 1 Blatch. 628. *Decker v. N. Y., B. & P. Co.*, 11 Id. 76; *Myers v. Dorr*, 13 Id. 22, ruled before the act of 1875. But see cases stated *supra*.

In equity the proper practice in objecting to the service is to obtain an order of the court for leave to enter a special appearance with the clerk, upon an undertaking to submit to such orders as the court may make if the objection should be overruled; and after such appearance, to move to discharge the service because of the irregularity. *Romaine v. Union Ins. Co.*, 28 F. R. 625. A written acceptance of service of a *subpœna* issued by a court of another district than that in which such acceptance was made, in the following



terms, "to have the same effect as if duly served on me by a proper officer," waives no objection. *Butterworth v. Hill*, 114 U. S. 128. The invalidity of the attachment proceedings is not waived by the subsequent appearance of the defendant, at least not so as to prevent a third party, who claims to own the attached property, from setting aside the attachment. *Noyes v. Canada*, 30 F. R. 665. If personal service is had on the defendant and the writ is duly served on the property, the court has jurisdiction of an attachment proceeding. *North v. McDonald*, 1 Biss. 57. If the defendant in a suit under the patent laws is served in the district in which suit is brought, the court has jurisdiction. *Allen v. Blunt*, 1 Blatch. 480. If in a suit against a corporation, by a citizen of another State than that in which it is located, service is made within the State where the case is pending upon a joint defendant, not a resident thereof, the court has jurisdiction over him. *Mowrey v. Indianapolis, &c. R. Co.*, 4 Biss. 78. A *subpœna* in chancery cannot issue on a bill to set aside a decree of foreclosure and sale, to whoever it may be directed, to be served upon a party who is neither an inhabitant of the State nor found within the district in which the suit is pending. *Pacific Railroad v. Missouri P. Ry. Co.*, 3 F. R. 772.

One who is not subject to arrest does not waive his privilege by submitting thereto and giving a bail bond, or by filing an answer to the merits with a plea of abatement. *Larned v. Griffin*, 12 F. R. 590; 30 Am. L. Reg. 672. The privilege is waived by moving to dismiss the bill for want of jurisdiction, and also because it does not set forth any equity. *Jones v. Andrews*, 10 Wall. 327. Filing a plea to the jurisdiction by attorney and not in person is *per se* an appearance, — an admission that the court has jurisdiction, and a submission thereto. *Thayer v. Wales*, 5 Fish. Pat. Cas. 448. But this rule does not apply to a corporation. *Decker v. N. Y., B. & P. Co.*, 11 Blatch. 76; *Commercial Bank v. Slocomb*, 14 Pet. 60. The objection to jurisdiction is not waived by a plea to the jurisdiction which also sets up facts showing that the cause of action and the subject-matter of the suit did not arise in the State in which the action is brought. *United States v. American Bell T. Co.*, 29 F. R. 17, 45. If one excepts to the service of State process, he does not waive anything by subsequently asking for a removal of the cause to a Federal court, if he renews his objection to the service in that court. *Parrott v. Alabama Gold Life Ins. Co.*, 5 F. R. 391. If a privileged person fails to prove, on making a motion to set aside the service of a *subpœna*, that he is a non-resident, he will not be allowed to allege that fact on a renewal of the motion without leave of court. *Matthews v. Puffer*, 10 F. R. 606. The regularity of service cannot be raised by demurrer. *Robinson v. National Stock-Yard Co.*, 12 F. R. 361. And the court will not hear objections to the sufficiency of the service of the summons after the defendant has demurred. *Hale v. Continental Life Ins. Co.*, 12 F. R. 359.

If one who is privileged from the service of summons has been served therewith by a State officer and appears specially in the State court to have such service set aside, and also so appears to ask for a removal of the cause, and the former motion is denied without prejudice, there has been no waiver of privilege, and a motion to discharge the service can be made in the Federal court to which the cause has been removed. *Miner v. Markham*, 28 F. R. 387. If parties or witnesses to a pending suit lay aside their character as such, and for their own interests give cause for the institution of actions against them, they thereby waive their privilege to immunity, and will not be protected any further than is necessary for the purposes of the trial upon which they are in attendance. *Nichols v. Horton*, 4 McCrary, 567. A member of Congress is exempt from the service of process, although no arrest is made, for a reasonable time while going to attend a session of that body. He does not forfeit his privilege by slightly deviating from the usual route taken by travellers who go from his place of residence to the national capital. *Miner v. Markham*, 28 F. R. 387. If by the statutes of the State in which service is made resident attorneys thereof are not privileged from the service of summons while attending the



courts, a non-resident attorney will not be privileged. A statute which exempts attorneys from arrest, does not apply to the service of summons only. *Robbins v. Lincoln*, 27 F. R. 342. If a non-resident is brought within the jurisdiction of a State, or detained therein, either as a party to a suit, or as a witness in another suit, he is not subject to service. *Small v. Montgomery*, 23 F. R. 707. But the privilege in such a case does not extend to the service of a *subpoena* to testify in the cause on account of which he is in attendance. *Norris v. Hassler*, 23 F. R. 581. Parties and witnesses attending in good faith any legal tribunal, with or without a writ of protection, are privileged from arrest on civil process during their attendance, and for a reasonable time in going and returning, whether such attendance be before arbitrators, commissioners, examiners, or a court (*Larned v. Griffin*, 12 F. R. 590; 30 Am. L. Reg. 672; *Brooks v. Farwell*, 2 McCrary, 220; *Parker v. Hotchkiss*, 1 Wall. Jr. 269; *Atchison v. Morris*, 11 Biss. 191); or before a register in bankruptcy. *Re Kimball*, 2 Ben. 38. A non-resident defendant who attends the trial of his case as a witness and for the purpose of assisting his counsel, is not subject to the service of a summons in another action against him. *Wilson S. M. Co. v. Wilson*, 22 F. R. 803. If a party to a suit attends before an examiner who is engaged in taking testimony in the cause, he is exempt from the service of process issued out of a court of another State than that of his residence in the same cause and between the same parties. *Plimpton v. Winslow*, 9 F. R. 365. Service made on a non-resident defendant, who goes into another State to defend a suit, will be set aside, though it was made after the discontinuance of such suit. *Juneau Bank v. McSpedan*, 5 Biss. 64. A State judge who is privileged from arrest is also privileged from the service of process when about to set out on his circuit to hold court. *Lyell v. Goodwin*, 4 McLean, 29; *contra*, *Id.* 44. The privilege of exemption from arrest does not extend to a witness in attendance on court who is charged with an indictable offence. *Ex parte Levi*, 28 F. R. 651. A party who is attending a court in a foreign State under compulsory criminal process is not liable to be served with civil process while he is necessarily in such State. *United States v. Bridgman*, 9 Biss. 221.

The act of June 4, 1880, ch. 120, § 2 (21 St. 155), which regulated the times and places of holding the circuit court in Iowa, and divided that district into four divisions, required that suits against an inhabitant of the district should be brought in the division in which he resides, and that "where the defendant is a non-resident of the district, suit may be brought in any division where property or the defendant is found," applies only to suits which may be properly brought in the district against a non-resident. Such a suit, if not local, must be in the division where the defendant is found when served with process; if local, in the division where the property which is the subject-matter of the action, is situated. This act does not repeal § 739, so far as it affects the Iowa district. *Ex parte Railway Co.*, 103 U. S. 794. See *Guinn v. Iowa Cent. Ry. Co.*, 4 McCrary, 566; *McCabe v. Illinois Cent. Ry. Co.*, *Id.* 492.

SECT. 740. — See note, § 1 of St. 1875, stated p. 94, *ante*. By 21 St. 62, ch. 17, § 4, suits not of a local nature against a single inhabitant of Georgia are to be brought in the district division where he resides, and if the suit is against residents in different divisions, it may be brought in either division. Substantially the same provision is applied to Ohio by 21 St. 63, ch. 18; Michigan, by 20 St. 175, ch. 326; Mississippi by 22 St. 101, ch. 218; to Iowa, by 21 St. 155, ch. 120; to Tennessee, by 21 St. 175, ch. 203; and to process and prosecutions in Texas, by 20 St. 318, ch. 97; 21 St. 198, ch. 213. *Sacketts Harbor Bank v. Barry*, 1 Bond, 154.

*Seidenbach v. Hollowell*, 5 Dillon, 382; *Third National Bank v. Harrison*, 3 McCrary, 162; 8 F. R. 721. A corporation created by a State "resides," if at all, in all the districts of that State, and the provision of this section as to a single defendant does not apply to such corporation. *Locomotive Truck Co. v. Erie R. Co.*, 10 Blatch. 292, 307. This section applies to suits at law and in equity. *Winter v. Ludlow*, 3 Phila. 464.



SECT. 742. — See note § 738.

SECT. 746. — This provision is held to apply where several jurors had been called and challenged, and only three had been found competent and sworn when the end of the session arrived. *United States v. Loughery*, 13 Blatch. 267.

SECT. 747. — The counsel or attorney is an officer of the court; he cannot release or discharge the cause of action, but as he has exclusive control of the remedy, he may continue or discontinue it, and neither the party nor his attorney in fact has authority to sign a stipulation for a continuance. *Nightingale v. Oregon Central R. Co.*, 2 Sawyer, 338.

20 St. 292, ch. 81, provides:—

“That any woman who shall have been a member of the bar of the highest court of any State or Territory, or of the Supreme Court of the District of Columbia for the space of three years, and shall have maintained a good standing before such court, and who shall be a person of good moral character, shall, on motion, and the production of such record, be admitted to practice before the Supreme Court of the United States.”

SECT. 748. — By 20 St. 415, ch. 183,

“No clerk of the district or circuit courts of the United States or their deputies shall be appointed a receiver or a master in any case except where the judge of said court shall determine that special reasons exist therefor to be assigned in the order of appointment.”

Where such reasons were not assigned, and the referee having proceeded for three years, the master made a report for the plaintiff, which was excepted to and confirmed, the objection to the appointment on the ground of this statute was held to be waived by consent, although the defendant's solicitor did not know of the statute, or that the master was the deputy clerk. *Fischer v. Hayes*, 22 Blatch. 505; 22 F. R. 92.

SECT. 750. — This applies to both the circuit and district courts, and the final record must correspond with the judgment record of the common law. *The Thomas Fletcher*, 24 F. R. 481; *Blain v. Home Ins. Co.*, 30 Id. 667.

## CHAPTER XIII.

### HABEAS CORPUS.

UNDER Art. I, § 9 of the United States Constitution, Congress alone can suspend the privilege of the writ of *habeas corpus*, and the President does not possess that power, in the absence of legislation by Congress (*Ex parte Merryman*, Taney, 246; *Kemp's Case*, 16 Wis. 359; *Warren v. Paul*, 22 Ind. 276; *McCall v. McDowell*, 1 Abb. U. S. 212; *Deady*, 233); except apparently in the case of military arrests. *Ex parte Field*, 5 Blatch. 82. Congress may, however, authorize such suspension by the President, and the act of March 3, 1863 (12 St. 755), by which this authority was given for the period covered by the war of the Rebellion, has been held constitutional. *McCall v. McDowell*, *supra*; *Ex parte Field*, *supra*; *Re Oliver*, 17 Wis. 681; *Re Fagan*, 2 Sprague, 91; *Com. v. Frink*, 13 Am. Law Reg. 700. Only a State legislature can suspend the writ when issued by a State court. *Griffin v. Wilcox*, 21 Ind. 370. Since the decision in *Ableman v. Booth*, 21 How. 506 (1858), the existence of a concurrent power in State courts to inquire into restraints by Federal authority has been generally denied. *Ex parte Hanson*, 28 F. R. 127. A *habeas corpus* proceeding is not removable, the matter in dispute not involving a money value of the required amount. *Kurtz v. Moffitt*, 115 U. S. 487; *Rosenbaum v. Supervisors*, 28 F. R. 223. While the common law may be resorted to for the meaning of the term *habeas corpus*, the power of Federal courts to award it must be found in the written law. *Ex parte Bollman*, 4 Cranch, 75, 94. The writ will be issued to test the validity of a detention under a writ of *capias ad satisfaciendum*. *Ex parte Watkins*, 7 Pet. 568.



SECT. 751. — The Supreme Court has, under the Constitution, original jurisdiction to issue the writ of *habeas corpus* only in cases affecting ambassadors, other public ministers, or consuls, or those in which a State is a party, so that ordinarily the writ can only be issued from that court under its appellate jurisdiction. *Ex parte Hung Hang*, 108 U. S. 552; *Ex parte Parks*, 93 Id. 18; *Ex parte Bollman*, 4 Cranch, 75; *Burford's Case*, 3 Id. 448; *Hamilton's Case*, 3 Dall. 17; *Ex parte Barry*, 2 How. 65; *Ex parte Wells*, 18 Id. 307; *Ex parte Siebold*, 100 U. S. 371; *Ex parte Kearney*, 7 Wheat. 38; *Barry v. Mercein*, 5 How. 103; *Marbury v. Madison*, 1 Cranch, 137. The appellate jurisdiction extends to all other cases of Federal cognizance, except as modified by Congress, and to questions of fact as well as of law. Id.; *Ex parte Yerger*, 8 Wall. 85; *Ex parte Cardle*, 6 Id. 18; 7 Id. 506; *Re Kaine*, 14 How. 103; *Ex parte Metzger*, 5 Id. 176; *Wildenhuss's Case*, 120 U. S. 11; 28 F. R. 924; *Re Coy*, 127 U. S. 731; *Ex parte Bigelow*, 113 Id. 328. The Supreme Court has no general power to review the judgments of inferior Federal courts in criminal cases, by *habeas corpus*, or otherwise; and the writ of *habeas corpus* cannot be used to perform the functions of a writ of error (Id.; *Ex parte Reed*, 100 U. S. 23; *Ex parte Siebold*, Id. 375; *Ex parte Watkins*, 3 Pet. 192; 7 Id. 568; *Re Wo Lee*, 26 F. R. 476; *Ex parte Curtis*, 106 U. S. 371; *Ex parte Mirzan*, 119 Id. 584), except to the Territorial courts. Rev. Stats., § 1909; *Potts v. Chumasero*, 92 Id. 358. An appeal lies to the Supreme Court from the judgment of a district Territorial court refusing a writ of *habeas corpus*. *In re Snow*, 120 Id. 274. That court will not review questions arising upon the evidence offered to sustain a criminal charge. *Ex parte Carll*, 106 U. S. 521. It has no appellate jurisdiction over a naval court-martial. *Wales v. Whitney*, 114 U. S. 564; *Re Bogart*, 2 Sawyer, 396. Such jurisdiction appears not to extend to the case of a prisoner held in custody in extradition proceedings. *Ex parte Metzger*, 5 How. 176; *Re Kaine*, 14 Id. 103; *Robb v. Connolly*, 111 U. S. 624; see *Veretemaître's Case*, 13 Law Rep. 608. For the purposes of review, this writ is commonly used in connection with the writ of *certiorari*. Id.; *Ex parte Lange*, 18 Wall. 163; *Ex parte Milligan*, 4 Id. 2; *McCardle's Case*, 6 Id. 318; 7 Id. 506; *Ex parte Virginia*, 100 U. S. 339; *Ex parte Clarke*, Id. 399; *Ex parte Jackson*, 96 Id. 727. And whenever a circuit court, in the exercise of its original jurisdiction, has caused a prisoner to be brought before it, and, after investigation, has remanded him back to custody, the Supreme Court, in the exercise of its appellate jurisdiction, may, by the writ of *habeas corpus*, aided by the writ of *certiorari*, review such decision, such jurisdiction being acquired through its own writ of *habeas corpus*, and there being no power to proceed until that is issued. *Ex parte Royall*, 112 U. S. 181; *Ex parte Yerger*, 8 Wall. 103; *Re Stupp*, 12 Blatch. 501. But the Supreme Court is not required to inquire into a restraint of liberty if the petitioner's case discloses that he would not be discharged. *Ex parte Terry*, 128 U. S. 289; 36 F. R. 428. As to the jurisdiction of the circuit and district courts, see note, § 763.

SECT. 752. — A justice of the Supreme Court may issue a writ of *habeas corpus* in any part of the United States. He may make it returnable to himself or, if it can be done without harm to the petitioner, he may refer it to the court for determination, when the case involves the exercise of appellate jurisdiction. *Ex parte Clarke*, 100 U. S. 399. When an order to that effect is made without objection, and for the convenience of the parties, an appeal from the final decision of a district court or a judge thereof in *habeas corpus* proceedings may be heard by the circuit justice at chambers. *Roberts v. Reilly*, 116 U. S. 80. A district judge who grants a writ at chambers may make it returnable to the circuit court held by him. *Re Kaine*, 10 N. Y. Leg. Obs. 257. Under § 14 of the judiciary act of 1789, authorizing the issue of writs of *habeas corpus* "agreeable to the principles and usages of law," it was held that they might be issued by a district judge at chambers. *Bennett v. Bennett*, Deady, 299. A circuit judge who grants a writ at chambers which has been refused by the circuit court, cannot confer jurisdiction on the



Supreme Court by adjourning the proceeding thereto for determination. *Re Kaine*, 14 How. 103.

SECT. 753. — The later of the cited acts plainly subjected new cases to the jurisdiction of the courts, as well as of the several judges. 1 Com. D. 433. The power conferred by the first clause of § 14 of the judiciary act, being given in general terms, "must necessarily extend to all cases to which the judicial power of the United States extends, other than those expressly excepted from it." *Ex parte Yerger*, 8 Wall. 101. A *habeas corpus* proceeding is an action, cause, or suit, contemplating a proceeding against some person having power to produce before the court or judge the body of the person detained. *Ex parte Milligan*, 4 Wall. 2; *Wales v. Whitney*, 114 U. S. 574. It may also be a controversy between citizens of different States. *Ex parte Yerger*, *supra*; *United States v. Williamson*, 3 Am. Law Reg. 729; 4 Id. 5; *Bennett v. Bennett*, Deady, 299; *Ex parte Des Rochers*, McAll. 68. A writ of *habeas corpus*, sued out by one arrested for crime, is a civil suit or proceeding against those who are depriving him, as a criminal, of his civil right of personal liberty. *Ex parte Tom Tong*, 108 U. S. 556. It is not a "suit at law or in equity, where the matter in dispute exceeds the sum or value of \$500," within the removal act of 1875. *Kurtz v. Moffitt*, 115 U. S. 494, *ante*, p. 124. The revisers assumed that the writ authorized by the judiciary act would have applied to every restraint of liberty to which the judicial power of the United States extended, but for the proviso which forbade all interference with prisoners in jail under State authority, except when needed as witnesses in Federal courts (*Ex parte Dorr*, 3 How. 103); and that the only effect of the subsequent acts was to do away with this restriction in the cases which they specify. 1 Com. D. 435. Thus, *e. g.*, by the cited act of 1867, the writ of *habeas corpus* from Federal courts and judges was extended to persons in custody in violation of the Constitution, or a law or treaty of the United States; and under it a person convicted by a State court of knowingly passing counterfeited national bank notes, and sentenced to imprisonment, could be discharged on motion in *habeas corpus* proceedings taken in the district court. *Ex parte Houghton*, 7 F. R. 657; 8 Id. 897; *Ex parte Lange*, 18 Wall. 163; *Brown v. United States*, 14 Am. Law Reg. 566; *Re Ah Lee*, 5 F. R. 899; *ante*, § 711. So a person convicted in a State court of perjury in an investigation before a United States commissioner under an act of Congress, may now be discharged by a Federal court on *habeas corpus*, if imprisoned by a State court for such perjury. *Ex parte Bridges*, 2 Woods, 428. But the Federal courts have no jurisdiction to discharge a prisoner held under a State statute which, it is claimed, violates a State, and not the United States, Constitution. *Re Brosnahan*, 18 F. R. 62; 4 McCrary, 4, 11. Prior to the act of 1867, Federal courts had power to apply the writ of *habeas corpus* in all cases which it would reach at common law, provided it was not issued to any person in jail who was not confined under or by color of the authority of the United States (*Ex parte Des Rochers*, McAll. 68); but not to surrender an imprisoned principal in discharge of his bail. *United States v. French*, 1 Gall. 1. It is immaterial by whom, or by what authority, even though it be the court's own sentence (*Re Greathouse*, 4 Sawyer, 487), the prisoner is held, if the restraint is in violation of the Constitution or laws of the United States (*United States v. Spink*, 19 F. R. 631; *Re Titus*, 8 Ben. 411; *Ex parte Kenyon*, 5 Dillon, 385; *United States v. Anderson*, Cooke (Tenn.), 143; *United States v. Green*, 3 Mason, 482; *Ex parte Schmeid*, 1 Dillon, 587); or its treaties. Id.; 15 A. G. Op. 181; *Re Wong Yung Quy*, 6 Sawyer, 237; *Ex parte Tom Tong*, 108 U. S. 556; *Re Metzger*, 5 How. 176. An Indian, being a "person" within the meaning of Federal statutes, has the right to sue out the writ. *United States v. Crook*, 5 Dillon, 453. In general, if the caption and detention were invalid when the writ was served, but have since been made legal, the prisoner should be discharged. *Re Doo Woon*, 18 F. R. 898.

It is not material to the jurisdiction whether there has been a formal commitment or



not, the sole question being whether the restraint is unlawful. *Re McDonald*, 9 Am. Law Reg. 661; *Wildenhus's Case*, 120 U. S. 11; *Re Ayers*, 123 Id. 443. There must, however, be something more than moral restraint; something amounting to physical coercion and actual confinement. *Wales v. Whitney*, 114 U. S. 564; *Dodge's Case*, 6 Martin (La.), 569; *Ex parte Meeers*, 3 Utah, 50. A prisoner, who is held under a void order for contempt, or under an unconstitutional law, or the judgment of a court lacking jurisdiction, may be discharged under this section. *Ex parte Milligan*, 4 Wall. 2; *Ex parte Virginia*, 100 U. S. 339; *Ex parte Siebold*, Id. 376; *Ex parte Kearney*, 7 Wheat. 38; *Ex parte Wells*, 18 How. 307; *Ex parte Lange*, 18 Wall. 163; *Ex parte Parks*, 93 U. S. 18; *Ex parte Yarborough*, 110 Id. 651; *United States v. Rogers*, 23 F. R. 658, 663; *Ex parte Fisk*, 113 U. S. 713; *Re Ayers*, 123 Id. 443; *United States v. Hamilton*, 3 Dall. 17; *Re Allen*, 13 Blatch. 271; *Re Buell*, 3 Dillon, 116; *Ex parte Perkins*, 29 F. R. 900; *United States v. Spink*, 19 Id. 631. In such case the *habeas corpus* is a writ of right (*Re Winder*, 2 Cliff. 89; *Re Bryant*, 1 Deady, 118; *Re Hamilton*, 1 Ben. 455); but the decision must be void, not simply erroneous. *Ex parte Parks*, 93 U. S. 18; *Ex parte Crouch*, 112 Id. 178; *Ex parte Bigelow*, 113 Id. 328; *Ex parte Shaffenburg*, 4 Dillon, 271; *Re Winder*, 2 Cliff. 89; *Griffin's Case*, Chase, 364; *Re Devoe*, 1 Lowell, 251; *Ex parte Gerry*, 2 Biss. 485; *Johnson v. United States*, 3 McLean, 85. If the judges of the circuit court are divided in opinion on an application for a writ, they may certify the cause to the Supreme Court. Or, if the former court refuse a discharge, the prisoner may take the case to the Supreme Court by writ of error (*Ex parte Milligan*, 4 Wall. 2); but jurisdiction will not be taken on a certificate of division unless final judgment has been rendered in the cause. *Ex parte Tom Tong*, 108 U. S. 556. Where a circuit court, in the exercise of its original jurisdiction, has remanded a prisoner whom it caused to be brought before it, the Supreme Court, exercising its appellate jurisdiction, may, if such action was unlawful, relieve the prisoner. *Ex parte Yerger*, 8 Wall. 85.

Refusal to permit a Chinese passenger to land is a restraint of liberty remediable by *habeas corpus*. *Re Jung Ah Lung*, 11 Sawyer, 211; 25 F. R. 141; 124 U. S. 621. An alien may pursue a lawful business in the United States, as *e. g.*, a laundry business, and if he is imprisoned therefor under an act of a board of supervisors, or under a city ordinance, which conflicts with the Fourteenth Amendment to the United States Constitution, he may be discharged on *habeas corpus*. *Re Lee Tong*, 18 F. R. 253; *The Laundry License Case*, 22 Id. 701; *Re Quong Woo*, 9 Pac. Coast L. J. 615; *The Stockton Laundry Case*, 26 F. R. 611; *Yick Wo v. Hopkins*, 118 U. S. 356. If, however, the concurrent jurisdiction of a circuit court is thereby brought in conflict with the decision of the highest state court, the case should be referred to the United States Supreme Court for final decision. *Re Woo Lee*, 26 F. R. 471.

The general rule is that the Federal courts have jurisdiction to discharge from custody a person restrained of his liberty in violation of the United States Constitution, although he may be held at the time under State process for trial on a charge of crime or on a conviction thereof; but the court may, in its discretion, subordinate to any circumstances requiring immediate action, refuse the writ in advance of the trial in the State court, or before the case has been heard, after conviction, on error in such court. *Ex parte Royall*, 117 U. S. 241; *Ex parte Fonda*, Id. 516; *Ex parte Yung Jon*, 28 F. R. 308; *Re Coy*, 127 U. S. 731; *Re Ah Jow*, 29 F. R. 181; *Re Chin King*, 35 Id. 356. If the petitioner is held upon a regular charge after examination and commitment before a tribunal having jurisdiction, and the offence was solely against State law, the writ will be denied. *Re Taylor*, 13 West. Jur. 505.

A Federal circuit court may issue the writ to ascertain whether one of the crew of a foreign vessel in a domestic port who is in the custody of the State, charged with the commission of an offence within the port, against State law, is exempt from its jurisdic-



tion because of a treaty in force between this government and the nation to which the vessel belongs. *Wildenhus's Case*, 120 U. S. 1, reversing 28 F. R. 924. If the parties who claim the custody of an infant are citizens of different States, and the right claimed by one is denied by another, there is a controversy which may be determined in a Federal court by a *habeas corpus* proceeding. *Bennett v. Bennett*, Deady, 299; *contra*, *Ex parte Barry*, 2 How. 65; s. c. 7 Law Rep. 374; *Ex parte Everts*, 1 Bond, 197. The circuit courts have jurisdiction to release on *habeas corpus* a minor of African descent who is bound by an indenture of apprenticeship which conflicts with § 1 of the civil rights act of 1866. *Re Turner*, 1 Abb. U. S. 84. The jurisdiction of a Federal court to inquire into the validity of a contract of enlistment, and to discharge a minor improperly held in the military service, is not affected by a statute empowering the Secretary of War to discharge such minor. *Re McDonald*, 1 Lowell, 100; *contra*, *Re Neill*, 8 Blatch. 156. See note, § 1117.

"*In custody under or by color of the authority of the United States.*" — A person arrested under a warrant of extradition from one State to another is within this clause, and the Federal courts may inquire into the legality of his detention. *Re Doo Woon*, 18 F. R. 898. One who is arrested under art. 4, § 2, of the Constitution, relative to fugitives from justice, and the acts of Congress passed pursuant thereto, is confined under color of or by the authority of the United States. *Re Smith*, 3 McLean, 121; *Ex parte McKean*, 3 Hughes, 23. So is a person who has been committed for extradition to a foreign country by a commissioner of a United States court. *Re Stupp*, 12 Blatch. 501; *Re Kaine*, 3 Id. 1. The validity of the enlistment of a minor in the military service of the United States may be inquired into on *habeas corpus*. *Ex parte Schmeid*, 1 Dillon, 585; *Re McDonald*, 1 Lowell, 100; *Re Keeler*, Hempst. 306; *United States v. Anderson*, 1 Brun. Coll. Cas. 202. A person detained by a distress-warrant issued pursuant to an application by the Treasury department may be released on *habeas corpus*, if the detention is unlawful. The language of the statute, "for the purpose of inquiring into the cause of commitment" applies to commitments under all kinds of process. *Ex parte Randolph*, 2 Brock. 447; *Ex parte Reardon*, 2 Cranch C. C. 639; *Ex parte Snow*, 3 Wood. & M. 430. But in *Ex parte Wilson*, 6 Cranch, 52, the Supreme Court, not being satisfied that *habeas corpus* is the proper remedy where there has been an arrest under civil process, refused the writ. The language of this section extends to all persons imprisoned under the authority of the United States, whether under the judgment of a court or the warrant of a committing magistrate. Hence the court which has passed sentence may determine as to the legality thereof. *Re Greathouse*, 4 Sawyer, 487. If the committing court had jurisdiction, error in the proceedings cannot be reviewed upon application for the writ. *Ex parte Parks*, 1 Hughes, 604.

"*In custody for an act done or omitted in pursuance of a law of the United States.*" — One confined by State authority for executing a law or process of the United States is entitled to his discharge, though such confinement was in pursuance of a general State law, if the act done by him was in pursuance of a law of the United States, under circumstances which made it justifiable. *United States v. Jailer*, 2 Abb. U. S. 265; *Ex parte Robinson*, 6 McLean, 355; 1 Bond, 39. If it is alleged that an officer of the United States, confined under State process, abused his powers, the facts will be inquired into, and, unless a *prima facie* case is made against him, and there is a positive oath as to the facts from the plaintiff in the cause in the State court, the officer will be discharged without opposing evidence. *Ex parte Jenkins*, 2 Wall. Jr. 521. An officer in the army holds a person enlisted therein by color of authority from the United States, and in detaining him, notwithstanding an order of discharge issued by a State court, acts in pursuance of a Federal law, and will be released from imprisonment by such court for disobeying its order. *Re Farrand*, 1 Abb. U. S. 140; *Re Neill*, 8 Blatch. 156. But see *Re McDonald*, 1 Lowell, 100. A person



who assists the marshal, at his request, in executing process is protected by this clause. *United States v. Morris*, 2 Am. L. Reg. 348. Acts done in the extradition of fugitives are done in pursuance of the authority of the United States, and the courts thereof will release officers held under civil or criminal process from imprisonment for acts done in discharging their duty in executing such writs. *Re Titus*, 8 Ben. 411; *United States v. McClay*, 23 Int. Rev. Rec. 80. But officers will not be so protected unless they keep within the scope of their duty. *Re Bull*, 4 Dillon, 323. Federal officers who are committed for contempt for refusing to produce before a State court poll-books, ballots, and other papers relating to an election, which have been placed in the custody of Federal court, and are retained there for use as evidence in a pending cause, will be released. *Ex parte Turner*, 3 Woods, 603. Acts done by a supervisor of elections in enforcing order and making an arrest, with or without process, are authorized by law, and he will be protected in performing them. *Ex parte Geissler*, 4 F. R. 188. And so of election officers generally at a congressional election. *Ex parte Hayne*, 9 Chi. Leg. News, 106. If a person in the custody of a State officer, under indictment for larceny, undertakes to justify the act of which he is accused, under a writ of replevin issued by a Federal court, on *habeas corpus* that court will investigate the facts, and if the writ was fraudulently issued, and with a fraudulent purpose, will refuse to interfere with the State's custody of the prisoner. *Ex parte Thompson*, 1 Flippin, 507. The writ will issue in favor of persons imprisoned for contempt by a State court, if the acts which constituted the alleged contempt were done in the discharge of duties imposed by the Constitution and laws of the United States, and the petitioners were acting pursuant thereto. Electoral College of South Carolina, 1 Hughes, 571; *Ramsey v. Jailer*, 2 Flippin, 451.

"*In custody in violation of the constitution or of a law or treaty of the United States.*" — The writ will issue where one has been convicted by a State court of passing counterfeit national bank-bills, and has been imprisoned therefor. *Ex parte Houghton*, 7 F. R. 657. If a person is imprisoned by virtue of a conviction under a State law which is in conflict with either the Constitution or a law or treaty of the United States, he may be discharged by the circuit court. *Re Brosnahan*, 18 F. R. 62; *Re Wong Yung Quy*, 6 Sawyer, 237. One who is imprisoned under a valid law by a judicial officer who holds by color of right, and is an officer *de facto*, is not imprisoned without due process of law, and cannot be released. *Re Ah Lee*, 5 F. R. 899. If a petitioner is held, according to the judgment of a commissioner, for an offence against the laws of the United States, upon any competent evidence, he is not held contrary to law. *Re Byron*, 18 F. R. 722; *Re Stupp*, 12 Blatch. 501; *Re MacDonnell*, 11 Id. 79; *Re Wahl*, 15 Id. 334; *Re Fowler* 4 F. R. 303; *United States v. Johns*, 4 Dall. 412; *contra*, *Re Henrich*, 5 Blatch. 414. A commissioner of a United States court has no authority to punish for contempt, and a person committed by him for that offence will be discharged. *Ex parte Perkins*, 29 F. R. 900. A person held under a void warrant is held contrary to law. *Re Farez*, 7 Blatch. 345. If a conviction has been had under a valid State statute, the validity of the commitment is not affected because of an unconstitutional amendment to the statute, which did not repeal the original act. *Ex parte Davis*, 21 F. R. 396. The sentence of a court-martial, organized under State laws, rendered against a member of the militia without notice, is void. *Meade v. Deputy Marshal*, 1 Brock. 324. It is in contravention of this clause for the State authorities to arrest a person accused of crime committed in a place where the United States has exclusive jurisdiction under Rev. Stats. § 711. *Re Tatem*, 1 Hughes, 588. State courts have no jurisdiction of the crime of perjury committed in a judicial investigation held under authority of a statute of the United States. *Ex parte Bridges*, 2 Woods, 428. A person imprisoned for an infamous crime without having been presented or indicted by a grand jury according to the Fifth Amendment, is entitled to a discharge. *Ex parte Wilson*, 114 U. S. 417. Marriage con-



tracts are not affected by the Constitution of the United States, and one confined for violating a State law relating thereto cannot be released by a Federal court. *Ex parte Kinney*, 3 Hughes, 9. Where under an indictment containing four counts, and alleging two distinct offences of a like character, the petitioner was sentenced, after a general plea of guilty, to two years' imprisonment under each count, each term to begin at the close of the preceding term, and application was made for a release at the expiration of two years, it was held that, as against this collateral attack, the judgment was good for at least four years' imprisonment. *Re Peters*, 4 Dillon, 169. Where it is shown that a prisoner is held under an extradition warrant which recites that it was issued upon the requisition of the governor of another State, and a copy of an indictment for burglary accompanies the warrant, the latter is conclusive evidence that the person named is charged with crime in the State whence the requisition issued, according to the Constitution and statutes of the United States. *Re Leary*, 10 Ben. 197. If no indictment has been found against one who has been held to await the action of the grand jury, on the discharge of the latter, he is entitled to be released; and the question of probable cause for holding him in the first instance will not be inquired into. *Re Esselborn*, 8 F. R. 904. If the indictment under which one is held to await trial is not clearly good, the prisoner will be discharged. *Re Buell*, 3 Dillon, 116. The Cherokee nation is neither a State nor a Territory within the meaning of the Constitution and laws, and a person held under the warrant of a governor of a State upon a requisition issued by the chief of that nation is entitled to be released. *Ex parte Morgan*, 20 F. R. 298. A person indicted for a felony in one State, forcibly abducted from another State and brought to the State where he was indicted, by parties acting without warrant or authority of law, is not entitled, under the Constitution or laws of the United States, to release from detention under the indictment by reason of such forcible and unlawful abduction. *Mahon v. Justice*, 127 U. S. 700. No right is established under the Constitution, laws, or treaties, where it appears that the petitioner was kidnapped in a foreign country and taken thence by force to the State whose law he had violated, no regard being had to an existing extradition treaty. *Ker v. Illinois*, 119 U. S. 436.

"Unless it is necessary to bring the prisoner into court to testify."—Under § 14 of the judiciary act of 1789, no Federal court or judge could issue a writ of *habeas corpus* to bring up a prisoner confined under a judgment of a State court for any other purpose than to have him testify. *Ex parte Dorr*, 3 How. 103. This rule was applied to an attaché of a foreign legation, in *Ex parte Cabrera*, 1 Wash. 232.

SECT. 754.—The application may be made to a Federal court in term time, or, at any time, to a justice or judge of a circuit or district court within his jurisdiction, or to any United States Supreme Court justice in any part of the country where he happens to be. *Ex parte Clarke*, 100 U. S. 403; *Ex parte Hibbs*, 26 F. R. 421, 435; *Harrison's Case*, 1 Cranch C. C. 159; *Ex parte Bollman*, 4 Cranch, 75. The writ may issue at the instance of a third party who is not directly interested. *Ex parte Des Rochers*, McAll. 68, 76. The language of § 760, "the petitioner or the party imprisoned or restrained," implies that application may be made by another than the person confined. *Re Hoyle*, 12 Chi. Leg. News, 279. Application may be made by the wife of the person whose release is sought. *Re Ferrens*, 3 Ben. 445. A writ cannot be sued out on behalf of a minor except by a person who is entitled to his custody or control, or who has been solicited by him or his parents or guardians, or other person entitled by law to his custody, to do so. *Re Poole*, 2 MacArthur, 583. The application must show probable cause, or the writ will not be granted. *Ex parte Davis*, 14 Law Rep. 301; *Ex parte Winder*, 2 Cliff. 89. If the defect or illegality complained of does not otherwise appear, the circumstances which entitle the person confined to the writ should be stated in an affidavit. *Re Keeler*, Hempst. 306. The application must be sworn to before some officer of whose power



the court will take judicial notice, or who is shown by evidence to be empowered to administer oaths. Such notice is not taken of the acts of justices of the peace in another State. *Id.* If the application makes it appear that the party is probably illegally confined, and shows the jurisdictional facts, the writ cannot be denied. *Ex parte Winder*, 2 Cliff. 89. Application to the Supreme Court must show that the case is within its jurisdiction. *Re Milburn*, 9 Pet. 704. The petitioner must produce the warrant of commitment or a copy of it, or an affidavit that the officer who detains him refused to furnish a copy. *Re Harrison*, 1 Cranch C. C. 159.

SECT. 755. — The usual practice is for the court to issue the writ, on the application of the prisoner, and on its return to hear and dispose of the case; but if the cause of imprisonment fully appears by the petition, the court may, without issuing the writ, decide whether upon the face of the petition the prisoner would be discharged if brought before the court. *Ex parte Milligan*, 4 Wall. 2. If it is apparent upon the petition that the writ if issued ought not to result, on principles of law and justice, in the immediate discharge of the accused from custody, the court is not bound to award it as soon as the application is made. *Id.*; *Ex parte Royall*, 117 U. S. 250, citing *Ex parte Watkins*, 3 Pet. 201; *Ex parte Virginia*, 100 U. S. 339; *McCready v. Virginia*, 94 Id. 391; 1 Hughes, 598; *Ex parte Clarke*, 100 U. S. 399; *Re Bull*, 4 Dillon, 323; *Re Wong Yung Quy*, 6 Sawyer, 237; *Re Keeler*, Hempst. 306; *Ex parte Kinney*, 3 Hughes, 9. Thus if a prisoner, restrained of his liberty in violation of the United States Constitution, is held under State process for trial on an indictment for an offence against the laws of the State, the United States circuit court has a discretion to discharge him at any time, either before trial or after conviction in the State court, pending a writ of error to the highest court of the State. *Ex parte Royall*, 117 U. S. 241, 254; *Re Hoover*, 30 F. R. 51. The fact that distinct offences were improperly joined in the indictment under which the prisoner was sentenced is not ground for release on *habeas corpus*. *Ex parte Peters*, 12 F. R. 461.

A circuit judge cannot review the judgment of a circuit court on *habeas corpus*, after conviction and sentence, on the ground that the statute under which sentence was passed was repealed prior thereto; and if it appears that the person sentenced has been pardoned unconditionally, and has received notice of the pardon, though it does not appear that he has accepted it, if he is not restrained of his liberty, the writ will not be granted. *Re Callicot*, 8 Blatch. 89; *Re Greathouse*, 4 Sawyer, 487.

The suspension of the privilege of the writ does not suspend the writ, which issues as a matter of course. The rights of the petitioner are decided when the return is made. *Ex parte Milligan*, 4 Wall. 2. If the petitioner is held under illegal restraint, without a formal or technical commitment, under or by color of the authority of the United States, the Federal courts will issue a writ. *Re McDonald*, 9 Am. Law Reg. 661. If the prisoner is confined under a commitment which is regular, the writ will not be allowed because he was insane when the offence was committed. *United States v. Lawrence*, 4 Cranch C. C. 518. The court may grant a rule to show cause why the writ should not issue, instead of issuing the writ. *Ex parte Milburn*, 9 Pet. 704.

SECT. 756. — Though the writ is previously returnable, an attachment will not issue until three days have expired after it was served. *United States v. Bollman*, 1 Cranch C. C. 373. If service of the writ is prevented by force, it will be placed on the files of the court for service when and where it may be practicable to make it. *Re Winder*, 2 Cliff. 89.

SECT. 757. — A return which shows a caption and detention upon valid process executed after the writ of *habeas corpus* was served is insufficient. *Re Doo Woon*, 18 F. R. 898. The return should be signed by the person to whom the writ was directed. *Seavey v. Seymour*, 3 Cliff. 439. If the court is not satisfied that the return has disclosed all



the material facts, the defendant will not be discharged because he avers that the person who is restrained of his liberty is not in his possession, power, or custody. *United States v. Green*, 3 Mason, 482. If a false or evasive return is made, the person who makes it may be punished for contempt. *United States v. Williamson*, 3 Am. Law Reg. 729; 4 Id. 5. If the party who makes a false and evasive return and refuses to produce the prisoner in court, be present, he will be committed until he produces him or is otherwise discharged. *United States v. Davis*, 5 Cranch C. C. 622. It is irregular to order the person detained to be delivered to the custody of the petitioner before a return has been made. *Re Poole*, 2 MacArthur, 583.

SECT. 760.—This requires no pleading after the traverse to the return, the new matter therein being deemed at issue. *Re Leary*, 10 Ben. 197; *Norris v. Newton*, 5 McLean, 92. The opening words of this section imply that the petition may be filed by another than the person who is confined. *Re Hoyle*, 12 Chi. Leg. News, 279. The return of the warrant of commitment, although originally conclusive under the judiciary act (*Ex parte Sifford*, 5 Am. Law Reg. 659; *Ex parte Jenkins*, 2 Wall. Jr. 521), may be controverted since the act of 1833 (4 St. 634). Id.; *United States v. Williamson*, 3 Am. Law Reg. 729; *Nelson v. Cutter*, 3 McLean, 326; *Ex parte Smith*, 3 Id. 121; *United States v. Green*, 3 Mason, 482. If the return is false or evasive, the person making it may be committed for contempt in order to compel obedience to the writ. *United States v. Williamson*, 3 Am. Law Reg. 729. The objection that the allegations of the petition anticipate the return will not prevail if first taken in the appellate court. *Seavey v. Seymour*, 3 Cliff. 455.

SECT. 761.—A discharge will not be granted because of errors committed by a court which had jurisdiction. *Ex parte Alexander*, 14 F. R. 680; *Ex parte Siebold*, 100 U. S. 371; *Ex parte Parks*, 93 Id. 18; *Ex parte Watkins*, 3 Pet. 193. One sentenced under an indictment in which several distinct offences were joined cannot be discharged because such joinder was improper. *Ex parte Peters*, 12 F. R. 461. A discharge will not be allowed because the indictment was not found until after the statute of limitations had run, but the bar should be pleaded. *Johnson v. United States*, 3 McLean, 89. The judgment of a court-martial which had jurisdiction cannot be impeached in a *habeas corpus* proceeding. *Ex parte Reed*, 100 U. S. 13. If a prisoner is held for extradition under an improper commitment, he may be remanded under the warrant of arrest so that new proceedings may be instituted. *Re Farez*, 7 Blatch. 349, 491; *Ex parte Bennett*, 2 Cranch C. C. 612. See notes §§ 751, 753.

The refusal of one court or judge to discharge the prisoner is no bar to applications to other courts or judges. *Ex parte Kaine*, 3 Blatch. 1. A discharge prevents further imprisonment under the process from which it was granted; but the person discharged may be held under other process issued under the same indictment. *Ex parte Milburn*, 9 Pet. 704.

SECT. 762.—It was probably intended that, except as provided in § 761, the proceedings directed by the act of 1867 should apply to all cases of *habeas corpus*. 1 Com. D. 440.

SECT. 763.—The words in the second line, "upon an application for a writ of *habeas corpus* or," were added by the Revision.

The district and circuit courts have always retained the original jurisdiction of *habeas corpus* conferred by the judiciary act in both civil and criminal matters. *Ex parte Watkins*, 3 Pet. 193; *Ex parte Yerger*, 8 Wall. 85; *Ex parte Randolph*, 2 Brock. 447; *Ex parte Wilson*, 6 Cranch, 52; *Hecker v. Jarrett*, 3 Binney, 404; *Ex parte Everts*, 1 Bond, 197. That act gave to the circuit court no appellate jurisdiction of *habeas corpus* from the district court, and such appellate jurisdiction now exists only as provided in this section. *Seavey v. Seymour*, 3 Cliff. 439. The act of 1867 provided for a writ of



*habeas corpus* in the case of any person restrained of his liberty in violation of any treaty with the United States, and gave an appeal as well from the circuit court to the Supreme Court as from a district court or judge to the circuit court, but the latter provision was repealed by § 2 of the act of 1868. Such right of appeal extended to judgments of the circuit courts rendered in the exercise of original jurisdiction in *habeas corpus* cases. *Ex parte* McCardle, 6 Wall. 318; 7 Id. 506. And the repeal of the act of 1867 did not affect the appellate jurisdiction previously exercised by the Supreme Court in cases of *habeas corpus* under the Constitution and acts of Congress, since acts which confer jurisdiction by appeal are construed as excluding all cases which they do not expressly provide for. *Ex parte* McCardle, 7 Wall. 506; *Ex parte* Yerger, 8 Id. 85. The circuit court cannot, on *habeas corpus*, look behind the record to review the proceedings of a court of co-ordinate jurisdiction. *Ex parte* Alexander, 14 F. R. 680. And on such proceedings, the record of a Federal court is not defective if it does not show jurisdiction. *Ex parte* Watkins, 3 Pet. 193. See Church on Habeas Corpus, §§ 222-230.

The circuit and district court may issue the writ, in conjunction with a writ of *certiorari*, to revise the action of a United States commissioner, as, *e. g.*, upon the commitment by him of a fugitive from justice for surrender under an extradition treaty. Note, *ante*, § 751; *Re* Henrich, 5 Blatch. 414; *Re* Clark, 2 Ben. 540; *Re* Lippman, 3 Id. 95; *Re* Byron, 18 F. R. 722; *Re* Cross, 20 Id. 824; *Re* Esselborn, 20 Blatch. 1; *Re* Stupp, 18 Id. 501; 11 Id. 124; 12 Id. 501; *Re* McDonnell, 11 Id. 79, 170; *Abranches v. Schell*, 4 Id. 256. See *Re* Wildenhus, 28 F. R. 924; 120 U. S. 11; *Benson v. McMahon*, 127 Id. 457. A circuit court commissioner cannot issue a writ of *habeas corpus* to take from confinement one held under authority of the United States, and bring him before such commissioner in order that his deposition may be taken for use in a cause pending in the district court. *Ex parte* Barnes, 1 Sprague, 133.

Sects. 763, 764, 765, have no reference to officers and clerks of the District of Columbia, but are limited in their operation to officers and clerks of the United States. *Donovan v. United States*, 21 Ct. Cl. 120.

SECT. 764. — The words, "the last clause of," were stricken out by St. March 3, 1885, ch. 353 (23 St. 437), thereby restoring the appellate jurisdiction of the Supreme Court in *habeas corpus* cases over decisions of the circuit court, and of the supreme court of the District of Columbia. *Wales v. Whitney*, 114 U. S. 564. This right of appeal is absolute, and not dependent upon the discretion of the judge. *Re* Sun Hung, 11 Sawyer, 173; 24 F. R. 723; *Ex parte* Milligan, 4 Wall. 2. The Supreme Court will not now issue the writ when it may as well be done in the circuit court and its direct action is not necessary or expedient. *Ex parte* Mirzan, 119 U. S. 584; *Re* Sun Hung, *supra*. No appeal lies to the Supreme Court from an order of a United States circuit judge, sitting as a judge and not as a court, discharging a prisoner brought before him on a writ of *habeas corpus*. *Carper v. Fitzgerald*, 121 U. S. 87. See *Re* Metzger, 5 How. 176; *Ex parte* Virginia, 100 U. S. 341; *Re* Kaine, 14 How. 103; *Ex parte* Yerger, 8 Wall. 85.

SECT. 765. — Such appeals from the final decision of a district court or judge, may, within the discretion of the court or judge, be sent to the circuit court at a term current when the appeal is taken, under regulations adapted to secure justice; and the appeal may be heard by the circuit justice at chambers, if there is no objection or hardship. *Roberts v. Reilly*, 116 U. S. 80.



## CHAPTER XIV.

## DISTRICT ATTORNEYS, MARSHALS, AND CLERKS.

SECT. 767. — As to Alabama, see 18 St. 195, ch. 401, § 3. By 18 St. 85, ch. 328, § 2 (see note § 619), clerks of the circuit and district courts, marshals, and district attorneys, are to reside permanently in their districts, except in the southern district of New York. See note, § 555. As to Georgia, see 22 St. 47, ch. 87.

SECT. 768. — 22 St. 172, ch. 312, § 3, provides —

“That the district attorney and United States marshal for the district of Iowa shall be the district attorney and marshal of the southern district of Iowa; and the President of the United States, by and with the advice and consent of the Senate, is authorized and directed to appoint one person as marshal and one as district attorney for the northern district of Iowa.”

SECT. 770. — Prior to the Revision, salaries were appropriated for and paid to the district attorneys, although, in the cases of several of them, no previous law established a salary; and salaries having been appropriated by Congress for all these officers, except the district attorney of Nebraska, the rule is here stated without exception. 1 Com. D. 443. District attorneys, being compensated by fees and emoluments limited by law to a fixed salary, cannot have extra allowances not expressly authorized by law. The Anna, Blatch. Pr. Cas. 337; *United States v. Ingersoll*, Crabbe, 135; *Townsend v. United States*, 22 Ct. Cl. 207.

SECT. 771. — *White v. Arthur*, 20 Blatch. 246; 10 F. R. 87. This section is general in its terms, and is qualified by §§ 3490–3493, and a *qui tam* action thereunder may be begun by any person without the consent of the district attorney. *United States v. Griswold*, 5 Sawyer, 25. The district attorney is the only prosecutor known to the law under Federal practice. *United States v. Stone*, 8 F. R. 261; *United States v. McAvoy*, 4 Blatch. 418; *United States v. Doughty*, 7 Id. 424. He may, in his discretion, offer or withhold any particular of testimony in suits subject to his control. The Peterhoff, Blatch. Pr. Cas. 463. If he doubts whether witnesses for the government will attend the trial, it is his duty to have them properly recognized. *United States v. Durling*, 4 Biss. 509.

The district attorney has charge of all legal proceedings within his district in which the government is a party or interested, subject only to the general direction and supervision of the Attorney-General. If other counsel are employed it is for the purpose of aiding him, not to exercise his authority or direct his conduct. The Pueblo Case, 4 Sawyer, 553, 569. Incident to his general superintending authority over prosecutions, is the duty to provide the marshal with all process required to carry the judgments of the court into effect. *Levy Court v. Ringgold*, 5 Pet. 451. He may employ a stenographer, at public expense, in a criminal case. *Fish v. United States*, 36 F. R. 677. If the authority of the government is involved in proceedings for contempt the district attorney must appear therein. *Durant v. Supervisors*, Woolw. 377. The district attorney is not an officer of the court to such an extent that the court can compel him to enter the appearance of the government. *Fifth National Bank v. Long*, 7 Biss. 502. The court cannot command him to prosecute a criminal case. *United States v. Corrie*, 23 Law Rep. 145, 158. He has no absolute power to dismiss a criminal charge pending the examination of the accused before a commissioner, or to prevent the grand jury from considering a charge by declaring that the government will not prosecute. After indictment and before trial he has the absolute power to enter a *not. pros.*; and may, after trial begun, with defendant's



consent, dismiss the prosecution. *United States v. Stowell*, 2 Curtis, 153; *United States v. Schumann*, 7 Sawyer, 439; *United States v. Corrie*, 23 Law Rep. 145, 158; *United States v. Davis*, 6 Blatch. 464; *United States v. Watson*, 7 Id. 60; *The Whiskey Cases*, 99 U. S. 594. A case arising under the internal revenue laws cannot be compromised by the district attorney without the concurrence of the commissioner of internal revenue, the Secretary of the Treasury, and Attorney-General. *United States v. Distilled Spirits*, 4 Ben. 349.

A district attorney is liable to the government for money which he has actually received, or which has been lost by his inexcusable neglect. He is not responsible for the acts of the marshal. *United States v. Ingersoll*, Crabbe, 135. He cannot take from a marshal a warrant regularly issued to him by a commissioner, for the purpose of deciding whether it shall be executed or not. *United States v. Scroggins*, 3 Woods, 529. He is not bound to attend on the examination by a State magistrate of a complaint preferred by an army officer against a citizen for a violation of a statute of the United States. Neither is it his duty to leave home to assist such officer in procuring evidence or otherwise furthering the prosecution. 6 A. G. Op. 218. He is not bound to resist applications for the discharge of enlisted minors under writs of *habeas corpus* issued out of State courts. 10 A. G. Op. 146. In the prosecution of prize cases the district attorney acts only as the law officer of the government. *The Anna*, Blatch. Pr. Cas. 337. It is in his discretion to offer or withhold testimony concerning a prize suit. *The Peterhoff*, Id. 463.

SECT. 773. — There appearing to be no inconsistency between the cited acts requiring a report to the Solicitor of the Treasury, and the provisions of the act of June 22, 1870, ch. 150 (16 St. 162), §§ 3, 12, 16, transferring the Solicitor, &c., to the Department of Justice, and conferring upon the Attorney-General supervision of the district attorneys, both provisions are retained in the Revision. 1 Com. D. 445.

SECT. 776. — See notes, §§ 619, 767. By 18 St. 178, ch. 390, § 19, marshals were required to make annual bankruptcy reports to the clerks of the district courts. As to Alabama, see 18 St. 195; as to Colorado, see 19 St. 61, ch. 147, § 4; as to North Carolina, see 18 St. 193, ch. 397; as to Utah, see 18 St. 253, ch. 469. As to Georgia, see 22 St. 47, ch. 87. The revisers observe that the act of June 4, 1872, ch. 282, omitted to provide a marshal for the new district thereby established in North Carolina, or to authorize the marshal of the other district to act within it. 1 Com. D. 446.

SECT. 778. — See note, § 768.

SECT. 780. — The marshal cannot delegate to another the power to appoint deputies here conferred. *Schloss v. Hewlett*, 81 Ala. 266. As to the deputy marshal in Utah, see 18 St. 253, ch. 469, § 1; in Tennessee, 20 St. 206, ch. 359, § 1.

SECT. 781. — The salaries and fees allowed by certain of the cited acts differed in different districts, although the salary was, in all cases, allowed for "extra services," which were not compensated by any fee, and might be rendered to as great an extent in one district as another. 1 Com. D. 448.

SECT. 782. — See note, § 2021; *Walter v. Bickham*, 122 U. S. 325. This provision and § 873 do not impose on the judge any judicial function to determine, while approving the bond and administering the oath, the right or title of the appointee to the office of marshal, or the power of the President in making the appointment. And if a person appears before the judge with the President's commission appointing him marshal to fill a vacancy, the oath will be administered and the bond acted upon. *Re Yancey*, 28 F. R. 445. As to the qualification of deputies appointed under § 2021, see *Re Deputy Marshals*, 22 F. R. 153.

SECT. 783. — By 18 St. 333, ch. 95, § 2, the Attorney-General may require from the clerk or marshal of any judicial district an increased bond not exceeding \$40,000. See note, § 795. The judge, and not the President, is to accept and approve the bond. Jack-



son *v. Simonton*, 4 Cranch C. C. 255. St. 1789, ch. 20, § 27, required that the marshals of the several Territories should give bonds for the faithful performance of their duties. 10 A. G. Op. 68. The President is not authorized to release the sureties on a marshal's bond. 7 Id. 62. When a marshal, appointed while a judicial district was co-extensive with a State, continues in office after it is divided into two districts, the act making the division neither enlarges nor changes his duties, nor does it affect the rights of his sureties. 5 A. G. Op. 96. The district judge is the only person authorized to approve the bond, and until he approves it the sureties are not liable for the acts of their principal. The bond must comply with the statute. If made to the President of the United States, it does not comply with the statute, and cannot be approved. *Jackson v. Simonton*, 4 Cranch C. C. 255. In a suit on a marshal's bond conditioned in conformity with the requirements of this section, where the questions raised involve the construction of this statute and of the condition of the bond, the cause is removable to the Federal court under St. 1875, ch. 137, § 2, without regard to the parties' citizenship. *Lawrence v. Norton*, 13 F. R. 1. A suit on the bond of the marshal may be brought by a person injured by his act, in the circuit court, although the parties reside in the same State. *Id.*; *Adler v. Newcomb*, 2 Dillon, 45; *Wetmore v. Rice*, 1 Biss. 237; *United States v. Davidson*, *Id.* 433.

SECT. 784. — See note, § 3468. If the marshal takes the goods of one person upon a writ of attachment on mesne process against another, it is a breach of the condition of his official bond for which his sureties are liable. *Lammon v. Feusier*, 111 U. S. 17. The Federal courts have jurisdiction of suits by individuals upon a marshal's bond even where all the parties to the suit are citizens of the same State, and the petition should ask judgment for the damages sustained, and not for the whole penalty of the bond. *Adler v. Newcomb*, 2 Dillon, 45. So a suit on the marshal's bond, against him and his sureties, for seizing a stock of goods of more than \$500 in value under a writ from a Federal district court in proceedings in bankruptcy, is a suit of a civil nature which is removable. *Feibelman v. Packard*, 109 U. S. 421. The marshal is not responsible on his official bond for the discharge by his deputy of sureties on a replevin bond, if the plaintiff's attorney misled the deputy, or induced, even without direct instructions, his erroneous act. *Rogers v. The Marshal*, 1 Wall. 644. So if the plaintiff himself gives instructions to the deputy, as to receive a certain kind of money in satisfaction of an execution, the deputy acts as his agent, and not as the marshal's. *Gwinn v. Buchanan*, 4 How. 1. Court dockets and records, showing that money has been received by the marshal or his deputies, under executions, are evidence in a suit against his sureties. *Williams v. United States*, 1 How. 290.

The sureties on the bond are not liable for money received by the marshal from the government with directions to pay it over, which directions he disobeys before the bond is executed, although the money was in his possession after the bond was given. *United States v. Giles*, 9 Cranch, 212. Proceedings against the marshal and his bondsmen must be taken under the act of Congress, not under the laws of a State. *Gwin v. Breedlove*, 2 How. 29; *Gwin v. Barton*, 6 Id. 7. Penalties imposed by State laws will not be recognized so as to increase the liability of the marshal and his sureties upon the bond. *Id.* The person injured may sue on the bond in his own name, or in the name of the United States to his use. *United States v. Davidson*, 1 Biss. 433. The fact that the suit is in the name of the injured party does not affect the jurisdiction of the Federal courts. *Adler v. Newcomb*, 2 Dillon, 45.

SECT. 786. — This limitation does not apply to suits by the United States upon marshals' bonds. *United States v. Godbold*, 3 Woods, 550; *United States v. Rand*, 4 Sawyer, 272. See *United States v. Herron*, 20 Wall. 251. Against such claims the laches of the officer to whom the assertion of the claim is entrusted by law, has no effect with respect to any party to the bond. *Dox v. Postmaster-General*, 1 Pet. 318. If the condition of a



marshal's bond is broken by his neglect to bring money into court, or to pay it to a party, as directed, yet if the proceedings are suspended by appeal, the party's right of action has not accrued, so as to bar them, if not commenced within six years. *Montgomery v. Hernandez*, 12 Wheat. 129.

SECT. 787. — *Kilpatrick v. Frost*, 2 Grant, 168. The marshal, being an officer of the court required to attend each sitting, is cognizant of its orders though not exemplified by its seal. *Singleton v. United States*, 22 Ct. Cl. 118. The marshal has no authority under a provisional warrant to make a seizure of property outside his district. *Carr v. Phillips*, 18 N. B. Reg. 527. After St. June 1, 1872 (17 St. 196), and before, original process directed to the marshal could not be served by a private person, although such service might be authorized by the State laws. *Schwabacker v. Reilly*, 2 Dillon, 127. But see *United States v. Jailer*, 2 Abb. U. S. 265; *Hyman v. Chales*, 12 F. R. 855. As to employing the army as a *posse comitatus*, see note, § 1094. *United States v. Harden*, 4 Hughes, 455; 10 F. R. 802, holds that the practice of removing prisoners from the jail to the place of trial without a writ of *habeas corpus* is unsafe, and that an officer in transporting a prisoner ought always to be under the authority and protection of the law by having process in his possession.

The duties of the marshal are purely ministerial. He is not required to demand that the district attorney issue process. *Levy Court v. Ringgold*, 5 Pet. 451, 454. A warrant issued by a justice of the Supreme Court and directed to the marshals for any district respectively and to their deputies, or the deputies of any one of them, or to any of said deputies, to arrest a fugitive from justice, may be served in any State. *Re Henrich*, 5 Blatch. 414. The marshal of the district in which a witness resides (the place of trial being within 100 miles) may serve the *subpœna* of the court of another district upon him. *Voss v. Luke*, 1 Cranch C. C. 331, 337; *Sommerville v. French*, Id. 474. A marshal must make return of his doings under a warrant issued by a circuit court commissioner. *United States v. Scroggins*, 3 Woods, 529. A *subpœna* directed to a witness or a notice directed to a party may be served by such persons as are authorized thereto by the laws of the State, and need not necessarily be served by the marshal. *Schwabacker v. Reilly*, 2 Dillon, 127; *Russell v. Ashley*, Hempst. 546. A return to process by the deputy, as such, service having been made by him, is good. *Spafford v. Goodell*, 3 McLean, 97.

SECT. 788. — "May have" is here substituted for "have" in the earlier statutes; and it seems that marshals now have such powers as sheriffs had when the act of 1861 was passed (July 29), irrespective of subsequent restrictive legislation by the States. The *E. W. Gorgas*, 10 Ben. 470. See *Gwin v. Barton*, 6 How. 7; *Gwin v. Breedlove*, 2 Id. 29. Where, under State laws, a sheriff may appoint a person to perform a special service, a marshal has the same authority, and a person appointed by him is an officer *de facto*, whose authority cannot be disputed by a person served with process if he has not taken the oath of office required for deputies. *Hyman v. Chales*, 4 McCrary, 246; 12 F. R. 855. Under § 1030 and this section, under a *mittimus* in the general form issued by a State magistrate to the sheriff, the marshal may take the prisoner out of jail and bring him into court, without a special order of the court. *United States v. Harden*, 4 Hughes, 455; 10 F. R. 802.

SECT. 790. — The power here conferred upon a marshal was held not to be taken away by the cited provision of 1800, which gave a right to the *party*, while the act of 1789 vested a power in the marshal after his term had expired, the two provisions not being inconsistent. The revisers considered it doubtful whether the words "or his deputy," in the first line of § 790, should be retained, and whether deputies were to proceed with the execution of duties for which they had been found untrustworthy by a court, § 27 of the judiciary act making them removable by the circuit or district courts. 1 Com. D. 452.



Service of summons by a deputy after the new marshal has qualified is good, the process having come to him before such qualification. *Stewart v. Hamilton*, 4 McLean, 534. A marshal may be allowed to amend his return, according to the real facts, after the lapse of several years, and even after the officer's term has expired, if there is no doubt about the facts. *Phoenix Ins. Co. v. Wulf*, 1 F. R. 775. In North Carolina a marshal may be required, after the expiration of his term, to amend his return upon an execution, so as to give his successor such description of the land levied upon as will enable him to execute a valid deed to the purchaser at the execution sale. *Ex parte Worley*, 19 F. R. 586. In *Doolittle v. Bryan*, 14 How. 563, it was held that a sale of land by a marshal on a *venditioni exponas*, after his removal from office and the qualification of a successor, such sale being confirmed by the court and a deed ordered by it to be made to the purchaser by the new marshal, was valid.

The intention of this section is that the marshal shall, notwithstanding he is out of office, make return to process under which he has, while in office, made a levy or an attachment. The word "execute" includes the power to make return to the process executed. *Cushing v. Laird*, 4 Ben. 70, 76. See *McFarland v. Gwin*, 3 How. 717.

SECT. 791. — As to the marshal's report in respect to bankruptcy matters, see § 19 of 18 St. 178, ch. 390.

SECT. 793. — Such filling of a vacancy by a circuit judge does not preclude the President from making an appointment to the same office during a subsequent recess of the senate. *Re Farrow*, 4 Woods, 491; 3 F. R. 112; § 1769; *Re Alabama Marshalship*, 20 F. R. 379; 16 A. G. Op. 538; *Re Yancey*, 28 F. R. 445. As the circuit judges had, by the act of April 10, 1869, ch. 22, the same power within their circuit as the judges of the Supreme Court, the revisers suggested that it would produce a conflict to include them in the case provided in this section. 1 Com. D. 453.

SECT. 794. — By 23 St. 224, the U. S. Supreme Court clerk shall annually, in January, —

"Make to the Secretary of the Treasury a return of all costs collected by him in cases disposed of at the preceding term or terms of said Supreme Court; and, after deducting his compensation as provided by law, and the incidental expenses of his office, including clerk-hire, said expenses to be certified by the Chief Justice or a justice of said court, shall pay any surplus that may remain into the Treasury of the United States at the time of making said return."

SECT. 795. — By 18 St. 333, ch. 95, §§ 2, 3, cited in notes, §§ 783, 797, the bonds given by the clerks of the Supreme Court and of the circuit and district courts respectively, are to be for not less than \$5000, nor more than \$20,000, to be determined and regulated by the Attorney-General, who may at any time require a bond of increased amount; and the sureties are to be approved by the court for which the clerk is appointed. The specification in the bond of one of the details covered by the general obligation does not affect its validity. *United States v. Ambrose*, 2 F. R. 552.

SECT. 797. — Sects. 5, 6, of the above act, 18 St. 333, makes it the duty of the President to remove such clerks for wilful refusal or neglect to make any report, certificate, statement, or other document required by law, and they are to be further punished by fine or imprisonment, and are not eligible to any appointment as clerk or deputy clerk for two years. 20 St. 327, ch. 125, § 2, adds the following to § 797: —

"He shall also, at the close of each quarter or within ten days thereafter, report to the Commissioner of Internal Revenue all moneys paid into court on account of cases arising under the internal-revenue laws, as well as all moneys paid on suits on bonds of collectors of internal revenue. The report shall show the name and nature of each case, the date of payment into court, the amount paid on account of debt, tax, or penalty, and also the amount on account of costs. If such money, or any portion thereof, has been paid by the clerk to any internal-revenue officer or other person, the report shall show to whom each of such payments was made; and if to an internal-revenue officer, it shall be accompanied by the receipt of such officer."

SECT. 798. — *State Bank v. Dodge*, 124 U. S. 340.



## CHAPTER XV.

## JURIES.

SECT. 800. — St. June 30, 1879, ch. 52, § 2 (21 St. 43), repeals the last clause of § 800, relating to Pennsylvania, and §§ 801, 820, 821 of this chapter, the last two being again repealed by 23 St. 22. The provision of 1879 is as follows:—

“SECT. 2. That the per diem pay of each juror, grand or petit, in any court of the United States, shall be \$2; And that the last clause of § 800 of the Revised Statutes of the United States, which refers to the State of Pennsylvania, and §§ 801, 820, 821, of the Revised Statutes of the United States, are hereby repealed; And that all such jurors, grand and petit, including those summoned during the session of the court, shall be publicly drawn from a box containing, at the time of each drawing, the names of not less than 300 persons, possessing the qualifications prescribed in § 800 of the Revised Statutes, which names shall have been placed therein by the clerk of such court and a commissioner, to be appointed by the judge thereof, which commissioner shall be a citizen of good standing, residing in the district in which such court is held, and a well-known member of the principal political party in the district in which the court is held opposing that to which the clerk may belong, the clerk and said commissioner each to place one name in said box alternately, without reference to party affiliations, until the whole number required shall be placed therein. But nothing herein contained shall be construed to prevent any judge from ordering the names of jurors to be drawn from the boxes used by the State authorities in selecting jurors in the highest courts of the State; And no person shall serve as a petit juror more than one term in any one year, and all juries to serve in courts after the passage of this act shall be drawn in conformity herewith: *Provided*, That no citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States on account of race, color, or previous condition of servitude.”

St. Aug. 8, 1888, ch. 785 (25 St. 386), amends the act of 1879 —

“So that whenever any circuit and district court of the United States shall be held at the same time and place they shall be authorized and required, if the business of the courts will permit, to use interchangeably the juries in either court drawn according to the provisions of said act.”

The last part of the above-quoted act of 1879 is also contained in 18 St. 335, ch. 114, § 4, which is constitutional, as is also this section. *Ex parte Virginia*, 100 U. S. 339; 3 Hughes, 576; *Com. v. Brown*, 121 Mass. 78. The above act (21 St. 43) did not repeal Rev. Stats. §§ 800, 802, 804, 808. *United States v. Eagan*, 30 F. R. 608; *Re Carnes*, 31 Id. 397. *United States v. Byrne*, 19 Blatch. 259.

The Federal practice is to examine each juror upon his oath, as he is called, respecting his statutory qualifications, and to accept him for the term, if his answers are satisfactory. *Brewer v. Jacobs*, 22 F. R. 217; *Anon.*, 2 Dall. 382. The act of 1840 was held not to require literal conformity to the mode of selecting and drawing jurors prescribed by State laws, but only substantial conformity. *United States v. Tallman*, 10 Blatch. 21; *United States v. Collins*, 1 Woods, 499; *United States v. Douglass*, 2 Blatch. 207; *United States v. Reed*, Id. 435; *United States v. Woodruff*, 4 McLean, 105; *United States v. Shackelford*, 18 How. 588; *Silsby v. Foote*, 14 Id. 218; *United States v. Rondeau*, 16 F. R. 109; *United States v. Dow*, Taney, 34; *Kie v. United States*, 27 F. R. 357; *United States v. Richardson*, 28 Id. 61; *United States v. Benson*, 31 Id. 898. The phrase “courts of the United States” does not include Territorial courts, in which jurors must be summoned in accordance with the Territorial laws. *Clinton v. Englebrecht*, 13 Wall. 434. The Federal courts have a large discretion as to the extent to which they may follow the details of State practice and avail themselves of the services of State officers, which they may exercise either by a general standing rule or by special order. *Silsby v. Foote*, 14 How. 218; *United States v. Shackelford*, 18 Id. 588; *United States v. Richardson*, 28



F. R. 61, 69. It is competent for them to have grand jurors drawn by the State officers; to address only a grand or general *venire* to the marshal, commanding him to cause a certain number of jurors from a certain number of towns to come before the court, and to return the precept, together with a list of jurors, to the court; and to deliver to him, with the grand *venire*, subordinate *venires*, addressed to constables or other officers of the several towns, to be served upon the municipal authorities and the jurors drawn by them, and returned by such officers to the court or marshal, to enable him to make up his return upon the grand *venire*. *United States v. Richardson, supra*. An indictment is not rendered invalid, everything else being regular, because the notice of the town meeting for drawing the grand jurors was posted only three days, instead of four, as was required by the *venire* issued to the constable and the statutes of the State. *United States v. Richardson*, 28 F. R. 61, 69, 74. The provisions of the Missouri statutes concerning the manner of drawing grand jurors are directory only. *United States v. Eagan*, 30 F. R. 608. Federal courts are not bound to strictly follow the laws of the States in selecting jurors, nor to employ State officers for that purpose, and a State law requiring that jurors' names shall be taken from the books of a certain officer is not binding upon them. *United States v. Collins*, 1 Woods, 499. A large discretion is vested in such courts as to the extent to which they will follow State laws in selecting persons to serve as jurors. *United States v. Gardner*, 5 Chi. Leg. News, 501; *United States v. Wilson*, 6 McLean, 604, 607. A rule of court which requires the clerk to issue a *venire facias* to the marshal commanding him to summon jurors, is not as near as practicable in conformity with the Illinois act of 1845. *United States v. Woodruff*, 4 McLean, 105. A change in the practice of the States courts in the mode of summoning juries, though based upon a statute, is not binding upon the Federal courts until they have adopted it by rule or otherwise. *Alston v. Manning*, Chase's Dec. 460. Substantial conformity, so far as practicable, to State laws is all that is required. *United States v. Tallman*, 10 Blatch. 21. Under the last clause of § 800, Federal courts were empowered to make all needful rules and regulations concerning the impanelling of juries, so that the laws and usages in force in the State might be enforced, including the regulation of challenges of all kinds and in all cases, except where the punishment for crime was death. State laws cannot affect the right of challenge as given by acts of Congress; but where such right is not thus given it should be regulated by State law. *United States v. Shackelford*, 18 How. 588. If a juror is taken ill and is discharged before any evidence has been received, the court may order another juror to be sworn, if the State practice provides for it. *Silby v. Foote*, 14 How. 218.

*Qualifications of jurors.* — It does not affect the qualifications of one drawn as a grand juror that he is a strong partisan. *United States v. Eagan*, 30 F. R. 608. A plea in abatement will be sustained on its being made to appear that a member of the grand jury which found the indictment had been on a jury which found the defendant guilty of the offence for which he was indicted, the first verdict having been set aside. *United States v. Jones*, 31 F. R. 725. In considering objections to grand jurors the Federal courts are not restricted to such as are specifically designated by State laws, but may give effect to any objection which goes to the fitness of men to serve. *United States v. Benson*, 31 F. R. 896. It is not a ground of challenge to a grand juror, under the statutes of California, that his name was not on the last preceding assessment roll of the county from which he was summoned. And a plea in abatement on that ground is insufficient, it not being alleged that the defendant was prejudiced. *United States v. Benson*, 31 F. R. 896. See Rev. Stats. § 1025. Under § 5 of 22 St. 31, providing "that in any prosecution for bigamy, polygamy, or unlawful cohabitation, under any statute of the United States, it shall be sufficient cause of challenge to any person drawn or summoned as a jurymen or talesman . . . that he believes it right for a man to have more than one living and undivorced



wife at the same time," it was held that this applies to grand jurors, and an indictment found by a grand jury from which persons who were summoned as jurors were excluded, because they were found to be within the statute, is good. *Clawson v. United States*, 114 U. S. 477.

Sect. 800 requires conformity to State laws concerning the qualifications and exemptions of jurors. Where the State law provides that jurors shall be selected from the book of the receiver of tax returns in each county, the fact that a man's name is in such book implies that he is qualified, but does not establish the fact. *United States v. Collins*, 1 Woods, 499. So far as the qualifications and exemptions of jurors are concerned, the Federal courts are without discretion. *United States v. Wilson*, 6 McLean, 604, 606.

The number of jurors is to be determined by the court, not by the State laws. *United States v. Tuska*, 14 Blatch, 5; *United States v. Collins*, 1 Woods, 499; *United States v. Insurgents*, 2 Dall. 335; *United States v. Fries*, 3 Id. 515; *United States v. Dow*, Taney, 34. State laws concerning challenges to the array, or for favor, are applicable in the Federal courts. *United States v. Reed*, 2 Blatch. 435; *United States v. Tallman*, 10 Id. 21; *United States v. Tuska*, 14 Id. 5. See *United States v. Douglass*, 2 Id. 207.

"Qualifications," as here used, refers to the general qualifications as to age, citizenship, &c., not to special reasons which at the instance of a party accused and bound over may at his election amount to a disqualification to sit in his case, but which, if they exist, do not exclude the juror from the panel, but only preclude him from acting in the particular case. Hence a prosecuting witness may serve as a juror, although the State law disqualifies him from acting in that capacity in a case where he is a witness. *United States v. Williams*, 1 Dill. 485, 495; *contra*, *United States v. Reed*, 2 Blatch. 435.

*Exemptions.* — One who is qualified to serve as a juror under the laws of the State in which a Federal court sits, is not entitled to exemption from such service because he was an officer of the United States Navy before the Civil War and served against the government in that war, and has not had his disabilities removed. This section removes his disabilities so far as service as a juror is concerned. *Re Carnes*, 31 F. R. 397.

*Construction and effect of the act of 1879.* — Sect. 2 of St. 1879, ch. 52, provides two methods of drawing jurors for the Federal courts: one, by drawing from a box provided for the purpose, containing names put in by the clerk and a commissioner of the court; the other, if the judge so orders, by drawing "from the boxes used by the State authorities in selecting jurors in the highest courts of the State." If this second method is adopted, as this act contains no further provision regulating the mode of drawing or of summoning and returning grand jurors, these matters must still be regulated by the unrepealed provisions of this chapter. *United States v. Richardson*, 28 F. R. 61, 73. An order of the circuit court, signed by the district judge only, authorizing the names of the jurors to be drawn from the boxes used by the State authorities, is valid, as "any judge" may make such order. *United States v. Hanson*, 28 F. R. 74.

It is not required that the three hundred names in the box shall be of qualified persons in order that those who are qualified shall be validly drawn. Hence where three hundred and three names were in the box, three of the persons whose names were therein being ineligible and three having died since their names were placed therein, it was ruled that if the names of the first three were in the box through inadvertence, no cause of challenge to the array was thereby given; that, as to the others, their deaths were presumed to operate impartially, and the list was not illegal. *United States v. Rondeau*, 16 F. R. 109. Where, in the jurisdiction of a circuit court, the district court is held in three places and there are three clerks, and the circuit court is held in as many places and has but one clerk, a jury being drawn from three boxes only, and the names being placed therein by the clerk of the circuit court and the general jury commissioner, the drawing is valid. *United States v. Munford*, 16 F. R. 164. The provision concerning



the manner of drawing jurors is mandatory and must be observed in summoning grand as well as petit jurors. But the principles applicable to a special demurrer are not to be applied, an honest intention to conform to the statute, and to execute its provisions in good faith, being alone required. Any irregularity arising from motives which are not of an evil character will not invalidate an indictment, such as the fact that the name of one of the jurors who assisted in finding the indictment was not put into the box nor drawn from it. *United States v. Ambrose*, 3 F. R. 283.

SECT. 801.—Repealed; see note, § 800.

SECT. 802.—St. July 20, 1840 (5 St. 394), did not repeal that part of § 29 of the judiciary act which provided that jurors should be drawn from such parts of the district as the court directed. *United States v. Stowell*, 2 Curtis, 153; *United States v. Woodruff*, 4 McLean, 105. This section authorizes the court to direct from what boxes the jurors should be drawn. *United States v. Munford*, 16 F. R. 164; *United States v. Clawson*, 5 Pac. Rep. 691. It is not obnoxious to the Sixth Amendment to the United States Constitution. *State v. Kemp*, 34 Minn. 64; *United States v. Stowell*, *supra*. In *United States v. Price*, 3 Hall's L. J., 121, there is a newspaper report of a case holding that it is unnecessary for the judge to make an order that the jury be selected from a particular part of the district, and that it is competent for the marshal to select. *United States v. Coit*, 1 Car. L. Rep. 346, holds otherwise.

SECT. 804.—The judiciary act, § 29, related to both grand and petit juries; but, as the act of March 3, 1865, ch. 86, directed a different method for filling up a grand jury, this provision is limited to petit juries. 1 Com. D. 456. This section was not repealed by the jury act of 1879 (see note § 800), but both are to be construed together. The panel may, therefore, be still filled from bystanders. *Lovejoy v. United States*, 128 U. S. 171; *United States v. Rose*, 6 F. R. 136; *United States v. Munford*, 16 Id. 164. The bystanders are sufficiently present if they are in attendance when returned by the marshal as present. *United States v. Loughery*, 13 Blatch. 267. If, under § 4 of St. 1874 (18 St. 254), in relation to courts and judicial officers in the territory of Utah, the names in the box of the two hundred jurors are exhausted before the jury is completed, the district court may issue a *venire* to the marshal to summon jurors from the body of the district. *Clawson v. United States*, 114 U. S. 477.

SECT. 806.—22 St. 33, ch. 48, § 3, strikes out "adjourned" in the second line, and after "Albany" substitutes the following:—

"And Syracuse, or at the adjourned term thereof required by law to be held at Utica, if a jury is drawn to serve in the district court held at the same times and places with said terms and adjourned term, but it shall be used for the trial of issues of fact arising in civil and criminal causes in said circuit court; and the verdicts of said jury and all proceedings upon the trial of said issues shall be of the same effect as if the said jury had been drawn to serve in the said circuit court."

SECT. 807.—The provision for summoning *grand* juries in Vermont, contained in § 2 of the act of 1802, seemed superseded by § 3 of St. Aug. 8, 1846, ch. 98. 1 Com. D. 457.

SECT. 808.—This section was not repealed by St. 1879. *United States v. Eagan*, 30 F. R. 608; note, § 800.

This section does not apply to Territorial courts. An indictment found in a district court of Utah by a grand jury of fifteen persons, pursuant to the laws thereof, is valid. *Reynolds v. United States*, 98 U. S. 145.

It is for the court to determine the number of grand jurors up to twenty-three. If less than the required number attend under the first *venire* and the court orders that others be drawn, they must be drawn from the wheel, and not selected from the district or particular localities therein. *United States v. Eagan*, *supra*. The court must determine the number of persons who shall be drawn for the grand jury. *United States v. Tuska*, 14 Blatch. 7. The marshal is not empowered to excuse one who has been drawn to serve



on the grand jury, and to summon another in his stead. *United States v. Burr*, 1 Burr's Trial, 37.

SECT. 810. — Although the immediate purpose of this provision was to do away with the invariable presence of a grand jury at every term of a circuit or district court, and to leave it discretionary with the judges whether and when such a body should be convened, yet the fair meaning is that Congress either makes it or recognizes it as already being a rigid, unyielding requirement of the law that no grand jury shall be summoned unless a *venire facias* has therefor issued, if in vacation, by order of one of the judges, or, if in term time, by order of the court. Billings J., in *United States v. Antz*, 16 F. R. 123. A verbal order from the judge to the clerk is sufficient to authorize the issuance of a *venire*; but the absence of a *venire* is a ground of challenge to the array, if taken advantage of at the proper time. *United States v. Reed*, 2 Blatch. 435.

SECT. 812. — This does not apply to the courts of the District of Columbia, which are governed by Rev. Stats. of the District, § 861, by which only one year need elapse. *United States v. Nardello*, 4 Mackey, 503. It is doubtful whether this section applies to grand jurors, especially its second clause; but, if it does, a person may be summoned once in the two years, although that period has not elapsed between the close of the term at which he last served as a juror and the beginning of the next term at which he is competent; and the fact that a grand juror has, on a previous summons, attended the court as a juror within two years, does not invalidate an indictment found by the grand jury of which he is a member. *United States v. Reeves*, 3 Woods, 199. As to disqualification of jurors under the bigamy act of 1882, see § 5 of that act, quoted, in part, p. 233, *ante*.

SECT. 818. — The further provision in the act of 1802 for transmitting indictments to the district court seemed covered by later legislation. 1 Com. D. 460.

SECT. 819. — This section governs as to the number of challenges where a case is brought into a Federal court by removal from a State court. *Georgia v. O'Grady*, 3 Woods, 496. In *United States v. Coppersmith*, 2 Flippin, 546; 4 F. R. 198, Hammond, J., says that, prior to legislation by Congress, the matter of peremptory challenges in the Federal courts was in some confusion, until the Supreme Court declared that they might by rule adopt the State practice, citing *United States v. Shackelford*, 18 How. 588; *United States v. Douglass*, 2 Blatch. 207; *United States v. Reed*, Id. 435, 447, and note; *United States v. Cottingham*, Id. 470; *United States v. Tallman*, 10 Id. 21; *United States v. Devlin*, 6 Id. 71; that since Congress has legislated, and the acts of Congress can alone be looked to, the use of the indefinite term "felony" has increased the confusion. It was held in that case that the making, uttering, and passing of counterfeit money is not a "felony." In *United States v. Daubner*, 17 F. R. 793, making a false claim or pension affidavit, under § 5438 or § 4746, was held not a felony within this section. The proper time for challenge is between the calling of the juror and his taking the oath in the case. *Brewer v. Jacobs*, 22 F. R. 242. Matter forming ground for a challenge cannot be the foundation for an issue for a jury, when set up by plea in abatement. *United States v. Tuska*, 14 Blatch. 8. As to prejudice by jurors, see *United States v. Noelke*, 1 F. R. 426.

A defendant may have ten challenges in cases not capital, where the offence of which he is accused is expressly or impliedly declared by statute to be a felony; where the acts of Congress have not defined the offence, but punish it by its common-law name, and at common law it is a felony: where Congress has adopted a State law as to an offence, and under such law it is a felony. *United States v. Coppersmith*, *supra*; *United States v. Daubner*, *supra*. In the trial of a case where the offence charged is not a felony each party may make three peremptory challenges. When a new juror is called because of a challenge of either party, the other party may challenge him, although he may have previously passed the list, if the right of such party to challenge has not been exhausted. *United States v. Daubner*, *supra*.



SECT. 820. — Repealed; see note, § 800. As to the constitutional validity of this section, which had not been in force for over two years at the time of the revision of the statutes, see *United States v. Gale*, 109 U. S. 65, 74. The mistake of incorporating it in the Revision did not prevent its re-enactment by Congress making it a part of the law of the land. It prescribed an absolute disqualification. *United States v. Hammond*, 2 Woods, 197. In this section, "the use of the word 'disqualification' has some purpose, and implies that there may be causes of challenge which are not positive disqualifications." Woods, J., in *United States v. Reeves*, 3 Woods, 199. This provision changed the common-law rule as to joint trials, by which each prisoner may challenge his full number, and every juror challenged as to one is withdrawn from the panel as to all the prisoners on the trial. *United States v. Marchant*, 12 Wheat. 480.

SECT. 821. — Repealed; see note § 800. The right here given to require the panel called was limited to the district attorney, and was not a right of individual suitors in a case about to be tried. *Atwood v. Weems*, 99 U. S. 183.

## CHAPTER XVI.

### FEEES.

THE act of 1853 was the first uniform statute regulating the fees of the clerks and other officers of the courts throughout the United States, and established the present fee-bill. The supervision of the accounts of marshals, clerks, and other officers of Federal courts, was transferred from the Treasury to the Interior Department by St. March 3, 1849 (9 St. 395), § 4. See *United States v. Hill*, 120 U. S. 176. St. 1853 was extended to Utah by 18 St. 253, ch. 469, § 7. As to Colorado, see 19 St. 61, ch. 147, § 4.

SECT. 823. — See notes, §§ 848, 856, 983. This provision extends to taxable costs and fees in all ordinary suits between party and party prosecuted in a court, at law or in equity or admiralty, whether civil or criminal, *in personam* or *in rem*, but not to special and peculiar cases, such as proceedings under the naturalization laws, under the shipping commissioner's act, or applications to be admitted to practice as an attorney. *United States v. Hill*, 120 U. S. 177, 181; *Re Baxter*, 24 Blatch. 124; *Re Moy Chee Kee*, 33 F. R. 377. The costs belong to the prevailing party only, except where otherwise provided by act of Congress, and State laws do not affect either the right to costs or the rates, since the Revision. *Ethridge v. Jackson*, 2 Sawyer, 598; *United States v. Treadwell*, 15 F. R. 532; *Jerman v. Stewart*, 12 Id. 271; *Day v. Woodworth*, 13 How. 363; *Kneass v. Schuylkill Bank*, 4 Wash. 106; *Heath v. Griswold*, 5 F. R. 573. If the decree of the lower court is reduced on appeal, the costs of appeal should be borne by the appellee. *Carr v. Austin R. Co.*, 14 F. R. 419. This section does not prohibit the Attorney-General from procuring, in a civil cause in which the government is a party, the attendance of witnesses living beyond the process of the court, by agreeing to pay their travelling expenses out of the miscellaneous-expense fund under his control. *Douglass v. United States*, 21 C. Cl. 462. Both before and since the act of 1853, costs have in some courts been allowed to the prevailing party for travel and attendance, by rule of court or in accordance with the State practice. *Nichols v. Brunswick*, 3 Cliff. 88. But a party who is a witness in his own behalf is not entitled to travel and attendance as a witness. *Nichols v. Brunswick*, *supra*; *Hathaway v. Roach*, 2 Wood. & M. 63; *Sebring v. Ward*, 4 Wash. 546; *Whipple v. Cumberland Cotton Manuf. Co.*, 3 Story, 84. As to the practice in security for costs, see *Thannhauser v. Cortes Co.*, 9 F. R. 225; *Huginin v. Thatcher*, 18 Id. 105. Only such costs can be allowed and such fees taxed as are



provided for by law. *Jerman v. Stewart*, 12 F. R. 271, 275; *Strong v. United States*, 34 Id. 18; *Dedekam v. Vose*, 3 Blatch. 153; *Lyell v. Miller*, 6 McLean, 422; *United States v. Smith*, 1 Wood. & M. 184.

Costs are an allowance to a party for expenses incurred in conducting his suit; fees are a compensation to an officer for services rendered in the progress of the cause. *United States v. Cigars*, 2 F. R. 494, 497. Expenses and disbursements may be allowed when rendered necessary by the rules or action of the court; as of printing any papers thereby required to be printed (*Railroad Co. v. Collector*, 96 U. S. 594; *Hathaway v. Roach*, 2 Wood. & M. 63; *Brooks v. Byam*, 2 Story, 553; *Dennis v. Eddy*, 12 Blatch. 195; *Hussey v. Bradley*, 5 Id. 210; *Spaulding v. Tucker*, 2 Sawyer, 50; *Neff v. Pennoyer*, 3 Id. 335; *Jordan v. Agawam Woollen Co.*, 3 Cliff. 239); not, however, including copies of pleadings, proofs, or stenographic reports of arguments, &c., for the convenience of counsel or the court, when not required by rule of court. *The Perseverance*, 3 Dall. 336; *Hussey v. Bradley*, 5 Blatch. 210; *Troy Iron Factory v. Corning*, 7 Id. 16; *Bridges v. Sheldon*, 18 Id. 507; 7 F. R. 17. The cost of a survey may be taxed against both sides. *Whipple v. Cumberland Cotton Manuf. Co.*, 3 Story, 84. And the expense of models in patent cases, if copies of those in the patent office, may be allowed. *Wooster v. Handy*, 23 F. R. 49; *Hussey v. Bradley*, 5 Blatch. 210; *Hathaway v. Roach*, 2 Wood. & M. 63; *Woodruff v. Barney*, 1 Bond, 528; 2 Fisher, 244; *Parker & Bigler*, 1 Id. 285. If the patent in suit describes a machine, the actual value of a model of it may be taxed. *Hathaway v. Roach*, *supra*. But not the value of models of machines which are not so described. *Parker v. Bigler*, 1 Fish. Pat. Cas. 285; *Hussey v. Bradley*, *supra*; *Woodruff v. Barney*, *supra*. If it is necessary for the defendant to obtain a copy of the plaintiff's patent he may have the expense of it taxed. Id. The expense of transmitting a commission by mail may be taxed. *Prouty v. Draper*, 2 Story, 199. So may money paid for necessary telegrams. *Hussey v. Bradley*, 5 Blatch. 210. No allowance can be made for reporting the argument of counsel at the final hearing of a cause. Id.

If a complainant has united two distinct causes of action in his bill and compelled the defendant to litigate both, and the latter has prevailed as to one cause, costs will not be allowed to either as against the other. *Adams v. Howard*, 19 F. R. 317; *Elfelt v. Steinhart*, 11 Id. 896, 899. Judgment for costs cannot go against a defendant in a *scire facias* who has paid the debt claimed with interest before plea pleaded or demurrer joined. *Duquesne Nat. Bank v. Mills*, 22 F. R. 611. Where the complainant's bill was dismissed on his motion with usual costs to the defendant, it was held improper to make allowances for a certified copy of file wrapper, and for six certified copies of patents which the defendant procured to establish his defence. *Ryan v. Gould*, 32 F. R. 754. The costs allowed by the laws of a State cannot be taxed by the successful party in the Federal court on his recovering judgment therein, after the removal of the cause from the State court, though they accrued under such laws before the removal, unless they are taxable under this and the next section. *Chadbourn v. German-American Ins. Co.*, 31 F. R. 625; *Clare v. National City Bank*, 14 Blatch. 445, treating as inaccurate an anonymous case to the contrary, in 13 Abb. New Cases, 54. The fee for serving the summons issued out of the State court was allowed in *Gunther v. Liverpool, &c., Ins. Co.*, 10 F. R. 830. See *Young v. Merchants' Ins. Co.*, noted § 848. In *Simpson v. 110 Sticks of Timber*, 7 F. R. 243, in New York, the libellant's disbursements for searching the titles of sureties offered on a stipulation, expenses of real estate brokers called in to appraise property, and notaries' fees in taking sureties' depositions were allowed as costs, but not telegrams and postage to secure attendance of attorneys upon examination of the claimant's witnesses in Georgia, a persistent attempt appearing to defraud the court and obtain the discharge of a cargo from custody upon worthless security.

No costs are allowed when a case is dismissed for want of jurisdiction. *Inglee v.*



Coolidge, 2 Wheat. 363; *M'Iver v. Wattles*, 9 Id. 650; *Strader v. Graham*, 18 How. 602; *Mead v. Platt*, 21 Blatch. 435; 17 F. R. 836; *Hayford v. Griffith*, 3 Id. 79; *Pentlarge v. Kirby*, 22 Id. 261; 20 Id. 898; *Cooper v. New Haven Steamboat Co.*, 18 Id. 588; *Burnham v. Rangeley*, 2 Wood. & M. 417. This chapter does not interfere with the practice of making allowances in cases in equity, or the discretion of the court to award costs in intermediate stages of such causes (*Avery v. Wilson*, 20 F. R. 856; *Louisiana State Lottery v. Clark*, 16 Id. 20; *Spaulding v. Tucker*, 2 Sawyer, 50; *Ex parte Jaffray*, 1 Lowell, 321; *Jordan v. Agawam Wool Co.*, 3 Cliff. 239; *Coburn v. Schroeder*, 8 F. R. 521; *Weigand v. Copeland*, 14 Id. 118); or upon a creditor's petition for an adjudication of bankruptcy (*Re Williams*, 2 N. B. R. 83); and in salvage cases counsel fees are sometimes considered by the court in estimating the amount of salvage to be given. The *Liverpool Packet*, 2 Sprague, 37. But no other compensation to attorneys and solicitors can be taxed against a party than that specifically allowed by statute (*The Baltimore*, 8 Wall. 377), as, *e.g.*, for an overruled exception to a master's report (*Garretson v. Clark*, 17 Blatch. 256); or costs allowable on judgment in a State court before removal of the case to a Federal court. *Clare v. National City Bank*, 14 Blatch. 445; *Lyell v. Miller*, 6 McLean, 422. Costs which have been taxed against the defendant on the overruling of his demurrer, cannot be taxed in his favor on a subsequent dismissal of the bill by the complainant. *New York Co. v. New Jersey Co.*, 32 F. R. 755.

"*Attorneys, solicitors, and proctors.*"—This means, in connection with § 983, that costs shall be allowed the attorneys of the prevailing party, except where the law otherwise expressly provides; the concluding clause of the first sentence shows that State laws no longer affect the right to costs or the amount which may be allowed. *United States v. Treadwell*, 15 F. R. 532. The act of 1793 allowed costs "in favor of parties obtaining judgment." The act of 1853, of which this and the following section are a revision, and which was intended merely to secure a uniform rule of taxation in the Federal courts, did not disclose a design to deprive the party of them and confer them upon his attorney. *Celluloid Manuf. Co. v. Chandler*, 27 F. R. 9. The practice which prevailed before the enactment of this statute of allowing compensation for legal services according to the discretion of the court, is no longer permissible. *The Nassau*, 1 Blatch. Pr. Cas. 601. The courts have no discretion but to apply this statute, and that without liberality of intendment. *Stimpson v. Brooks*, 3 Blatch. 456. Counsel who have rendered services for the benefit of a portion of the creditors only, are not entitled to an allowance therefor against the estate of a bankrupt. *Re Baxter*, 28 F. R. 452.

"*Commissioners.*"—These officers, as referred to in this chapter, are the "commissioners of the circuit court," appointed under § 627. *Sedgwick v. Grinnell*, 10 Ben. 6.

The phrase "Except where otherwise expressly provided by law," means except where otherwise provided by statute. In connection with § 983 this section seems to entitle the prevailing party to costs whether the court had jurisdiction of the action or not, in the absence of a statute to the contrary. *Cooper v. New Haven Co.*, 18 F. R. 588. This case was disapproved in *Pentlarge v. Kirby*, 20 F. R. 898, holding that this section and § 983 do not change the rule, uniformly held by the Federal courts, that if the case is one in which the court has no jurisdiction, it must be dismissed without costs.

The attorney's docket fee of \$20 is taxable when, after answer filed, a bill in equity is dismissed by the plaintiff, on his own application, either generally or without prejudice (*Goodyear v. Sawyer*, 17 F. R. 2; *Mead v. Platt*, Id. 836; *Goodyear Co. v. Osgood*, 2 Ban. & A. 529; *The Alert*, 15 F. R. 620; *The Bay City*, 3 Id. 47; *cf. Coy v. Perkins*, 13 Id. 111); but not when a suit is dismissed for want of prosecution. *Wooster v. Handy*, 23 F. R. 56; *Wigton v. Brainerd*, 28 Id. 29. But see *Partee v. Thomas*, 27 F. R. 429. This fee can, in general, be allowed but once (*Strafer v. Carr*, 6 F. R. 466; *Huntress v. Epsom*, 15 Id. 732; *Troy Iron Factory v. Corning*, 7 Blatch. 16; *Dedekam v. Vose*, 3 Id. 77, 153);



and only to attorneys admitted to the bar, and those whose names are on the docket before the general replication is filed. *Goodyear Co. v. Osgood*, *supra*. If a jury trial is waived and the case is tried by the court without a jury, only \$10 fee is taxable. *Jones v. Schell*, 8 Blatch. 79. Where a case was twice tried by a jury, which each time disagreed, and at a subsequent term the case was dismissed by the plaintiff, an attorney's fee of \$5 only was held taxable,—"trial before a jury" applying only where the controversy is terminated by a verdict and judgment thereon. *Strafer v. Carr*, 6 F. R. 466. After a demurrer was overruled the plaintiff died, and subsequently the case was dismissed on defendant's motion, after notice. The court allowed a docket fee of \$20. *Partee v. Thomas*, 27 F. R. 429. Where a decree in equity was ordered for the plaintiff after a hearing on the pleadings and evidence, and the case being reheard, the bill was dismissed, two docket fees of \$20 each were held taxable against the plaintiff. *Wooster v. Handy*, 23 Blatch. 112; 23 F. R. 49; *American Co. v. Sheldon*, 28 Id. 217. Where a case was tried, resulting, first, in a disagreement of the jury, and second, in a verdict for the defendant, the court allowed but one docket fee. *Huntress v. Epsom*, 15 F. R. 732. Where a verdict in an action of replevin, rendered in favor of the plaintiff for four-fifths of the property claimed, was set aside, and on a new trial the plaintiff was awarded judgment for seven-eighths, he was held to be the prevailing party, and a docket fee was taxed for each trial. *Williams v. Morrison*, 32 F. R. 682; *contra*, *Strafer v. Carr*, 6 Id. 466.

No docket fee is allowed when there is no jurisdiction (*Mead v. Platt*, 17 F. R. 836); or where there is no hearing or conclusive decision (*Yale Lock Manuf. Co. v. Colvin*, 21 Blatch. 168; 14 F. R. 269; *McMillan v. Scott*, 2 N. B. R. 86; *The Bay City*, 2 Flippin, 703; 3 F. R. 47; *Cahn v. Qung Wah Lung*, 28 Id. 396; *Ryan v. Gould*, 32 Id. 754; *New York Co. v. New Jersey Co.*, Id. 755); as where a demurrer to a bill in equity is overruled with leave to the defendant to answer (*McLean v. Clark*, 23 F. R. 861; 20 Repr. 36); *contra*, where the hearing on the demurrer is final (*Price v. Coleman*, 22 F. R. 694; *Alley v. Nott*, 111 U. S. 472; *Scharff v. Levy*, 112 Id. 711); or where a suit in equity is voluntarily discontinued by the complainant before any hearing either interlocutory or final (*Consolidated Co. v. American Co.*, 24 F. R. 658; *Taylor v. Life Association*, 13 Id. 493); or upon interlocutory proceedings upon a reference before a master (*Jerman v. Stewart*, 12 F. R. 271; *Stimpson v. Brooks*, 3 Blatch. 456); or upon exceptions to a commissioner's report (*Beckwith v. Easton*, 4 Ben. 357; *Garretson v. Clark*, 17 Blatch. 256; 15 Id. 70); or upon the hearing of exceptions to a pleading in admiralty, where the exceptions are in the nature of a special demurrer or a motion to make more definite and certain. *The Anchoria*, 23 F. R. 669. A complainant is not entitled as of course to a final decree when he has obtained an order *pro confesso*. The matter of the bill is still to be decreed by the court. But after a final decree has been made the prevailing party is entitled to a docket fee. *Andrews v. Cole*, 22 Blatch. 184; 20 F. R. 410. The highest docket fee allowed cannot be taxed on a motion for an order by default against stipulators. *Dedekam v. Vose*, 3 Blatch. 153. It may be taxed where the cause is dismissed from the calendar of the circuit court because the appellant failed to give security for the costs of his appeal. *Hayford v. Griffith*, 3 Blatch. 79. And also when a case of involuntary bankruptcy is tried by the court and the petition is dismissed. *Dundore v. Coates*, 6 N. B. R. 304. An attorney's fee of \$20 is all that can be allowed for obtaining an involuntary adjudication in bankruptcy. *Re Bignall*, 9 F. R. 385. The highest fee cannot be allowed where the proceedings were before a master upon a reference for a provisional or interlocutory purpose. *Doughty v. West Manuf. Co.*, 4 Fish. Pat. Cas. 318. If a trial by jury is waived and the case is tried before the court, the docket fee cannot exceed \$10. *Jones v. Schell*, 8 Blatch. 79.

The docket fee is taxable in a common-law case whenever the trial is begun by swearing a jury, and in an equity or admiralty case on the introduction of testimony or



the opening of the argument upon the final hearing. *The Bay City, supra.* Where the jury twice disagreed, and at a subsequent term of court the case was dismissed, it was ruled that only a docket fee of \$5 was taxable. *Strafer v. Carr*, 6 F. R. 466. Where the first verdict in a suit at law was for the plaintiff, and two subsequent ones were for the defendant, the latter was held entitled to tax three docket fees in his favor. *Schmieder v. Barney*, 19 Blatch. 143; 7 F. R. 451. A hearing on a demurrer is a final hearing and the docket fee of \$20 may be taxed. *Price v. Coleman*, 22 F. R. 694. A defendant is not entitled to a docket fee of \$20 where the suit is dismissed because it is not prosecuted. *Wigton v. Brainerd*, 28 F. R. 29.

An admiralty court has no power to allow fees to the counsel of the prevailing party, as an incident to the judgment, except as here provided. *The Baltimore*, 8 Wall. 377. The fee bill is intended to regulate only those fees and costs which are strictly chargeable as between party and party, and not to regulate the fees of counsel and other charges and expenses as between solicitor and client; nor to restrain the power of a court of equity, in cases of administration of funds under its control, to make such allowance to the parties out of the fund as justice and equity may require. The statute does not deprive the court of chancery of its established control over the costs and charges of the litigation, including proper allowances to those who have instituted proceedings for the benefit of the general fund. *Trustees v. Greenough*, 105 U. S. 535; *Re Waite*, 1 Lowell, 321; *Ex parte Plitt*, 2 Wall. Jr. 453. This rule was applied where a stakeholder who was in possession of a fund claimed entire by contending parties brought it into court, thereby promoting the litigation, and securing the due application of the property. *Louisiana State Lottery Co. v. Clark*, 16 F. R. 20.

"*Referees.*"—This word has reference to officers appointed under State laws and authorized to hear and determine the questions referred to them; not to masters in chancery, whether they are generally or specially appointed. *Central Trust Co. v. Wabash R. Co.*, 32 F. R. 684. The decision upon the claim of an intervenor is not a final hearing of an equity or admiralty case. And a special master in chancery is not a "referee," as that word is here used. *Id.*

"*On a trial before a jury.*"—There has been a trial before a jury within the meaning of this section only where a verdict has been rendered and a judgment given on it. *Strafer v. Carr*, 6 F. R. 466.

"*Final hearing.*"—This phrase had a recognized meaning in the practice of the courts when used in the act of 1853. It is only where some question of law or fact, involved in or leading to the final disposition actually made of the case, has been submitted, or at least presented to the court, that there is a final hearing which warrants the taxation of the fee provided for. *Coy v. Perkins*, 13 F. R. 111; note p. 110, *ante*; *Vannevar v. Bryant*, 21 Wall. 41; s. c. *nom.* *Bryant v. Rich*, 106 Mass. 180; *Doughty v. West M. Co.*, 8 Blatch. 107; *Hayford v. Griffith*, 3 Id. 34; *Schmieder v. Barney*, 19 Blatch. 143; 7 F. R. 451; *McMillan v. Scott*, 2 N. B. R. 86; *Goodyear v. Sawyer*, 17 F. R. 2; *Mercartney v. Crittenden*, 11 Sawyer, 113; 24 F. R. 401. Granting a motion for an order discharging a vessel in the custody of the court under process, where the case was entered in the admiralty docket, and cancelling stipulations, is a final hearing within the intent of this section. *The Alert*, 15 F. R. 620.

Cl. 5. "*Deposition*" is not applicable to oral testimony taken in court or before a master. *Troy Iron Factory v. Corning*, 7 Blatch. 16; *Hathaway v. Roach*, 2 Wood. & M. 63. The deposition must be used on the final hearing of a cause, or it is not taxable. *Stimpson v. Brooks*, 3 Blatch. 456. Depositions read in the district court and then read from the apostles on appeal in admiralty cannot be taxed for. *Dedekam v. Vose*, 3 Blatch. 77. The fee is not allowed for an *ex parte* affidavit in an application for a preliminary injunction (*Stimpson v. Brooks*, 3 Blatch. 456); or for an illegible document (*The Avid*,



3 Ben. 434); or for depositions not introduced in evidence. *Cahn v. Qung Wah Lung*, 12 Sawyer, 92; 28 F. R. 396; *Cahn v. Monroe*, 29 Id. 675. If a deposition is admitted in evidence, the fact that the deponent attended the trial does not prevent the taxation of the fee. *Beckwith v. Easton*, 4 Ben. 357. In *Tuck v. Olds*, 29 F. R. 883, it was held that this provision applies only to depositions taken *de bene esse* and extraordinary methods of taking depositions. See *Fry v. Eaton*, 1 Cranch C. C. 550. In a suit voluntarily dismissed by consent, without a hearing, the solicitor's fees for taking depositions are not allowable. *Cahn v. Qung Wah Lung*, *supra*. A party who has taken the depositions of witnesses who are not subject to the process of the court, is not deprived of his right to tax for them because the other party to the action procured the attendance of the witnesses, thereby rendering the depositions inadmissible. *Hunter v. International R. Imp. Co.*, 28 F. R. 842. Fees will not be allowed for testimony taken before an examiner or master. *Strauss v. Meyer*, 22 F. R. 467. Allowance cannot be made for depositions taken before a commissioner appointed to distribute the proceeds from a sale of a vessel in the registry of a court of admiralty. *Dalzell v. The Daniel Kaine*, 31 F. R. 746. But the fee is allowed for evidence returned to court and used, taken by reference to a commissioner to take testimony under admiralty Rule 19. *Troy Iron Factory v. Corning*, 7 Blatch. 16; *The Sallie P. Linderman*, 22 F. R. 557. Depositions taken to be used in proceedings for contempt cannot be taxed though they were used on a motion for re-hearing which resulted in the dismissal of the bill. They were in the case only for the purposes for which they were taken. *Spitt v. Celluloid Co.*, 28 F. R. 870. Nor can the prescribed fee be allowed for depositions used by an intervenor before a special master in chancery appointed to audit and allow preferential claims against property in the hands of receivers. *Central Trust Co. v. Wabash R. Co.*, 32 F. R. 684.

If a deposition, taken in one cause, is admitted in evidence in another cause by stipulation of parties thereto, the fee of \$2.50 provided by the fifth sentence of this section cannot be taxed in the latter cause against the losing party. *Wooster v. Handy*, 23 Blatch. 112; 23 F. R. 49; *American Co. v. Sheldon*, 28 Id. 217. (The act of 1853 said, "in the cause.") Otherwise as to depositions taken in a State court, and used by stipulations on the trial of the suit in the circuit court. *Jerman v. Stewart*, 12 F. R. 271. *Cf.* *Green v. French*, 5 N. J. L. J. 228. A deposition taken by consent to be used in two cases, and so used on the joint trial thereof, though written out but once, may be taxed by the prevailing party in each case, no agreement to the contrary having been made. *Archer v. Hartford Fire Ins. Co.*, 31 F. R. 660. If a deposition taken in an equity cause is subsequently used in that and other causes, by stipulation, but one fee can be taxed for it, and that must be taxed in the cause in which it was taken. *American Diamond Co. v. Sheldon*, 28 F. R. 217; *Winegar v. Cahn*, 29 Id. 676.

Cl. 6. This clause did not apply to a cause which was removed before it was enacted. *Dedekam v. Vose*, 3 Blatch. 77.

Cls. 8, 9. The allowances for travel and court attendance are designed to reimburse court expenditures, not to compensate for services. Hence a district attorney cannot charge for travel done by his assistants and for their attendance before court commissioners, although he paid such expenses. *Townsend v. United States*, 22 Ct. Cl. 207.

Cl. 10. This clause confers a discretion upon the court in which a cause was tried, and the allowance it makes cannot be reduced by the Attorney-General under Rev. Stats. § 368, nor by the accounting officers. *Waters v. United States*, 21 Ct. Cl. 30. St. 1875, ch. 95 (18 St. 333), which requires district attorneys' accounts to be forwarded, when approved, to the proper accounting officers of the Treasury, does not make such forwarding a condition precedent to an action. *Ravesies v. United States*, 21 Ct. Cl. 243; *Bryan v. United States*, Id. 249.



SECT. 825. — 15 A. G. Op. 387. The revisers observe that, as this fee is required to be taxed as if it were part of the costs, the First Comptroller had declined to allow payment of it from the Treasury, although it seemed inconvenient to tax a fee, at the time of making up the bill, when the amount due the attorney depended wholly upon the sum afterwards collected or realized. 1 Com. D. 463.

The words "revenue laws" have different meanings in different statutes. As here used, they entitle the district attorney to the two per cent named upon recovery in a suit against a surety upon a collector's bond, to recover moneys due for customs duties, not directly from the importer, but indirectly from the revenue officer to whom they are paid. *Beckwith v. United States*, 16 Ct. Cl. 250. This section applies only to cases where the money is "collected or realized," these words being substantially synonymous. *The Pacific*, Deady, 192. As this cannot be told until it is done, the sum cannot be "taxed" in court, in the judgment against the defendant. The section was doubtless intended to establish a rule of compensation as between the government and its attorney, by allowing him a commission of two per cent for collection in case of success, but leaving him his ordinary statutory fee where nothing is realized. *King v. United States*, 99 U. S. 229, 234; 11 A. G. Op. 393. The act of June 22, 1874 (18 St. 186), did not affect the act of March 3, 1863, of which this section is a revision. *United States v. One Horse*, 7 Ben. 405. If the judgment is satisfied, deducting a judgment against the United States in another action under St. 1875, ch. 145 (see note § 1065), the money is "collected or realized" within this section. *Id.*; *Beckwith v. United States*, 16 Ct. Cl. 250. A commission upon the tax upon purchasers of forfeited property sold in pursuance of Rev. Stats. § 3334, is to be paid to district attorneys, but not to clerks of court or marshals. 15 A. G. Op. 566. This section includes not only cases arising under the customs revenue laws, but also those growing out of the internal revenue laws; and the district attorney is entitled to two per cent of the sum which the government may receive under a compromise with a person who has been prosecuted by him. *United States v. 500 Barrels of Whiskey*, 2 Bond, 7. A suit against a surety upon a collector's bond to recover moneys due for customs duties from the revenue officer to whom they were paid, is a suit arising under the revenue laws, and the district attorney who prosecuted it is entitled to the two per cent allowed. *Beckwith v. United States*, 16 Ct. Cl. 250. If a proceeding *in rem* under the internal revenue laws is discontinued by direction of the proper authority, on the payment of costs by the claimant, the district attorney is not entitled to two per cent on the value of the property. 11 A. G. Op. 329.

SECT. 827. — See notes, §§ 299, 629, par. 12; 828, 989. In determining the allowances which a district attorney should receive under this section for services rendered under it, the Secretary of the Treasury may, in his discretion, consider his salary and other compensation, and limit his entire compensation to \$10,000 per year. 15 A. G. Op. 277.

SECT. 828. — See notes, §§ 797, 847; as to travel, see note, § 74. As to mileage, see note § 829, cls. 21, 25. The cited act of 1853 in terms gave the clerks power to administer oaths, take acknowledgments, &c., but this provision was not carried into the Revised Statutes. *United States v. Evans*, 2 F. R. 152. 18 St. 333, ch. 95, §§ 1, 7 (see *Re Rand*, 18 F. R. 99; *Re Conrad*, 15 Id. 641), provide —

"SEC. 1. That before any bill of costs shall be taxed by any judge or other officer, or any account payable out of the money of the United States shall be allowed by any officer of the Treasury, in favor of clerks, marshals, or district attorneys, the party claiming such account shall render the same, with the vouchers and items thereof, to a United States circuit or district court, and, in presence of the district attorney or his sworn assistant, whose presence shall be noted on the record, prove in open court, to the satisfaction of the court, by his own oath or that of other persons having knowledge of the facts, to be attached to such account, that the services therein charged have been actually and necessarily performed as therein stated; and that the disbursements charged have been fully paid in lawful money; and the



court shall thereupon cause to be entered of record an order approving or disapproving the account, as may be according to law, and just. United States commissioners shall forward their accounts, duly verified by oath, to the district attorneys of their respective districts, by whom they shall be submitted for approval in open court, and the court shall pass upon the same in the manner aforesaid. Accounts and vouchers of clerks, marshals, and district attorneys, shall be made in duplicate, to be marked respectively 'original' and 'duplicate.' And it shall be the duty of the clerk to forward the original accounts and vouchers of the officers above specified, when approved, to the proper accounting officers of the Treasury, and to retain in his office the duplicates, where they shall be open to public inspection at all times. Nothing contained in this act shall be deemed in any wise to diminish or affect the right of revision of the accounts to which this act applies by the accounting officers of the Treasury, as exercised under the laws now in force. . . .

"SEC. 7. That the proviso in the sixth paragraph of 18 St. 72, ch. 285, shall not be construed to apply or to have applied to attorneys, marshals, or clerks of courts of the United States, their assistants or deputies. And all accounts of said attorneys, marshals, and clerks, for mileage and for expenses incurred subsequent to July 1, 1874, and prior to January 1, 1875, shall and may be audited, allowed, and paid at the Treasury Department of the United States in the same manner as if said act had not been passed. And from and after January 1, 1875, no such officer or person shall become entitled to any allowance for mileage or travel not actually and necessarily performed under the provisions of existing law."

In general, the clerk may collect his costs as they accrue without regard to the final result. *Cavender v. Cavender*, 3 McCrary, 383; 10 F. R. 828. He may charge for binding and express charges the reasonable and actual cost thereof to him. *Id.* Under a decree upon a stipulation that the complainant pay the costs, the clerk's fees are a proper charge. *Cahn v. Qung Wah Lung*, 12 Sawyer, 92; 28 F. R. 396. The right of redemption given a mortgagor by a State statute is subject to the payment of the amount to the clerk as provided by this section. *Blair v. Chicago R. Co.*, 12 F. R. 750.

The relations of the clerk to the government, so far as services are required of him by statute or by an authorized officer, are the same as he sustains to an individual, with respect to compensation provided for in this section. Hence, the government is liable to the clerk for services, on the removal of an election case to the court of which he is an officer from a State court, under Rev. Stats. § 643. *Re Clerk's Charges*, 5 F. R. 440. The government is liable to the clerk of a court for fees properly chargeable to it in suits in which it is plaintiff, although the marshal may have collected them of the defendants, and failed to pay them to the clerk. 3 A. G. Op. 575. When the clerk is required to account to the Treasury for the fees and emoluments of his office, he may demand payment in advance. *Steever v. Rickman*, 109 U. S. 74; *Bean v. Patterson*, 110 Id. 402. It is not necessary to a right of action against the government that a clerk shall forward his account, when approved, to the proper accounting officers of the Treasury, as required by St. 1875, ch. 95 (18 St. 333). *Ravesies v. United States*, 21 Ct. Cl. 243; *Bryan v. United States*, Id. 249. Under § 7 of that act the marshal is entitled to travel on each of several writs served at the same place. 16 A. G. Op. 165; 15 Id. 108, and note. See *Turner v. United States*, 19 Ct. Cl. 629.

A citizen has not an unlimited right to inspect and examine all the records and papers in the clerk's office; but he has a right to inspect those enumerated in this section, and courts will see that the right is enjoyed without regard to the technical rules of law. *Re McLean*, 9 Cent. L. J. 425. This section does not apply to writs of *habeas corpus*. It applies only to ordinary litigation in the courts in common law, equity, and admiralty cases, and other ordinary litigation where there are regularly two parties litigating concerning some right, and where he who prevails recovers costs from his opponent. *Habeas corpus* cases, with respect to fees, are *sui generis*, the amount to be allowed being discretionary with the court. *Re Moy Chee Kee*, 33 F. R. 377. See *United States v. Hill*, noted with § 823.

Cl. 3. A paper is not "filed" by being placed in the court papers without the proper indorsement by the clerk. *Amy v. Shelby County*, 1 Flippin, 104. The clerk is entitled



to ten cents for every separate voucher filed by him, although filed with his report of moneys on hand. *Goodrich v. United States*, 35 F. R. 193.

Cl. 6. The Federal courts usually allow the same fees to any one taking a deposition as the statute allows to clerks of court and commissioners. *Jerman v. Stewart*, 12 F. R. 271; *Stimpson v. Brooks*, 3 Blatch. 456.

Cl. 8. Under Rev. Stats. § 2026, making it the duty of the chief supervisor to present to the court applications or recommendations for the appointment of supervisors, a charge of fifteen cents a folio for drafting such recommendations is within this clause, and so is a like charge for preparing blank oaths to be filled out by the supervisors and marshals provided for by § 2026, and for instructions furnished the supervisors under that section. *Re Conrad*, 15 F. R. 641. The clerk cannot tax costs for drawing and approving a bond when he did neither. *Cavender v. Cavender*, 10 F. R. 828. When an original entry of an order is made, though it be less than a folio, it is chargeable as a folio, each entry of a kind standing by itself. *Id.* Where pending the hearing before an auditor of a cause removed into a Federal court, the parties settled it, and an entry of dismissal was made upon the minutes, the clerk was held entitled to fifteen cents per folio for entering of record the process and pleadings in the State court, the proceedings for removal, and those in the Federal court. *Blain v. Home Ins. Co.*, 30 F. R. 667.

Cl. 9. An original entry, distinct from all others, though less than a folio, is to be charged as a full folio; a transcript of a record on appeal or writ of error is a copy for which only ten cents per folio is chargeable. *Cavender v. Cavender*, 10 F. R. 828; *Amy v. Shelby County*, 1 Flippin, 104; § 858, *post*; *Blain v. Home Ins. Co.*, 30 F. R. 667. The clerk cannot charge beyond what is here allowed for making a record. *The F. Merwin*, 10 Ben. 403.

Cl. 12. *The Alice Tainter*, 14 Blatch. 227.

Cl. 14. The clerk is not entitled to a fee for affixing the seal of the court, unless he does it at the request of the party. *Re Woodbury*, 7 F. R. 705.

Cl. 15. This section does not provide compensation to the clerk for searching for petitions in bankruptcy; a reasonable compensation for such service is fifteen cents for each name searched against. *Re Vermeule*, 10 Ben. 1.

Cl. 16. The clerk may charge fifteen cents for filing a request to search for judgments, and the same sum for each person against whom such search is made, and fifteen cents per folio for the certificate he makes stating the result of his search. *Re Woodbury*, 7 F. R. 705. He cannot make a charge against the government for searching the record in order to make up his report to the Government. *Re Clerk's Charges*, 5 F. R. 440.

Cl. 17. See note, § 825. This applies where money is paid into court to redeem under a State statute. *Blair v. Chicago R. Co.*, 12 F. R. 750; 11 Biss. 320. The tax required to be paid by the purchasers of forfeited property sold under § 3334 is not within this clause or clause 6 of § 829. 15 A. G. Op. 566. The clerk is entitled to receive one per cent upon moneys collected by the marshal upon executions (*Fagan v. Cullen*, 28 F. R. 843; *Kitchen v. Woodfin*, 1 Hughes, 340), and upon the proceeds of a sale paid into court by the marshal. *The Avery*, 2 Gall. 308; *Re Clerk's Fees*, Taney, 453; *Ex parte Prescott*, 2 Gall. 146. A judgment is an order of the court within the intent of this clause, and money paid to the clerk in pursuance of it is in his hands as an agent of the law, and for receiving, keeping, and paying it out he is entitled to the commission fixed, which is to be paid by the defendant as part of the costs. *Blake v. Hawkins*, 19 F. R. 204. The clerk is entitled to one per cent of the moneys which are the proceeds of fines, penalties, or forfeitures under the revenue laws, if they are received, kept, or paid by him. *United States v. One Horse*, 7 Ben. 405. The clerk is not entitled to his commission merely because the amount of a judgment was ordered to be paid to him. Fees cannot be claimed under this clause unless the money passes through



the clerk's hands, either actually or constructively. *Fagan v. Cullen*, 28 F. R. 843; *Leach v. Kay*, 2 Flippin, 590; 4 F. R. 72; *Ex parte Plitt*, 2 Wall. Jr. 453. Hence, if one who has been ordered to pay money pays it to the party or the attorney of the party to whom it is due, the clerk will not be entitled to poundage. *Re Goodrich*, 4 Dillon, 230; *Upton v. Tribblecock*, Id. 232, note; *Kitchen v. Woodfin*, 1 Hughes, 340; *State v. Bryant*, 32 N. W. Rep. 302. And if the amount paid is not sufficient to satisfy the decree and the clerk's commissions, the judgment opens to include such commissions. *Id.*; *Peyton v. Brooke*, 3 Cranch, 92.

CL. 18. The fee for attendance includes days when the court, opened at the time and place appointed by law, adjourns to a future day without transacting business. *Jones v. United States*, 21 Ct. Cl. 1; *Goodrich v. United States*, 35 F. R. 193. But see now 24 St. 253, 541, stated in note to § 579. It also includes days when the court is open for registrations under Rev. Stats. §§ 2011–2014. *Pleasants v. United States*, 35 F. R. 270.

SECT. 829.—See notes, §§ 74, 579, 848. The marshal may demand his fees in advance for serving process in actions in which the government does not require the service. *Duy v. Knowlton*, 14 F. R. 107. A marshal cannot claim commissions on money paid to his deputies for taking the census. *United States v. Smith*, 1 Wood. & M. 184. The approval of a marshal's account by a district court, under § 1 of St. 1875, ch. 95 (see note, § 828), is only *prima facie* evidence of the amount due. *Turner v. United States*, 19 Ct. Cl. 629. As to forwarding accounts under St. 1875, see *Ravesies v. United States*, stated in note, § 828. Fees earned by a marshal for his services in connection with the Court of Commissioners of Alabama Claims are regulated by this section, and, when received by him, form part of the emoluments of his office which are to be included in his emolument return. 15 A. G. Op. 533.

CL. 3. If jurors are drawn by State officers, the marshal is entitled to a fee for serving the *venire* on such officers. *United States v. Cogswell*, 3 Sumner, 204; *United States v. Smith*, 1 Wood. & M. 184. But not for travel when the *venires* are served by a constable. *United States v. Smith*, *supra*.

CL. 5. A marshal is entitled to be paid for serving a *subpoena* in a criminal case on a witness without the boundaries of his own district, and also for executing an attachment on such witness. 9 A. G. Op. 265. The *subpoena* in criminal cases for witnesses on behalf of the government must contain the names of all the witnesses in the same cause who reside in the same locality and can be embraced in it without inconvenience. *United States v. Ralston*, 17 F. R. 895.

CL. 6. See note, § 825; *Pomroy v. Harter*, 1 McLean, 448; *Causin v. Chubb*, 1 Cranch C. C. 267; *Swann v. Ringgold*, 4 Id. 238. As originally and correctly printed (10 St. 164), there should be a comma after "law" at end of the 4th line. 15 A. G. Op. 347. The tax required to be paid by the purchasers of forfeited property, sold under Rev. Stats. § 3334, is not within this clause, and marshals are not entitled to commissions thereon. 15 A. G. Op. 566. The marshal is not deprived of his right to poundage on the amount specified in the execution because the plaintiff accepted as a compromise a less sum than was indicated therein. The marshal in the county of New York is entitled to the same rate of poundage as is allowed sheriffs under the general State law, and is not limited to the rate allowed the sheriff of the county of New York. *United States v. Haas*, 5 F. R. 29. The laws of the State in which an execution is served determine the fees of the marshal therefor. *Pomroy v. Harter*, 4 McLean, 448; *Alexander v. Thomas*, 1 Cranch C. C. 92; *Thomas v. Brent*, Id. 161. The marshal for the district of Kentucky, in a case where proceedings are stayed after a levy of execution, no moneys being collected thereon, is entitled to charge half the commissions allowed by the State law to a sheriff in such a case. If the marshal who received such fee is succeeded by another, the latter is entitled to no more than half commissions for completing the collection and paying



over the money. 15 A. G. Op. 346. The marshal, to be entitled to poundage on property, must have taken it into his actual custody so as to make himself chargeable therefor. *Ringgold v. Lewis*, 3 Cranch C. C. 367. If he extends an execution on real estate for the government, he is entitled to his fees, though the property is not converted into money. *United States v. Smith*, 1 Wood. & M. 184.

Cl. 10. The purchaser may draw his own deed; and if he does, the marshal must execute it for a fee of \$1. *The John E. Mulford*, 18 F. R. 455.

Cl. 14. This section does not fix \$2.50 per day as the absolute limit of the marshal's fees for the care of property in his custody in admiralty cases. If such property is in danger from thieves, or is in different places, he may be allowed more. But \$5.00 per day cannot be charged because two watchmen were employed in watching the same property, situated in the same place, one at night and the other by day. The court disallowed charges for extra men who were employed to prevent the collector of customs from taking the property from the marshal by force. *The Perseverance*, 22 F. R. 462; *The Nellie Peek*, 25 Id. 463; *The F. Merwin*, 10 Ben. 403. In *The Novelty*, 9 Ben. 195, a marshal's reasonable bill was allowed for the dockage of a vessel seized by the marshal on a marine railway, from which it could not be removed without danger of sinking. If it is prudent to remove and insure property, the expense of doing both may be allowed. *United States v. 300 Barrels*, 1 Ben. 72. The marshal's claim for reimbursement for keeping property must be established to the satisfaction of the court. *The Free Trader*, Brown Adm. 72; *The Phebe*, 1 Ware, 354. If the marshal does not take and hold manifest possession of the vessel, he is not entitled to his fees, although, as between himself and the parties, he had taken such possession as rendered him liable. *The Hibernia*, 1 Sprague, 78. If the marshal has the custody of a vessel under process in several cases, the *per diem* custody fee must be apportioned among the cases, saving to him, in case any party fails to pay his proper proportion, a remedy against the other parties for the amount. *The Circassian*, 6 Ben. 512; *The John Walls, Jr.*, 1 Sprague, 178. Where a stipulation has been given for the release of a vessel, and a warrant of delivery handed to the marshal directing him to deliver the vessel to the claimant, the latter is not entitled to fees for serving it, he being the party served. But if, in consequence of it, he is put to any expense, he is entitled to be reimbursed. *The Jeanie Landles*, 17 F. R. 91.

Cl. 15. This relates to a final disposition of the cause by agreement of parties; and the marshal is not entitled to a commission on a vessel seized by him under a monition, and afterwards released on a stipulation for her appraised value. *The Acadia*, 10 Ben. 482. The claim is "settled" when the amount of a final decree is paid before execution. *The City of Washington*, 13 Blatch. 410; *Re Johnson*, 8 Ben. 201. Where, after a libel was filed to recover for salvage service, there was a seizure by the marshal under admiralty process, and the property being released on stipulation, the claim was compromised and the suit withdrawn before a decree was rendered, the marshal was held entitled to his commissions upon the amount paid in settlement. *The Clintonia*, 11 F. R. 740, denying *The Norma*, Newb. 533, *contra*. See *Robinson v. Bags of Sugar*, 35 F. R. 603; *Erwin v. Cummins*, Hempst. 703. If process has issued in a suit *in rem* against a vessel and the marshal has received a bond under § 941, he is entitled to his commission, although service of process was waived and no actual seizure was made. *The City of Washington*, 13 Blatch. 410. Where, after a bill was filed, a vessel was seized under process and discharged on stipulation, a decree was entered and the amount paid into court, no execution having issued or sale been made, that payment so made was held a settlement of the claim, and the marshal was held entitled to his commission. *The Russia*, 5 Ben. 84.

Cl. 16. See note, § 828, cl. 17. If the marshal employs an auctioneer to make the sale, without authority therefor from the parties, the auctioneer is a mere agent of the



marshal in making the sale, is not entitled to compensation, and cannot impose any charge upon the property or purchaser which the law does not authorize the marshal to impose. The *John E. Mulford*, 18 F. R. 456. The marshal cannot claim, in addition to his fees and commissions on the sale of a vessel, a commission for paying over the balance to the claimant. The *Colorado*, 21 F. R. 592. Upon an interlocutory sale of prize property the marshal may claim his full commission, and it is his duty to bring the proceeds into court with an account of the sales. The *Avery*, 2 Gall. 308. He is also entitled to commissions upon the sale of such property removed from his district by consent of parties, and sold in another district. The *San Jose Indiano*, Id. 311. The marshal is not entitled to a commission upon specie on board of a vessel captured in his custody. 1 A. G. Op. 178.

Cl. 18. It is competent for the marshal to charge, as part of the expense of serving a writ in a criminal case, a *per diem* paid his deputy, not exceeding \$2. *United States v. Harker*, 3 Sawyer, 237. The marshal is not entitled to a fee for the arrest if he allows the accused to go free on his promise to attend the commissioner's court. *United States v. Ebbs*, 4 Hughes, 473.

Cl. 19. The fee for a commitment may be allowed when made under an order of court or in the execution of a *mittimus*, but in no other cases; also for a discharge when the prisoner is wholly released from custody, but not when he is taken into court for trial or to testify. It is no reason for not allowing the fee for a commitment that the duty was performed during the time the court sat, and while the marshal was receiving a *per diem*. *Ex parte Paris*, 3 Wood. & M. 227.

Cl. 21. The proviso in St. 1874, ch. 285, declaring that only actual travelling expenses shall be allowed "to any person holding employment or appointment under the United States," supersedes the provision of this section allowing mileage to marshals. 14 A. G. Op. 681. This clause in St. 1874 supersedes the provision of this section allowing mileage to marshals on account of guards employed in transporting prisoners; and in such case the compensation of the guard and his travelling expenses are a part of the actual travelling expenses of the marshal. 14 A. G. Op. 683.

Cls. 25, 26. See note, cl. 21, *supra*. The final clause of § 7 of St. 1875, printed in note, § 828, providing that attorneys, marshals, and clerks shall not become entitled to any allowance for mileage or travel not actually and necessarily performed under existing laws, perhaps qualifies this clause. The acting Attorney-General ruled that only one charge for mileage is allowable for the service of several writs in hand at the same time, which only made it necessary for the marshal to travel to the same place, or in the same direction. 15 A. G. Op. 108. The Attorney-General overruled this opinion, and held that the act of 1875 does not modify the provisions of this section, and also that where a marshal travels with several writs in his hand for service at the same place, he actually and necessarily travels to serve each of them within the meaning of that act. 16 Id. 165. This view is supported by a decision of Judge Ballard's. See Ex. Doc. 1, part 3, Sp. Sess. 1881, p. 19, referred to in *United States v. Ralston*, 17 F. R. 895, 900, and by *Re Crittenden*, 2 Flippin, 212; *Turner v. United States*, 19 Ct. Cl. 629. The contrary view was taken by the first comptroller of the currency, who ruled "that the marshal is entitled to but one mileage for all government witnesses served in one locality or direction at the same time, no matter how many writs of *subpoena* he may have, or what may be their form." This view is sustained in *United States v. Ralston*, *supra*. If the wrong person is arrested, the marshal is not allowed fees of any kind, and if, in transporting a prisoner, he does not travel by the usual route, he is allowed mileage only for the route usually travelled. *Re Crittenden*, *supra*. The marshal may appoint a bailiff to perform a particular act or duty, who then becomes a special deputy. Id.; *Ex parte Roberts*, 2 Abb. U. S. 265. The marshal may charge for the distance he actually travelled to enable him to make a return of *nulla bona*. *Anon.*, *Hempst.* 450. No mileage can be allowed for



serving the defendant with a rule to plead. *Parker v. Bigler*, 1 Fish. Pat. Cas., 285. The marshal must compute the distance travelled to serve process by the same rule as the court computes it in determining its jurisdiction. Where the witness lived within 100 miles by an air line the court refused to allow travel for 160 miles by railroad and steamboat. *Id.* Constructive travel will not be allowed for. *United States v. Cogswell*, 3 Sumner, 204.

SECT. 830. If more is expended for furniture and rent than the statute specifies, the marshal will not be allowed for the excess in his accounts unless he has obtained the required authority. 11 A. G. Op. 506. In general the marshal can make no charges except such as the law expressly authorizes, as, *e. g.*, for an auctioneer upon sales by the marshal. *The John E. Mulford*, 18 F. R. 456; *Bottomley v. United States*, 1 Story, 153; *Croft v. Brandt*, 13 Abb. Pr. n. s. 132; 46 How. Pr. 481; 9 A. G. Op. 98. The marshal is entitled to receive, and bound to pay, interest after a demand of payment by or upon him. *United States v. Smith*, 1 Wood. & M. 184. The marshal cannot claim compensation for establishing and settling his accounts against the government. He may recover interest on his proper demands against it. *United States v. Cogswell*, 3 Sumner, 204; *United States v. Smith*, 1 Wood. & M. 184. No allowance can be made to the marshal for inspecting or keeping State jails, unless he acted under the direction of the court for the purpose of ascertaining their fitness for keeping United States prisoners. *United States v. Smith*, *supra*. The marshal's fees and compensation, when chargeable to the government, are payable out of the Treasury upon a certificate of the amount made by the court or one of the judges. *The Antelope*, 12 Wheat. 546. See 18 St. 333, ch. 95, § 7, printed in note, § 828.

SECT. 833. By 20 St. 7, ch. 1, the emolument returns of the United States attorney for the District of Columbia are to be made to the Attorney-General, and his accounts rendered, audited, and paid, like those of other district attorneys. By 22 St. 631, ch. 143, the clerk of the supreme court of the District of Columbia is likewise to make a semi-annual report to the Attorney-General of fees and emoluments, the maximum of whose compensation, apart from office expenses and allowances, is not to exceed \$3500, the balance to be paid into the Treasury under Rev. Stats., § 844; and the clerk of the United States Supreme Court is not to retain for personal compensation above \$6000 a year, accounting to the Treasury for the balance of fees and emoluments less clerk hire and office expenses certified to by the court or one justice appointed therefor.

Compensation allowed a district attorney under Rev. Stats. § 299 should be included in the annual return required by § 833. 16 A. G. Op. 99. The words "fees and emoluments" in § 833 include fees outstanding as well as those which have been collected. The marshal may entitle himself to a credit for such as he has not collected if he shows that he cannot collect them by any reasonable effort. 9 A. G. Op. 176. A marshal must account for the fees which he has earned, whether he has collected them or not. He cannot be credited in his accounts for fees which he has not collected because the parties were insolvent or non-residents. 11 A. G. Op. 455. So clerks must account for all fees earned by them, whether collected or not. 8 A. G. Op. 33. Fees received by the clerk of the Massachusetts district court for naturalizing aliens are not within this section, and need not be included in his semi-annual returns. *United States v. Hill*, 120 U. S. 169; 25 F. R. 375. If the same person holds the office of clerk both of the district and circuit courts, his return must distinguish between the fees of each, and if the fees of either are less than the maximum allowed by § 839, the deficiency cannot be made up from an excess in the other. *United States v. Bassett*, 2 Story, 389.

SECT. 834. — See notes, §§ 629, cl. 12; 989; 11 A. G. Op. 88.

SECT. 835. — Under the law as it stood in 1866, a district attorney was entitled to compensation for examining the title to lands purchased by the government. 11 A. G.



Op. 433. Under the law as it stood in 1867, a district attorney, employed by the Attorney-General to argue a case in which the government is concerned as special counsel, before the Supreme Court, was entitled to receive proper compensation for his services, and the sum received was not part of his maximum allowance, and was not returnable in his emolument account. 12 A. G. Op. 284. A statute which gives a public officer a compensation from fees and emoluments, limited to a fixed sum, is a salary restriction which prohibits all additional allowances for extra services within the scope of his employment, unless such allowances are expressly provided for by law. In prosecuting prize cases, the district attorney acts as the law officer of the government, and cannot claim extra compensation therefor. The Anna, Blatch. Pr. Cas. 337. But see Rev. Stats. § 836.

SECT. 836. — 11 A. G. Op. 79.

SECT. 837. — By 22 St. 344, ch. 436, this section and St. Feb. 26, 1853 (10 St. 161), are extended to the Territories of New Mexico and Arizona, and apply to the fees of all officers therein, the district attorney, by fees and salary together, not to receive more than \$3500 per year, accounting to the Treasury for the surplus of fees or moneys received.

SECT. 838. — 19 St. 240, ch. 69, inserts "the" after "be" in the first line. By 18 St. 186, ch. 391, § 15, violations of the customs laws are to be reported to the collector, and by him to the district attorney of the district, who shall forthwith cause an investigation of the complaint, if he deems it sustainable, before a United States commissioner having jurisdiction; and it is made his duty to proceed diligently to recover the fines and penalties. This act so far modifies § 838 as to require the district attorney to commence proceedings in all cases covered by § 838, excepting only where the case cannot in his judgment be maintained, and in all cases it is his duty to report the facts to the Secretary of the Treasury in order that he may determine what the ends of public justice require. 15 A. G. Op. 522. The word "case," as used in § 838, covers all complaints reported by revenue officers to the district attorney, which may be subject to the final determination of the court by trial or other action therein, and the expenses and services of the district attorney in examining revenue reports, when no judicial action thereon is formally instituted, fall within the rule prescribed for compensation. This section is limited to such cases, while cases which are tried are provided for by § 824. *Re* District Attorney, 23 F. R. 26.

SECT. 839. — See notes, §§ 842, 843. Sect. 15 of St. 1870 changed the supervision from the Secretary of the Interior to the Attorney-General. *United States v. Hill*, 120 U. S. 173. If the same person held the offices of clerk of both a district and a circuit court, he was entitled to the maximum allowance for each of them, prior to the enactment of the last sentence of § 840, which changed this rule. 9 A. G. Op. 250. See 7 Id. 543; *United States v. Bassett*, 2 Story, 389.

SECT. 840. — The revisers at first assumed that St. April 10, 1869, ch. 22 (16 St. 45), authorized the district judges generally to appoint the clerks of their own courts, but not a separate clerk of a district court where, by previous special provision, the clerk of the circuit court appointed by the circuit justice (afterwards by the circuit judge) was also the clerk of the district court. As, however, the district courts of California, Oregon, and Nevada, which they thus regarded as not entitled to separate clerks, had decided otherwise, and had made appointments, such decision was followed by the commission, and this section was recast accordingly. 1 Com. D. 471.

SECT. 841. — The intent of this statute is that the compensation of the marshal, after making the deductions provided for, shall not exceed \$6000 per year; and, in order to effect this design, the semi-annual return is to be made; that the proper allowance to his deputies shall not exceed three-fourths of the fees and emoluments earned by them; and



that the rate of allowance may be reduced whenever the marshal's returns show that rate, in the judgment of the Attorney-General, to be unreasonable. Hence, the Attorney-General cannot fix a deputy's salary, but can only reduce the rate of his compensation. *Phillips v. United States*, 11 Ct. Cl. 570. A marshal required to serve process in suits where the service is not required by the United States, has a right to demand his fees in advance. *Duy v. Knowlton*, 14 F. R. 107. Under this act, the Attorney-General has limited the earnings of deputy-marshals to \$3000 per year. Reg. Dept. of Justice (1876), p. 202; *Schloss v. Hewlett*, 81 Ala. 269.

SECT. 842. — This and §§ 839, 844, recognize the right of clerks, district attorneys, and marshals to retain fees received, until the limit fixed as the maximum of their compensation is exceeded. *United States v. Cigars*, 2 F. R. 494.

SECT. 843. — Sect. 3 of 18 St. 85, ch. 328, providing that civil officers shall not receive compensation or perquisites from the United States beyond their salary, contains a proviso that it shall not be construed to prevent the employment and payment by the Department of Justice of district attorneys, as then allowed by law, for services not covered by their salaries or fees. This act relates only to civil officers; it extends to the compensation of a gauger, but not to the clerk of a supervisor of internal revenue. *Hedrick v. United States*, 16 Ct. Cl. 88. Such a statute, prohibiting additional compensation to public officers, does not apply to the salaries of two offices properly held by the same person. *Collins v. United States*, 15 Ct. Cl. 22; *United States v. Bassett*, 2 Story, 389.

SECT. 844. — See notes, §§ 368, 833, 842. This section is not a "revenue law" within the meaning of clause 2 of § 699. *United States v. Hill*, 123 U. S. 681.

SECT. 846. — The following is added to this section by 18 St. 316, ch. 80: —

"That where the ministerial officers of the United States have or shall incur extraordinary expense in executing the laws thereof, the payment of which is not specifically provided for, the President of the United States is authorized to allow the payment thereof under the special taxation of the district or circuit court of the district in which the said services have been or shall be rendered, to be paid from the appropriation for defraying the expenses of the judiciary."

The act of Oct. 2, 1888, ch. 1069 (25 St. 545), appropriates —

"For payment of the fees and expenses of United States marshals and deputies, \$675,000: *Provided*, That not exceeding \$300,000 of this appropriation may be advanced to marshals, to be accounted for in the usual way, the residue to remain in the Treasury, to be used, if at all, only in the payment of the accounts of marshals in the manner provided in Rev. Stats. § 856. . . . For fees of United States commissioners and justices of the peace acting as United States commissioners, \$100,000. And no part of any money appropriated by this act shall be used to pay any fees to United States commissioners, marshals, or clerks for any warrant issued or arrest made, or other fees in prosecutions under the internal-revenue laws, unless the prosecution has been commenced upon a sworn complaint setting forth the facts constituting the offense and alleging them to be within the personal knowledge of the affiant, or upon sworn complaint by a collector, or deputy collector of Internal Revenue or revenue agent, setting forth the facts upon information and belief and approved either before or after such arrest by a circuit or district judge or the attorney of the United States in the district where the offense is alleged to have been committed or the prosecution is by indictment."

The commissioners deemed it advisable to omit the provision of the cited act of 1856 for an appeal from the decision of the Treasury accounting officers upon accounts named in § 846 to the Secretary of the Interior, although not appearing to be strictly repealed by St. March 30, 1868, ch. 36; the powers of the Secretary, as an appellate officer, being independent of his direct supervision over these accounts, and not passing to the Attorney-General under St. June 22, 1870. 1 Com. D. 473. The fees of the marshal for services rendered the government, whether fixed by law or depending upon what is reasonable and just under the circumstances, must be certified to, and cannot be made a part of the



judgment or decree in the cause. The Antelope, 12 Wheat. 546. The certificate is *prima facie* evidence of the legality and correctness of an account, but the proper department may require further evidence in support of it. United States v. Smith, 1 Wood. & M. 184. The judge of a district court may administer to the clerk thereof the oath required to be made to his accounts with the government. United States v. Ambrose, 2 F. R. 556.

SECT. 847. — See note, § 848. A chief supervisor of elections is *ex officio* United States commissioner, and when required by statute to perform any service, for which payment is not provided by Rev. Stats. § 2031, payment may be claimed under § 828 or § 847, if the service falls therein. *Re Conrad*, 15 F. R. 642; *Gayer v. United States*, 33 Id. 625. If the commissioner keeps, by the court's direction, a docket with entries of each warrant issued and subsequent proceedings thereon made on the day of occurrence, he is entitled to the fee allowed the clerk of court for docket, indexes, &c., although his docket entries may differ from the clerk's. United States v. Wallace, 116 U. S. 398; 20 Ct. Cl. 273; *Phillips v. United States*, 33 F. R. 164. The proviso of St. Aug. 4, 1886 (24 St. 274), that commissioners shall not be entitled to docket fees, repealed, for the year covered by that act, the authority therefor contained in Rev. Stats. §§ 828, 847. *Bell v. United States*, 35 F. R. 889; *Strong v. United States*, 34 Id. 17; *McKinstry v. United States*, Id. 211; *Rand v. United States*, 36 Id. 671. The provision of 24 St. 274 is —

“That for issuing any warrant or writ and for any other necessary service commissioners may be paid the same compensation as is allowed to clerks for like services, but they shall not be entitled to any docket fees.”

The commissioner, if so requested by the defeated party, must make a detailed statement of his fees, showing the items, and that they are legally chargeable; which statement must be verified by oath that the services charged for have been actually and necessarily performed. *Beckwith v. Easton*, 4 Ben. 357. No docket fee can be allowed upon exceptions to a commissioner's report. Id. A commissioner cannot maintain a suit against the government to collect fees due him unless his petition is filed within six years of the time when the last item of service charged for was rendered. *Patterson v. United States*, 21 Ct. Cl. 322. As to forwarding accounts under St. 1875, ch. 95, see *Ravesies v. United States*, stated with § 828. If, for any service which commissioners are authorized to render, no statute or rule of court fixes the compensation, the local law may be resorted to as a proper basis, in cases where the fees are payable by the government. 4 A. G. Op. 233.

Cl. 1. A commissioner is entitled to the prescribed fee for administering the oath required to every criminal complaint made before him. *Strong v. United States*, 34 F. R. 17; *McKinstry v. United States*, Id. 211. And for administering the oath to each witness in proof of his mileage and attendance. Id. And for the oath required by State law to be administered to sureties to a bail bond. *McKinstry v. United States*, *supra*.

Cl. 2. This has no reference to bail bonds, which do not require acknowledgments. Id.; *Strong v. United States*, 34 F. R. 17. The fee is allowed for each acknowledgment when taken separately. *Barber v. United States*, 35 F. R. 886.

Cl. 3. If the accused's request for a continuance is granted on the day set for the hearing, and no other proceedings are had before the commissioner, he is not entitled to his *per diem*. *McKinstry v. United States*, *supra*. For acts not merely clerical, upon which counsel ought to be heard, or acts which involve investigation and decision, a commissioner is entitled to the *per diem* of \$5; but acts which are merely clerical do not involve a hearing and decision, and for days on which they are performed no fee is allowable. *Harper v. United States*, 21 Ct. Cl. 56; *Rand v. United States*, 36 F. R. 671.

Cl. 4. If an order of court requires a commissioner to send a transcript of the proceedings had in each case before him he is entitled to a fee of 10 cents per folio therefor,



and of 15 cents per folio for the certificate annexed thereto. *Strong v. United States*, 34 F. R. 17; *McKinistry v. United States*, Id. 211.

Cl. 5. The evidence of witnesses who are examined before a commissioner on a preliminary examination, which is required by a State law to be taken down by the examining magistrate, is not, when so taken, a deposition within the intent of this section, and a commissioner is not entitled to a fee therefor. *Strong v. United States*, 34 F. R. 17; *McKinistry v. United States*, Id. 211. Although no Federal statute prescribes the fee for any other officers who may take depositions except a clerk of court or a court commissioner, yet the same fees will be taxed in favor of any State officer who is authorized to take depositions as are allowed the officers named, and they will not be confined to the fees fixed by the State of which they are officers. *Jerman v. Stewart*, 12 F. R. 271.

Cl. 7. A commissioner is entitled to a fee for issuing a warrant and *subpoena* and filing them when returned; but not for making an entry of the return. *Strong v. United States*, 34 F. R. 17; *McKinistry v. United States*, Id. 211. The words "any other service" mean service required of commissioners by law or by order of court, and fees cannot be collected unless the services were rendered pursuant to law or under such an order. *McKinistry v. United States*, *supra*. The words "like services" mean similar, not identical, services. *Wallace v. United States*, *supra*. Under this section and § 828 a commissioner is entitled to 15 cents a folio for drawing a bail bond; but not for filing it. *Strong v. United States*, 34 F. R. 17; *McKinistry v. United States*, Id. 211. A commissioner who, pursuant to an order of court, makes a monthly report in duplicate of all cases instituted or examined before him is entitled to fees therefor at 15 cents per folio. *McKinistry v. United States*, *supra*. A commissioner is entitled to 10 cents a folio for copies of process returned into the office of the clerk of the court, as required by § 1014. But this fee is allowed only for copies of warrants so returned, process signifying warrant, or the writ by which the accused is brought before him for examination. Id.

Cl. 10. A commissioner is not entitled to a fee for drawing criminal complaints. *Strong v. United States*, 34 F. R. 17. But he is for filing them. Id.; *McKinistry v. United States*, F. R. 211.

Cl. 11. A commissioner is entitled to 15 cents per folio for each certificate issued to a witness who has attended before him and on which the witness receives his *per diem* and mileage. *Strong v. United States*, 34 F. R. 17; *McKinistry v. United States*, Id. 211.

SECT. 848. — See note, § 699. By 19 St. 41, ch. 88, witnesses residing in the District of Columbia, and not in the service of the District or of the United States, are not allowed exceeding \$2 for each day's attendance before any committee of the House of Representatives. 20 St. 278, ch. 40, § 2, provides that the compensation of the master, taking testimony under that act, to be used before Congress relating to private claims against the United States, and of marshals and others serving the papers, shall correspond to that for like services in equity cases in the circuit courts, and the witnesses' attendance and travel to those of witnesses before such circuit courts, all such and the other expenses of investigation on the part of the United States to be paid out of the contingent fund of the branch of Congress appointing such committee. In the Federal courts of Colorado, jurors and witnesses are entitled to receive 15 cents for each mile travelled to and from such courts, by 21 St. 290, ch. 247. 22 St. 403, ch. 26, provides —

"That all persons residing west of the Mississippi River, excepting those who are by law entitled to a higher compensation, who have been or may hereafter be in attendance at Washington, District of Columbia, under subpoena or under the direction of the Department of Justice as witnesses in any of the courts of said district, in any of the cases known as star-routes prosecutions, shall be entitled to receive a total per diem of \$2.50 per day, and mileage for actual travel only to and from their place of residence, by the usual routes of travel, at the rate of seven cents per mile."

Congress may require the attendance of witnesses without compensation. *Lilley v. United States*, 14 Ct. Cl. 539. Under § 848 the fees of witnesses are taxable for each



day's necessary attendance in court, although they may not be called or sworn on the trial (Clark v. American Dock Co., 25 F. R. 641); and in each of several cases, if between different parties, or where only one of the parties is the same. *Wooster v. Handy*, 23 Blatch. 135; 23 F. R. 49; *Archer v. Hartford Fire Ins. Co.*, 31 Id. 660; *O'Neil v. Kansas City R. Co.*, Id. 663; *Young v. Merchants' Ins. Co.*, 29 Id. 273; *Parker v. Bigler*, 1 Fisher, 285. See *Parker v. Cartzler*, 5 McLean, 4. A juror, or defendant under recognizance, is entitled to his mileage and witness fees. *Edwards v. Bond*, 5 McLean, 301. The only qualification of this section is in §§ 849, 850, which except officers of the Federal courts, clerks, and other officers of the government. An indicted defendant, who is under recognizance as a witness in another case, is entitled to the same compensation as other witnesses for attendance in such case. *Re Addis*, 28 F. R. 794. Witnesses are allowed but once for travel in going and returning. *Spill v. Celluloid Manuf. Co.*, 28 F. R. 870; *Schott v. Benson*, 1 Blatch. 564. If the testimony of a witness residing in another country or State was important and necessary, his fees for actual travel and attendance were held properly taxable, in *United States v. Sanborn*, 28 F. R. 299; *Cahn v. Monroe*, 29 Id. 675; *Whipple v. Cumberland Manuf. Co.*, 3 Story, 84; *Hathaway v. Roach*, 2 Wood. & M. 63; *Prouty v. Draper*, 2 Story, 199; *Anderson v. Moe*, 1 Abb. U. S. 299. The early cases were under St. 1799, which provided that the compensation of witnesses and jurors should be the sum fixed, and concluded: "to the witnesses summoned in any court of the United States the same allowance as is above provided for jurors." If a witness who resides within reach of the process of the court attends in good faith on behalf of the party who has him examined, his fees can be taxed, though he was not served with a *subpoena*. *Dennis v. Eddy*, 12 Blatch. 195; *Cummings v. Akron Cement Co.*, 6 Id. 509. On the other hand, it has been held that the losing party is not to be taxed with the travel of witnesses residing within or beyond the reach of a *subpoena* who voluntarily attended by request. *Dreskill v. Parish*, 5 McLean, 213, 241; *Woodruff v. Barney*, 2 Fisher, 245; *Parker v. Bigler*, 1 Id. 289; *Spaulding v. Tucker*, 2 Sawyer, 50; *Anon.*, 5 Blatch. 134; *Haines v. M'Laughlin*, 29 F. R. 71; 12 Sawyer, 126. The words "pursuant to law" in St. 1853 were, by these decisions, equivalent to "summoned" in St. 1799. *Woodruff v. Barney*, 1 Bond, 528; *Edwards v. Bond*, 5 McLean, 305. If, by agreement of parties, the testimony of a witness is taken before an officer who is a resident of another State, the fees of the former may be taxed, although his attendance was voluntary. *Spaulding v. Tucker*, 2 Sawyer, 50. If a witness who does not reside within reach of the process of the court is served with a *subpoena* and attends the trial, his fees for one hundred miles of travel only can be taxed. *The Leo*, 5 Ben. 486; *Russel v. Ashley*, Hempst., 546; *Beckwith v. Easton*, 4 Ben. 357; *Anon.*, 5 Blatch. 134. A witness who has been *subpoenaed* to testify concerning particular facts will be allowed his fees up to the time these facts are admitted by the other party, if they are admitted. And if a second trial is had without stipulation or entry made of record whereby the facts admitted on the first trial are considered proven, the fees of the witness will be allowed at such trial. *Young v. Merchants' Ins. Co.*, 29 F. R. 273. Where a cause might have been tried at a term which a witness was summoned to attend, and the trial was postponed at too late a date to enable the party to notify the witness not to attend, he is entitled to his fees. Id. A witness under recognizance who is a grand juror at the same term of court, and who has been paid his fees as such, is only entitled to his *per diem* as a witness from the time he ceased to be a juror. *Ex parte Turner*, 32 Id. 372; *contra*, *Edwards v. Bond*, 5 McLean, 300. Witnesses imprisoned because of their inability to give security for their appearance at court are not entitled to any other compensation than is provided for in other cases. 1 A. G. Op. 344, 424.

No *per diem* allowance should be taxed for the attendance before a master of witnesses for a plaintiff whose testimony was afterwards abandoned or given up, or was stricken out.



or rejected by the master, where the latter's action was sustained by the court. *Troy Iron Factory v. Corning*, 7 Blatch. 16. If, by agreement of parties, a case is temporarily suspended, the witnesses will not be allowed fees for a journey to their homes and back, in the absence of agreement; but they will be allowed their *per diem*. *Hathaway v. Roach*, 2 Wood. & M. 63. If a case is postponed for two or three days the *per diem* of witnesses will be allowed. *Hance v. McCormick*, 1 Cranch C. C. 522. A witness fee may be taxed for the whole time of his attendance during the trial, although the examination on both sides was closed, or the illness of counsel suspended the trial. *Whipple v. Cumberland Manuf. Co.*, 3 Story, 84. The statute contemplates but one trip, and witnesses who return to their homes while testimony is being taken cannot have their fees for such travel taxed. *Spill v. Celluloid Manuf. Co.*, 28 F. R. 870; *Hathaway v. Roach*, 2 Wood. & M. 63. The jurisdiction of the circuit court for the eastern district of South Carolina extends over all that State, and mileage will be allowed witnesses who attend a trial from any part of it. *Young v. Merchants' Ins. Co.*, 29 F. R. 273. A witness who is *subpœnaed* at the place of trial on the day on which he is to attend, is not entitled to mileage. If he was not thus *subpœnaed*, he is entitled to it. *The Sunnyside*, 5 Ben. 162. Fees are taxable for the attendance of witnesses at court; and if the clerk taxes the fees of witnesses who were not sworn, it will be presumed that they attended in good faith, and the fees will be allowed. *Clark v. American Dock Co.*, 25 F. R. 641; *Hathaway v. Roach*, 2 Wood. & M. 63. The fees of a witness for surveying the *locus in quo*, the location of which was one of the points in controversy, are not allowed by the statute, and cannot be taxed. *Tuck v. Olds*, 29 F. R. 883. If a party to an action makes it appear by his affidavit that he attended the trial solely for the purpose of giving his testimony and not to aid in its management, his fees as a witness are taxable. If these facts are not set out in his affidavit it will be presumed that they are the facts, in the absence of an exception by the opposite party. *Id.* A party who is called and examined as a witness in his own behalf is not entitled to tax his travel and attendance as a witness. *Nichols v. Brunswick*, 3 Cliff. 88; *The Elizabeth & Helen*, 4 Ben. 101.

A witness may demand prepayment of his fees, but does not waive them by not insisting thereon. If he makes his demand before judgment is entered, the party who has caused him to attend is bound to pay, and can tax the fees in his costs. *Young v. Merchants' Ins. Co.*, 29 F. R. 273. A witness who has been summoned, and has received and receipted for money to pay his travelling expenses, cannot refuse to attend because the exact amount of his mileage has not been paid. *Norris v. Hassler*, 23 Id. 581. The officer who *subpœnas* a witness for the government need not tender him his travelling fees if he has the means to travel. *United States v. Durling*, 4 Biss. 509. If depositions were taken in the State court before that court lost jurisdiction by proceedings to remove the cause, the fees of witnesses will be allowed, whether the depositions were used in the Federal court or not. *Young v. Merchants' Ins. Co.*, *supra*.

Witnesses' fees may be taxed in civil as well as criminal cases. *Sebring v. Ward*, 4 Wash. 546. A witness's right to his fees is not lost because he was a juror at the same time. *Edwards v. Bond*, 5 McLean, 300. A witness who actually attends is entitled to have his fees taxed, although he was not examined (*Hathaway v. Roach*, 2 Wood. & M. 63), and although his deposition had been taken. *Anderson v. Moe*, 1 Abb. C. C. 229; *Beckwith v. Easton*, 4 Ben. 357.

SECT. 849. — The deputy clerk of a district court is an officer of the court, and is not entitled to witness fees. The clerks in the office of the marshal are not such officers; nor is a deputy marshal when not actually employed in waiting upon the court. Both are entitled to the usual fees when summoned as witnesses for the government. *Ex parte Burdell*, 32 F. R. 681.



SECT. 850. — The prohibition against the allowance of mileage applies as well to military as to civil officers. 15 A. G. Op. 486. Army officers and soldiers, and government clerks, sent to attend as witnesses for the government in a Federal court, are hereby entitled to receive their necessary expenses, but not travel or witness fees, which expenses may be paid by the marshal upon proper proof. 16 Id. 113, 147; *United States v. Sanborn*, 28 F. R. 299. A defendant attending court under an indictment, when under recognizance, owes no special duty to the government, being in attendance or absenting himself at his own peril, and is entitled, if under recognizance as witness for the United States in another case, to his mileage and witness fees for attendance in that case. *Re Addis*, 28 F. R. 794.

SECT. 852. — See notes, §§ 800, 848. A person who is summoned as a juror, and at the same term is *subpoenaed* as a witness by the United States, and attends in obedience to each process, is entitled to compensation for each service. *Edwards v. Bond*, 5 McLean, 300.

SECT. 853. — This section and the following, though modified by St. 1875, ch. 128, as to the advertisement of certain mail lettings, are not modified with respect to the advertising of the Treasury Department. 15 A. G. Op. 282. This section cannot be so restrained in its meaning as not to apply to departments and bureaus. Id. 633. The joint effect of this section and of § 3826 (before the latter was repealed), as regards government advertisements in newspapers published in the District of Columbia, was to allow the compensation fixed by this section unless, under § 3826, that was more than was paid by private individuals for like services. Id. 594. 20 St. 206, ch. 359, § 1, provides —

“That hereafter all advertisements, notices, proposals for contracts, and all forms of advertising required by law for the several departments of the government may be paid for at a price not to exceed the commercial rates charged to private individuals, with the usual discounts; such rates to be ascertained from sworn statements to be furnished by the proprietors or publishers of the newspapers proposing so to advertise: *Provided*, That all advertising in newspapers since April 10, 1877, shall be audited and paid at like rates; but the heads of the several departments may secure lower terms at special rates whenever the public interest requires it.”

SECT. 855. — The circuit and district courts are invested with discretion to determine the manner in which the facts affecting the fees due jurors and witnesses are to be ascertained, and the form in which orders shall be made. *Singleton v. United States*, 22 Ct. Cl. 118.

SECT. 856. — See note, § 846. The payment is hereby authorized of commissioners' accounts whenever made out, approved, and presented. *Patterson v. United States*, 21 Ct. Cl. 322; 15 A. G. Op. 386. The “cases where the United States are liable to pay” are not suits in which the fees are collected from its antagonists, but others, in which the government is an unsuccessful party, and also those where services are required for which no fees are taxed to the defendant; the United States, if successful, and recovering fees from the defendant, are not liable to pay, the case not falling within this section. *United States v. Cigars*, 2 F. R. 494; *Townsend v. United States*, 22 Ct. Cl. 207. When the fees of marshals, district attorneys, and clerks are, in a government suit, taxed and recovered as costs from the defendant, they are not payable out of the proceeds of the property seized except where the statute so provides specially; they should be turned into the Treasury, the officers being entitled to payment only on there settling their accounts. 15 A. G. Op. 386; *Patterson v. United States*, 21 Ct. Cl. 322.

SECT. 857. — A marshal's services in arresting a vessel are so closely analogous to those of a sheriff in making an attachment or upon replevin, that they are deemed covered by the phrase “like services,” and, in New York, may be recovered from the attorneys and solicitors at whose request the process is executed, if no other mode of payment is provided by law. *The Georgeanna*, 31 F. R. 407.



## CHAPTER XVII.

## EVIDENCE.

St. Feb. 3, 1879, ch. 40 (20 St. 278), provides for taking testimony by masters in chancery, to be used before Congress, in cases of private claims against the United States. Prior to the repeal of the bankrupt law, the bankrupt and any party to the proceedings were made competent witnesses by 18 St. 178, ch. 390, § 8; *Re Campbell*, 3 Hughes, 276, 285. By § 8 of St. 1887, ch. 359 (24 St. 506), providing for the bringing of suits against the United States (see note, ch. 21, *post*), interested parties may testify, and any plaintiff or party in interest may be examined as a witness on the part of the government. The anti-polygamy act of 1887 (24 St. 635) allows the accused, with the consent of the husband or wife, to testify as to communications not deemed confidential at common law. 20 St. 30, ch. 37, provides —

“That in the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offences, and misdemeanors, in the United States courts, Territorial courts, and courts-martial, and courts of inquiry, in any State or Territory, including the District of Columbia, the person so charged shall, at his own request but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him.”

SECT. 858. — See notes, §§ 1079, 1977. This section does not apply to courts of a Territory, as such courts are not courts of the United States (*Clinton v. Englebrecht*, 13 Wall. 434; *Hornbuckle v. Toombs*, 18 Id. 648; *Good v. Martin*, 95 U. S. 90; *Bridges v. Armour*, 5 How. 91), but does apply to the District of Columbia. *Noerr v. Brewer*, 1 McArthur, 507; *Page v. Burnstine*, 102 U. S. 664. It does not apply to the Court of Claims. *Jones v. United States*, 1 Ct. Cl. 383. There is no ground for the suggestion that §§ 721, 858, and 914 relate to the competency of a witness rather than to the nature and principles of evidence. *Insurance Co. v. Trust Co.*, 112 U. S. 255. This section applies to trials in which the United States is a party. *Green v. United States*, 9 Wall. 655; but see *Jones v. United States*, 1 Ct. Cl. 383. It is remedial, and its language should be construed accordingly. *Texas v. Chiles*, 21 Wall. 488. A party may testify either orally or by deposition. *Cornett v. Williams*, 20 Wall. 226. This section applies where a party offers to testify in his own behalf. *Texas v. Chiles*, 21 Wall. 488; *Railroad Co. v. Pollard*, 22 Id. 341. A bill in equity for a discovery merely is unnecessary, as a party may be examined as a witness. *Heath v. Erie R. Co.*, 9 Blatch. 316. This statute has not changed the rule by which the admissions of a party may be given in evidence as independent testimony, though he was sworn as a witness, and no impeaching questions were put. *The Stranger*, Brown's Adm. 281. It does not allow a wife to testify in favor of her husband (*Wooster v. Hill*, 22 F. R. 830; *Lucas v. Brooks*, 18 Wall. 453), except where a State statute allows it. *Packet Co. v. Clough*, 20 Wall. 537. In an action in which husband and wife are defendants, she not being a necessary party, he may testify in favor of any interest of hers, but not against it. *Green v. Taylor*, 3 Hughes, 400. This section allows a husband to testify for his wife (*Re Campbell*, 3 Hughes, 276), unless State laws forbid it. *Witters v. Sowles*, 24 Blatch. 87; 28 F. R. 218. A lawyer cannot testify as to confidential communications, although a State statute allows it. *Life Ins. Co. v. Schaefer*, 94 U. S. 457. But see *Packet Co. v. Clough*, 20 Wall. 537; *Insurance Co. v. Trust Co.*, 112 U. S. 255; *Rice v. Martin*, 8 F. R. 476. It does not allow persons convicted of an infamous crime to testify where the State law does not allow it. *United States v. Barefield*, 23 F. R. 136. It does not adopt State laws as to the examination of witnesses in suits in equity (*Pennsylvania R. Co. v.*



Allegheny V. R. Co., 25 F. R. 115); but although a State statute providing that a party to the record, when called by the adverse party, may be examined as though under cross-examination, does not apply in United States courts in suits in equity, yet as, under this section, the parties to a suit are admissible to testify for themselves and compellable to testify for the others, the testimony is admissible, and such effect is to be given it as if they had been called generally by the party. *Dravo v. Fabel*, 25 F. R. 116. In certain cases of necessity an interested party is allowed to testify, as where he is an informer of stolen property and entitled to a part of the penalty (*United States v. Murphy*, 16 Pet. 203); or to testify as to the contents of a trunk, lost or destroyed (*United States v. Clark*, 96 U. S. 37); and the evidence of interested witnesses can be given by deposition. *Cornett v. Williams*, 20 Wall. 226; *Railroad Co. v. Pollard*, 22 Id. 341.

*"In any civil action."* — This includes actions at law, suits in chancery, proceedings in admiralty, and all other judicial controversies in which rights of property are involved, whether between private parties, or such parties and the government. *United States v. Cigars*, Woolw. 123; *Rison v. Cribbs*, 1 Dillon, 181. See also note, § 739 (p. 212, *ante*).

*"Because he is a party to or interested in the issue tried."* — See *Potter v. National Bank*, 102 U. S. 164, as to the two classes here referred to. No witness can be excluded on the ground of interest, except in cases within the *proviso*. *Rice v. Martin*, 7 Sawyer, 337; 8 F. R. 476.

*"Provided," &c.* — For cases as to the admissibility of testimony concerning transactions with deceased persons, see note to *Life Ins. Co. v. Watson*, 30 F. R. 653. The proviso applies only to parties to the record, and does not exclude parties interested in a suit, but not parties to the record. *Berry v. Sawyer*, 19 F. R. 286; *Potter v. National Bank*, 102 U. S. 163; *King v. Worthington*, 104 Id. 50. It does not exclude the testimony of the defendant executor, on an inquiry incidental to taking an account, and not upon an issue which is the subject of a decree. *Charlotte, Duchesse d'Auxy v. Soutter*, 28 F. R. 733. It does not exclude testimony of a defendant as to transactions with the deceased, in a suit by a widow and minor children. *Crawford v. Moore*, 28 F. R. 830; *Life Ins. Co. v. Watson*, 30 Id. 653. In a bill for an interpleader between an administrator and an assignee of the fund in dispute, such assignee is incompetent to testify (*Life Ins. Co. v. Watson*, 30 F. R. 653; and see note 1, on this case); but where the assignee is the real defendant, he may testify. *Monongahela Bank v. Jacobus*, 109 U. S. 277. In a suit by an administrator for the annulment of a contract, the defendant cannot testify as to transactions and conversations with the deceased. *R. I. Trust Co. v. Hazard*, 6 F. R. 119, 125. This proviso does not exclude the testimony of a creditor seeking to prove against the estate of a deceased bankrupt, as to transactions with the deceased (*Re Merrill*, 9 Ben. 165); and does not apply to suits by or against assignees in bankruptcy. *Hobbs v. McLean*, 117 U. S. 579. It does not exclude the testimony of a defendant where an action begun by a party whose deposition is taken is continued by his administrator (*Mumm v. Owens*, 2 Dillon, 475; see *Jerman v. Stewart*, 12 F. R. 275); nor the testimony of a partner as to transactions with a deceased partner. *Rice v. Martin*, 8 F. R. 476; 7 Sawyer, 337. A deposition of the complainant in a chancery case is admissible on the trial of the case by his administrator. *Vattier v. Hinde*, 7 Pet. 252; *Sheidley v. Aultman*, 18 F. R. 666. A wife was compelled to testify against her husband in a suit against him as executor, in *Witters v. Sowles*, 28 F. R. 218. Where an administrator is a party, the opposite party is not competent to testify unless called by the administrator, or required to testify by the court. *James v. Atlantic Delaine Co.*, 3 Cliff. 614. The opposite party is that party against whom the evidence is sought to be used. *Eslava v. Mazange*, 1 Woods, 623.

*"Or required to testify thereto by the court."* — An *ex parte* order obtained by the complainant before process issued for his own examination does not qualify him within this



clause, which was inserted to provide for extreme and special cases which might arise, in which it would be a great hardship not to take it. It is for the court to suggest that a party be called in special cases. *Eslava v. Mazange*, 1 Woods, 623. The court will not require a person to testify where the State law forbids it. *Robinson v. Mandell*, 3 Cliff. 169.

"*In all other respects*," &c.—This refers to the proviso which immediately precedes it, and not to the main provision of the section, as limited by the proviso. Hence, State laws which exclude witnesses on account of their color or affect the competency of parties as witnesses, do not govern. *Rice v. Martin*, 8 F. R. 476, 483, 484. State statutes which authorize the examination of a party to a suit when he is called by his adversary, as if under cross-examination, do not apply to suits in equity in the Federal courts. Such suits are not within § 721 or § 914. The provisions of this section cover the whole subject of the examination of parties to a suit. *Pennsylvania R. Co. v. Allegheny V. R. Co.*, 25 F. R. 115. If a party offered as a witness is competent under the statutes of the United States, the fact that he is incompetent under the laws of the State does not disqualify him from testifying in the Federal courts in such State. *Crawford v. Moore*, 28 F. R. 824.

SECT. 860.—This section is repealed so far as it is inconsistent with the act of June 22, 1874, (see notes §§ 2837, 3090). *United States v. Distillery*, 6 Biss. 486; *United States v. Three Tons of Coal*, Id. 388. But the act of 1874 could not apply to cases begun before the passage of that act (*United States v. Hughes*, 12 Blatch. 553); and the act of 1874 is unconstitutional and void as applied to suits for penalties or to establish a forfeiture of the parties' goods. *Boyd v. United States*, 116 U. S. 616. This section obliges a witness, in any case not against himself, to answer all questions, as any information thus obtained cannot be used in any criminal prosecution against him; and the Fifth Amendment applies only to criminal prosecutions against the witness. *United States v. McCarthy*, 18 F. R. 87; 21 Blatch. 469; *United States v. Brown*, 1 Sawyer, 536. In an action under § 4965 for penalty and forfeiture, the defendant cannot be compelled to give evidence against himself. *Johnson v. Donaldson*, 3 F. R. 22. The books and papers of a party taken from him are competent evidence against him. *United States v. Myers*, 1 Hughes, 533; *United States v. Hughes*, 12 Blatch. 553; *Barnes v. United States*, 21 Int. Rev. Rec. 212. But see *Boyd v. United States*, 116 U. S. 616.

SECT. 861.—Every action at law in a United States court must, as to the mode of proof, come within the rule provided by this section or within some one of the exceptions following; State rules can make no exceptions either under § 721 or § 914. *Ex parte Fisk*, 113 U. S. 713, 724, overruling *Fogg v. Fisk*, 22 Blatch. 30; *McLennan v. Kansas City R. Co.*, 22 F. R. 198; *Beardsley v. Littell*, 14 Blatch. 102; *Colgate v. Compagnie du Telegraphe*, 23 Id. 88. A State statute permitting a party to a suit to be examined by his adversary as a witness at any time previous to the trial in an action at law is in conflict with this section, and has no force in a United States court even though the examination was begun before a removal into the United States court. *Ex parte Fisk*, 113 U. S. 713; *Easton v. Hodges*, 7 Biss. 324. This section means the production of the witness before the court at the time of the trial and his oral examination then; and does not mean proof by reading depositions, though these depositions may have been taken before a judge of the court, or even in open court, at some other time than during the trial. *Ex parte Fisk*, *supra*; *Beardsley v. Littell*, 14 Blatch. 104. It does not refer to discovery, whether by bill or interrogatory, and interrogatories authorized by a State statute may be filed in a United States court in lieu of a bill of discovery. *Bryant v. Leyland*, 6 F. R. 125; but see *Ex parte Fisk*, *supra*.

SECT. 862.—The apparent assumption by the court, conformed to in practice by the profession for thirty years, that the act of 1842 gave power to control the whole subject



of the mode of proof in equity and admiralty causes, without reference to existing statutes, rules having been provided for the purpose, was regarded by the revisers as settling a practice to disturb which would have the effect of proposing a new rule of law. 1 Com. D. 481.

Cases in equity go to the United States Supreme Court from the circuit courts, and the district courts sitting as circuit courts, by appeal, and not by writ of error. Rev. Stats. § 692. They are heard upon the proofs sent up with the record from the court below, and no new evidence can be received in the United States Supreme Court. Rev. Stats. § 698. So much of the Judiciary Act of 1789 as relates to the oral examination of witnesses in open court in causes in equity was not expressly repealed until the adoption of the Rev. Stats. § 862. While the United States Supreme Court does not say that, even since Rev. Stats. § 862, the circuit courts may not in their discretion, under the operation of existing rules, permit the examination of witnesses orally in open court upon the hearing of cases in equity, it does say they are not now by law required to do so; and that, if such practice is adopted in any case, the testimony presented in that form must be taken down, or its substance stated in writing and made part of the record, or it will be entirely disregarded in the United States Supreme Court upon appeal. If testimony is objected to and ruled out, it must still be sent to the United States Supreme Court with the record, subject to objection, or the ruling will not be considered. A case will not be sent back to have the rejected testimony taken, even though this court might on examination be of opinion that the objection ought not to have been sustained; and § 914 has no application to suits in equity. *Blease v. Garlington*, 92 U. S. 1. See also act of Feb. 16, 1885, stated in § 631.

SECT. 863. — The words "as either may be nearest," in the 16th line, were added by the Revision. 1 Com. D. 481. Depositions of witnesses in a foreign country cannot be taken under this section, but should be by commission (*Cortes Co. v. Tannhauser*, 18 F. R. 667; 21 Blatch. 552; *Stein v. Bowman*, 13 Pet. 209); they may, however, under § 863 with § 1750. *Bischoffsheim v. Baltzer*, 10 F. R. 1; 20 Blatch. 232. An *ex parte* deposition may be taken out of the district in which the trial is held. *Patapsco Ins. Co. v. Southgate*, 5 Pet. 615, overruling *Evans v. Hettick*, 3 Wash. 417. From the time an appeal is perfected a case is no longer "depending" in a circuit court (*Richter v. Jerome*, 25 F. R. 681; *Slaughter-House Cases*, 10 Wall. 273); and this section has no application to cases pending in the Supreme Court. *The Argo*, 2 Wheat. 287; *Richter v. Jerome*, 25 F. R. 681. It is construed strictly. *Bell v. Morrison*, 1 Pet. 351; *Harris v. Wall*, 7 How. 693; *Shutte v. Thompson*, 15 Wall. 151. Depositions taken otherwise than as provided by law cannot be received in evidence if properly objected to. *Evans v. Hettick*, 3 Wash. 408. This is true, even since § 914, because the whole subject of evidence is here provided for. *Ex parte Fisk*, 113 U. S. 713. The facts calling for the exercise of the authority of the magistrate should appear on the face of the instrument, and not be left to parol proof. *Harris v. Wall*, 8 How. 693. *Ex parte* depositions should never be allowed unless absolutely necessary, except in cases of mere formal proof or on some isolated fact. *Walsh v. Rogers*, 13 How. 283; *Merrill v. Dawson*, Hempst. 563. The cases on *ex parte* depositions under the act of 1789 do not control depositions taken under notice pursuant to the act of 1872. Under the act of 1789 rigid compliance with the requirements of the statute was necessary. *Egbert v. Citizens' Ins. Co.*, 2 McCrary, 386. A party may waive informalities, and a waiver may be presumed from circumstances. *Shutte v. Thompson*, 15 Wall. 151. For cases where objections have been held to be waived, see *Shutte v. Thompson*, 15 Wall. 151; *York Co. v. Railroad Co.*, 3 Id. 113; *United States v. One Case of Hair Pencils*, 1 Paine, 400; *Buddicum v. Kirk*, 3 Cranch, 293; *Rich v. Lambert*, 12 How. 354. Depositions taken *de bene esse*, and without notice to the opposite party, in suits at common law are not admissible on the trial



of feigned issues out of equity, unless the same were sent down with the record of the issues framed on the equity side of the court. *Cahoon v. Ring*, 1 Cliff. 592. A party who has initiated proceedings to take a deposition *de bene esse*, has no power, after a witness has been examined in chief and an adjournment taken, to withdraw the proceedings, and a party in interest may by attachment compel such witness to appear and submit to cross-examination. *Re Rindskopf*, 24 F. R. 542. Depositions taken during the session of the court with or without notice are inadmissible except by order of the court or consent of parties, although the witness lives more than one hundred miles from the place of trial. *Allen v. Blunt*, 2 Wood. & M. 136. See also, *Bell v. Nimmon*, 4 McLean, 539. The mode of taking depositions under §§ 863, 864, 865 is by oral questions put at the time, if desired, and not necessarily by written interrogatories given to the officer before commencing the taking. *Bischoffsheim v. Baltzer*, 10 F. R. 1. But where the right to take a deposition exists under a Federal statute, then, as to the mere mode of procuring the deposition, parties may follow at their election either the provisions of the State law or the acts of Congress; they may be taken upon written interrogatories duly served according to the State statute and in the mode therein provided, as well as in the manner provided for in the acts of Congress. *Flint v. Comm'rs*, 5 Dillon, 481; *McLennan v. Kansas City R. Co.*, 22 F. R. 198; *contra*, *Sage v. Tauszky*, 6 Cent. L. J. 7. But the production of books and writings must be enforced according to modes of procedure not deriving their origin from State statutes or practice. See § 724; *Easton v. Hodges*, 7 Biss. 327. *Quære*, whether § 914 applies to the subject of evidence, either as to its character or competency, or the mode of taking it. *Per Blatchford, J.*, in *Beardsley v. Littell*, 14 Blatch. 105. A United States circuit court sitting in a State where by State laws depositions of witnesses can be taken only on commission, can authorize commissions to take depositions of witnesses to be issued, executed and returned, in the manner and subject to the regulations prescribed by the laws of such State; and the restrictions limiting the use of depositions taken *de bene esse* do not apply. *Warren v. Younger*, 18 F. R. 859; but see *Randall v. Venable*, 17 F. R. 162; *Ex parte Fisk*, 113 U. S. 713. A deposition taken under a rule of court and executed by a justice of the peace may be read, as § 30 of the Judiciary Act related to depositions taken without a rule of court. *Banert v. Day*, 3 Wash. 243; but now see *Ex parte Fisk*, 113 U. S. 713.

"*The testimony of any witness may be taken,*" &c. — The act does not require the deposition of such persons to be taken, and if they are present and testify, the full cost of their travel and attendance should be allowed in the costs. *Prouty v. Draper*, 2 Story, 199. Costs of depositions of witnesses living more than 100 miles distant can be taxed, where the witness is produced by the other side at the trial (*Hunter v. Improvement Co.*, 24 Blatch. 159; 28 F. R. 842); but otherwise if a party dispenses with a deposition he has had taken, and examines the witness before the jury. *Hathaway v. Roach*, 2 Wood. & M. 75. See also, note, § 828.

"*When the witness lives at a greater distance from the place of trial than one hundred miles.*" — A certificate that states that the place where a deposition is taken is more than 100 miles from the place of residence is bad; and parol evidence cannot be given to show that the witness lived more than 100 miles from the place of trial, and that that was the cause of taking the deposition. *Wheaton v. Love*, 1 Cranch C. C. 451. But an averment that the adverse party and his counsel resided at the city of Washington, upwards of 100 miles from the place of taking the deposition, was a sufficient averment that the adverse party and his attorney were at the time more than 100 miles distant. *Banks v. Miller*, 1 Cranch C. C. 543. The distance need not appear in the deposition, but may be proved at the trial. *Voce v. Lawrence*, 4 McLean, 203. It must affirmatively appear that the witness's place of residence was more than 100 miles from the place of trial. *Dunkle v. Worcester*, 5 Biss. 102; *Dick v. Runnels*, 5 How. 7. The witness



must reside more than 100 miles away at the time the deposition is taken. *Curtis v. Railway Co.*, 6 McLean, 401; *Dreskill v. Parish*, 5 Id. 241. The deposition of a witness casually absent from his home, which is within 100 miles of the place of trial of the cause, cannot be taken unless he is about going to sea, or is aged, infirm, &c. *Ex parte Humphrey*, 2 Blatch. 228. Residence of the witness without the district need not be shown, either by certificate or deposition (*Sage v. Tauszky*, 6 Cent. L. J. 7); and depositions can be taken without the district. *Patapsco Ins. Co. v. Southgate*, 5 Pet. 604. The liability of a seaman to be ordered out of the reach of the court is not a sufficient cause for taking a deposition *de bene esse*. *The Samuel*, 1 Wheat. 16. A certificate that the witness was "about to depart the State" is not good. *Harris v. Wall*, 7 How. 693. The mere fact that a witness is 65 years of age is not of itself sufficient cause for his non-attendance. *Banert v. Day*, 3 Wash. 243.

"*Or any commissioner of a circuit court.*"—A commissioner of a district court is qualified to take a deposition under this section when such district court has the power of a circuit court. *Whitney v. Hunt*, 5 Cranch C. C. 120. The certificate of the person that he is such a commissioner is sufficient, and his appointment need not be authenticated by the record. *Whitney v. Hunt*, *supra*; *s. p. Vasse v. Smith*, 2 Cranch C. C. 31; *Ruggles v. Bucknor*, 1 Paine, 358. The certificate of the presiding judge is necessary to the certificate of the clerk that a commissioner whose appointment is made a matter of record, is duly appointed. *Tooker v. Thompson*, 3 McLean, 92.

"*Mayor or chief magistrate of a city.*"—A deposition taken before a mayor of a city, who usually certifies his acts under his official seal, must be so certified, or his authority otherwise proved. *Paul v. Lowry*, 2 Cranch C. C. 628. But if the deposition is certified by him as mayor without a seal it is *prima facie* good. *Price v. Morris*, 5 McLean, 4. A township justice is not authorized to take depositions. *Shutte v. Thompson*, 15 Wall. 151.

"*Judge of a county court.*"—A judge of probate is a "judge of a county court." *Fowler v. Merrill*, 11 How. 393; *Merrill v. Dawson*, Hempst. 563. The County Commissioner's court of Illinois was not one of the courts included in the act of 1789. *Garey v. Union Bank*, 3 Cranch C. C. 91. A judge of a county court may take a deposition in any county in the State. *Voce v. Lawrence*, 4 McLean, 204.

"*Or any notary public.*"—A deposition may be before a notary public, and the certificate and seal of a notary are sufficient proof of his authority to act as such (*Dinsmore v. Maroney*, 4 Blatch. 416); but a notary public of a foreign country is not empowered to take depositions under this section. *Cortes Co. v. Tannhauser*, 18 F. R. 667. See *Bischoffsheim v. Baltzer*, 10 Id. 1.

"*Not being of counsel or attorney to either of the parties, nor interested in the event of the cause.*"—The certificate of the officer taking the deposition should state that he is not of counsel, or attorney to either of the parties, nor interested in the event of the cause. *Gartside Coal Co. v. Maxwell*, 20 F. R. 187; *Donahue v. Roberts*, 19 Id. 863; *contra*, *Miller v. Young*, 2 Cranch C. C. 53; *Peyton v. Veitch*, Id. 123.

"*Reasonable notice.*" &c.—Under § 30 of Judiciary Act of 1789, no notice was necessary where neither the party nor his attorney was within 100 miles. *Dick v. Runnels*, 5 How. 7; *Merrill v. Dawson*, Hempst. 563; 11 How. 393. If the deposition was taken without notice, the other party might have it taken again. *Goodhue v. Bartlett*, 5 McLean, 186. The notice need not state that the place where the deposition will be taken is more than 100 miles from the place of trial, if it is so in fact, and all the parties are well informed of it. *Egbert v. Citizens' Ins. Co.*, 7 F. R. 47. Notice is essential. *Dick v. Runnels*, 5 How. 7. If depositions are to be taken against the United States, notice must be given to its attorney. *The Argo*, 2 Gall. 314. If an attorney has acted publicly in a cause, and is still employed therein, notice should be given him though his name does not appear on the record. *Allen v. Blunt*, 2 Wood. & M. 121.



The notice may be served by delivering to the party a copy, or by leaving one at his dwelling-house or usual place of abode with a member of, or person resident in his family. *Merrill v. Dawson*, Hempst. 563; *contra*, *Carrington v. Stimson*, 1 Curtis, 437. The service of notice should be certified by the magistrate as well as the marshal. *Harris v. Wall*, 7 How. 693. A notice not containing the name of the person whose deposition is to be taken is bad. *Carrington v. Stimson*, *supra*. Where the notice was that the witness was about to "depart the State," and a certificate of reasons was omitted, it could not be proved at the trial that the witness was about to go out of the United States. *Harris v. Wall*, *supra*. The notice need not state the reason for taking it. *Debutts v. McCulloch*, 1 Cranch C. C. 286. A notice was held good although not containing "to put interrogatories if he should think fit" (*Bussard v. Catalino*, 2 Cranch C. C. 421), or although a word is accidentally omitted from the caption. *Bussard v. Catalino*, *supra*. A deposition will not be suppressed because taken at a different place from the one named in the notice, if taken in the presence of both parties or their representatives. *Gartside Coal Co. v. Maxwell*, 20 F. R. 187. A certificate that neither the adverse party nor his attorney lived within 100 miles was sufficient, and it was not necessary for him to state that they were not actually within 100 miles. If they had been temporarily within 100 miles, and the officer or party did not know it, the certificate would have been good; but otherwise, if either the magistrate or party knew of such facts. *Dick v. Runnels*, 5 How. 9. In an action against three persons, where one only is arrested, a deposition was inadmissible under the act of 1789, where the magistrate certified that no notice was given to the defendant arrested because he was not within 100 miles of the place of caption, but where the other two defendants were within 100 miles. *Brown v. Piatt*, 2 Cranch C. C. 253. The requirements as to previous notice are not necessary if notice was in fact served, and the adverse party appears by counsel and cross-examines the witness. *Dinsmore v. Maroney*, 4 Blatch. 416. Objections to the competency of a witness known at the time of taking the deposition by the party attending, and not then made by him, are deemed to be waived by him; but otherwise, if the facts constituting the objection were not then known. *United States v. One Case of Hair Pencils*, 1 Paine, 400. So also objections in regard to previous notice are waived, if a notice was in fact served, and the adverse party appears and cross-examines the witness. *Dinsmore v. Maroney*, 4 Blatch. 416.

When the notice was that the deposition would be taken within designated hours, it was not irregular to proceed before the arrival of the last hour named. *House v. Cash*, 2 Cranch C. C. 73. Where the notice was that depositions would be taken on a day named, and that the taking would be adjourned from day to day until completed, it was held that the notice was good, and covered adjournments from day to day. *Knobe v. Williamson*, 17 Wall. 586. A notice without date that depositions will be taken on a day named, no year being given, in the city of G., does not cover a deposition taken in the town of G., it not appearing that the town and city were the same, and the opposing party not having attended. *Id.* In the absence of special circumstances, one hour's notice to the opposite party's attorney was held to be reasonable, all the parties residing in the same place. *Leiper v. Bickley*, 1 Cranch C. C. 29; *Nicholls v. White*, *Id.* 58. A notice, served at noon, for the taking of a deposition between four and six o'clock of the same day, was held not reasonable, no circumstances being shown why longer notice might not have been given. *Renner v. Howland*, 2 Cranch C. C. 441. Notice given at Washington, December 31, of the taking of a deposition on January 2 following, at Baltimore, was held not reasonable. *Barrell v. Simonton*, 3 Cranch C. C. 681. Where the deposition was to be taken in the place where the parties resided, between nine and two o'clock, and notice was served at half-past eight o'clock the same day, it was held not reasonable. *Irving v. Sutton*, 1 Cranch C. C. 567.



"Any person may be compelled to appear and depose," &c. — This refers to the instrumentalities for compelling the attendance and testimony of witnesses; it includes the *subpœna ad testificandum*, the *subpœna duces tecum*, and the writ of *habeas corpus ad testificandum*; and therefore a witness can be compelled to produce books and papers in his possession which would be material and competent evidence for the party calling him, upon the trial of the cause, but he cannot be compelled to produce his books and papers merely for the purpose of refreshing his memory; and before granting an attachment, on the refusal of a person to answer questions, such facts must be shown. *Ex parte* Peck, 3 Blatch. 113; *United States v. Tilden*, 10 Ben. 576. The power of compulsion is in the person taking the deposition under this section. *Re* Humphrey, 2 Blatch. 228; *Ex parte* Peck, 3 Id. 113; *Ex parte* Judson, Id. 89; *United States v. Tilden*, *supra*. The procedure of issuing the *subpœna duces tecum* is not governed by the State practice, as § 914 does not apply to depositions *de bene esse*. *Beardsley v. Littell*, 14 Blatch. 102; *United States v. Tilden*, 10 Ben. 579; but see *Re* Rindskopf, 24 F. R. 542; 23 Blatch. 302. In determining the propriety of compelling a witness to answer, the court will apply the same rules as are applicable on the examination of witnesses on the trial of a cause. *Re* Judson, 3 Blatch. 148. A commissioner cannot issue a writ of *habeas corpus* to take a person from jail for the purpose of giving his deposition before such commissioner. *Ex parte* Barnes, 1 Sprague, 133. The court where the trial is to be had cannot issue a *subpœna* to a witness distant more than 100 miles, commanding him to appear and testify before an officer in his district. *Henry v. Ricketts*, 1 Cranch C. C. 580; *Ex parte* Peck, 3 Blatch. 113.

SECT. 864. — "Every person deposing, as provided in the preceding section, shall be cautioned and sworn to testify the whole truth, and carefully examined." — If the magistrate certifies that the deponent was carefully examined, and cautioned and sworn to speak the whole truth, it will be inferred that he was so examined, cautioned, and sworn by the magistrate who took the deposition. *Edmondson v. Barrell*, 2 Cranch C. C. 228. The deponent must be "cautioned," as well as sworn. *Luther v. The Merritt Hunt*, Newb. 4; *contra*, *Brown v. Piatt*, 2 Cranch C. C. 253; *Moore v. Nelson*, 3 McLean, 383. A certificate that he "was sworn in pursuance of the act" is sufficient, although it does not say that he was cautioned. Id. He may be sworn before or after the deposition. *Tooker v. Thompson*, 3 McLean, 92. An affirmation is good if it is certified that the witness was conscientiously opposed to taking an oath. *Elliot v. Hayman*, 2 Cranch, C. C. 678. As to the form of the oath the law of the State controls. *Wilson Sewing Machine Co. v. Jackson*, 1 Hughes, 295. The certificate should show that the deponent was carefully examined, cautioned, and sworn to testify to the whole truth. *Pentleton v. Forbes*, 1 Cranch C. C. 507; *Garrett v. Woodward*, 2 Id. 190. He must be sworn to testify the "whole truth" on the entire subject-matter of the deposition, and not merely the whole truth in response to each of the interrogatories. *Wilson Sewing Machine Co. v. Jackson*, 1 Hughes, 295. It is not sufficient that the deponent is sworn to testify "to the truth," but he must be sworn to testify "to the whole truth." *Shutte v. Thompson*, 15 Wall. 151; *Rainer v. Haynes*, Hempst. 689. It is not sufficient to certify that the deponent was cautioned, &c., to testify the truth concerning all the matters touching which he should be questioned, although one of the questions was, "If you know anything further, material to plaintiff or defendant in the cause, mention it, and conceal nothing." *Garrett v. Woodward*, 2 Cranch C. C. 190. The deponent need not be sworn to testify to the whole truth "in the matter in controversy." *Bussard v. Catalino*, 2 Cranch C. C. 421.

"His testimony shall be reduced to writing," &c. — The omission by the magistrate to certify that he reduced the testimony to writing himself, or that it was done by the witness in his presence, is fatal. *Cook v. Burnley*, 11 Wall. 659; *United States v. Smith*, 4 Day, 126; *Bell v. Morrison*, 1 Pet. 355; *contra*, *Bussard v. Catalino*, 2 Cranch C. C. 421,



Such facts will not be presumed, but must clearly appear from the certificate. *Bell v. Morrison*, *supra*. The magistrate must certify that he reduced it to writing in the presence of the witness. *Donahue v. Roberts*, 19 F. R. 863; *contra*, *Vasse v. Smith*, 2 Cranch C. C. 31; *Van Ness v. Heineke*, Id. 259; *Centre v. Keene*, Id. 198. The objection that the magistrate does not certify that the deposition was signed by the witness in the presence of the magistrate, is not fatal. *Van Ness v. Heineke*, *supra*; *Centre v. Keene*, *supra*. The deposition must be reduced to writing by the magistrate or the deponent, and not by any other person. *Marstin v. McRae*, Hempst. 688; *Rainer v. Haynes*, Id. 689. A certificate by the magistrate that it was reduced to writing in his presence, without saying by whom, is not good. *United States v. Smith*, 4 Day, 121. If the deponent reduce it to writing, the magistrate must certify that it was reduced to writing by the deponent in the presence of the magistrate (*Edmonson v. Barrell*, 2 Cranch C. C. 228; *Rainer v. Haynes*, Hempst. 690; *Pettibone v. Derringer*, 4 Wash. 215; *Elliott v. Piersol*, 1 Pet. 335; *Cook v. Burnley*, 11 Wall. 659); but in *Vasse v. Smith*, 2 Cranch C. C. 31, this fact was allowed to be proved. If the magistrate certifies that it was reduced to writing by the witness and himself, it is sufficient. *Bussard v. Catalino*, 2 Cranch C. C. 421. But see *Cook v. Burnley*, 11 Wall. 659; *Donahue v. Roberts*, 19 F. R. 863. A certificate that the deposition which is signed by the witness was reduced to writing by the magistrate is sufficient, although the certificate does not say it was signed by the witness. *Voce v. Lawrence*, 4 McLean, 203. In *Burton v. Simmons*, 2 Cranch C. C. 195, a deposition was rejected because the magistrate certified that the form (not "the same," which were the words of 1 St. 73) was reduced to writing. A deposition taken by other persons than those named in the commission cannot be read, although offered merely to prove a pedigree. *Banert v. Day*, 3 Wash. 243. A deposition taken under a rule of court, as in the State practice, was admitted, although it did not appear by whom the deposition was written. *Wilkinson v. Yale*, 6 McLean, 16. But see now *Ex parte Fisk*, 113 U. S. 724.

If the certificate discloses that the person who took the deposition was an officer authorized to act, further proof of his official character need not be made. *Price v. Morris*, 5 McLean, 4; *Winter v. Simonton*, 3 Cranch C. C. 104; *Ruggles v. Bucknor*, 1 Paine, 358. The certificate is *prima facie* evidence of the person's authority. *Jasper v. Porter*, 2 McLean, 579. If the officer usually attaches his official seal, a certificate is not good unless a seal is affixed. *Paul v. Lowry*, 2 Cranch C. C. 628. And authority to act may be proved by parol. Id.; *Dunlop v. Munroe*, 1 Cranch C. C. 536. The deposition must be certified by the magistrate. *Harris v. Wall*, 7 How. 693. All facts must appear in the certificate, and there are no presumptions in their favor. *Bell v. Morrison*, 1 Pet. 351; *Jones v. Knowles*, 1 Cranch C. C. 523; *The Thomas*, 1 Brock. 367; *Harris v. Wall*, 7 How. 693; *Luther v. The Merritt Hunt*, Newb. 4; *Thorpe v. Simmons*, 2 Cranch C. C. 195. The certificate is good evidence and *prima facie* proof. *Bell v. Morrison*, 1 Pet. 351; *Patapsco Ins. Co. v. Southgate*, 5 Pet. 604. Where the certificate fails to state certain facts, the deposition may be withdrawn so as to have the certificate amended. *Gartside Coal Co. v. Maxwell*, 20 F. R. 187; *Donahue v. Roberts*, 19 Id. 863. The certificate should state the precise caption. *Pentleton v. Forbes*, 1 Cranch C. C. 507. In the caption the county need not be named. *Van Ness v. Heineke*, 2 Id. 259. Naming the place where the deposition is taken in the caption is sufficient. *Tooker v. Thompson*, 3 McLean, 92. The court in which the case is pending should be named. *Van Ness v. Heineke*, 2 Cranch C. C. 259. So should the names of the parties to the suit. *Peyton v. Veitch*, 2 Cranch C. C. 123; *Centre v. Keene*, Id. 198; *Smith v. Coleman*, Id. 237; *Waskern v. Diamond*, Hempst. 701; *Allen v. Blunt*, 2 Wood. & M. 121; *Buckingham v. Burgess*, 3 McLean, 368. The certificate should state whether the parties were or were not present. *Curtis v. Railway Co.*, 6 McLean, 401. An objection that the name of one of the parties is misspelled, is



not fatal. *Van Ness v. Heineke*, 2 Cranch C. C. 259. The deposition may be read, although entitled in the case against one defendant alone. *Pannill v. Eliason*, 3 Id. 358. In the caption the parties may be named “A. *et al.*, plaintiffs, and B. *et al.*, defendants.” *Egbert v. Citizens’ Ins. Co.*, 2 McCrary, 386. The omission of the name of a defendant from the caption, when it appears in the commission and proceedings, is not fatal. *Merrill v. Dawson*, Hempst. 563. Stating in the body of the deposition “A., the above plaintiff,” when the plaintiff, as appears by the title, is “V,” is no error. *Voce v. Lawrence*, 4 McLean, 205. The omission of the word “resides” in the certificate cannot be supplied by the court, when the reason for taking the deposition was that the witness resided more than one hundred miles from the place of trial. *Dunkle v. Worcester*, 5 Biss. 102. The certificate should state that the magistrate is not of counsel nor attorney for either of the parties. *Gartside Coal Co. v. Maxwell*, 20 F. R. 187; *Donahue v. Roberts*, 19 Id. 863; *contra*, *Miller v. Young*, 2 Cranch C. C. 53; *Peyton v. Veitch*, Id. 123. Each item of costs before the magistrate must be certified by him. *Russell v. Ashley*, Hempst. 546. But costs of such depositions may be taxed when the other side procures the deponents’ attendance at the trial. *Hunter v. Railway Imp. Co.*, 28 F. R. 842; 24 Blatch. 159. Each interrogatory must be at least substantially answered. *Hurst v. M’Neil*, 1 Wash. 70; *Ketland v. Bissett*, Id. 144; *Winthrop v. Union Ins. Co.*, 2 Id. 7; *Bell v. Davidson*, 3 Id. 328; *Gilpins v. Consequa*, Id. 184; *Dodge v. Israel*, 4 Id. 323.

**SECT. 865.** — “*Every deposition taken under the two preceding sections shall be retained,*” &c. — If the magistrate does not retain the deposition until he delivers it into court, or seals it and directs it to court, it cannot be read. *Jones v. Neale*, 1 Hughes, 268. If he personally delivers it into court, he need not state any reasons for taking it. *United States v. Tilden*, 10 Ben. 170.

“*Or it shall be . . . sealed up.*” — If the deposition is taken by the clerk of the court, it need not be sealed up. *Nelson v. Woodruff*, 1 Black, 156. The magistrate need not certify that he delivered the deposition and certificate to the court, or that he sealed up and directed them to such court. *Egbert v. Citizens’ Ins. Co.*, 2 McCrary, 389; 7 F. R. 47. A certificate of the magistrate that he intended to seal the deposition, placed together with the deposition in an envelope sealed with two seals, over each of which the magistrate has signed his name, is sufficient. *Thorp v. Orr*, 2 Cranch C. C. 335. A deposition not sealed must be rejected; but it is sufficient if it bears the seal of an express company across which are written the names of the members of the commission. *Re Thomas*, 35 F. R. 337. The magistrate must certify that he retained the deposition until it was sealed and directed to the court. *Shankwiker v. Reading*, 4 McLean, 240.

“*And directed to such court.*” — A deposition directed to the judges of the court is good. *Thorp v. Orr*, 2 Cranch C. C. 335. So is one directed to the clerk of the court. *Whitney v. Hunt*, 5 Cranch C. C. 120. No notice of filing a deposition is necessary to a party who knows it has been taken. *Nelson v. Woodruff*, 1 Black, 156.

“*Remain under his seal until opened in court.*” — This section does not change the construction as to the time of opening depositions *de bene esse*. *United States v. Tilden*, 10 Ben. 170. A deposition opened out of court without the consent of the adverse party is inadmissible. *Beal v. Thompson*, 8 Cranch, 70; *Shankwiker v. Reading*, 4 McLean, 240; *The Roscius*, Brown Adm. 442. Consent to such opening should be shown by writing duly signed and filed, or indorsed on the deposition. *The Roscius*, *supra*. But it may be opened before the trial by order of the court upon motion of one party and against the objection of the other. *United States v. Tilden*, 10 Ben. 170. It may be taken from the files by leave of court and the magistrate’s certificate amended. *Leatherberry v. Radcliffe*, 5 Cranch C. C. 550.

“*Together with a certificate of the reasons as aforesaid of taking it.*” — There must be



a certificate of reasons. *Shutte v. Thompson*, 15 Wall. 158; *Sage v. Tauszky*, 6 Cent. L. J. 7; *Jones v. Neale*, 2 Mart. (N. C.) 81; *Harris v. Wall*, 7 How. 693; *Woodward v. Hall*, 2 Cranch C. C. 235; *Wheaton v. Love*, 1 Id. 451; *Jones v. Knowles*, Id. 523. Parol evidence is inadmissible to show a sufficient reason where the magistrate's certificate gives an insufficient reason. *Wheaton v. Love*, 1 Cranch C. C. 451. But parol evidence is admissible to show that a witness lives more than 100 miles away where the word "lives" is omitted in the certificate. *Dunkle v. Worcester*, 5 Biss. 102. A caption sufficiently shows the reason for taking the deposition when it states where the deposition was taken, without giving the distance to the place of trial, if such distance is known by the parties to be more than 100 miles. *Egbert v. Citizens' Ins. Co.*, 2 McCrary, 386; 7 F. R. 47.

"*And of the notice, if any, given to the adverse party.*" — Appending to the deposition the notice sent the party with the return of the marshal thereon is not certifying the notice. *Harris v. Wall*, 7 How. 693.

"*But unless it appears,*" &c. — The party objecting must show that the deponent is within 100 miles. *Russell v. Ashley*, *Hempst.* 546; *Patapsco Ins. Co. v. Southgate*, 5 Pet. 604. Depositions taken *de bene esse* cannot be used at the trial if the witness is actually attainable, and the party offering the deposition knew it, or ought to have known it. If the witness lives more than 100 miles away, no *subpœna* need be issued to secure his compulsory attendance. If he lived more than 100 miles away when his deposition was taken, it will be presumed that he continued to live there at the time of trial; but this presumption may be overcome by proof. *Penns v. Ingraham*, 2 Wash. C. C. 487; *Brown v. Galloway*, Pet. C. C. 291; *Pettibone v. Derringer*, 4 Wash. 215; *Russell v. Ashley*, *Hempst.* 546, 549; *Weed v. Kellogg*, 6 McLean, 44; *Whitford v. Clark Co.*, 119 U. S. 522. A deposition taken *de bene esse* can be read only when the witness himself is unattainable. *The Samuel*, 1 Wheat. 9; *Weed v. Kellogg*, 6 McLean, 44. The required diligence to procure the attendance of a witness is not shown by an affidavit of the plaintiff's agent that the former left the State before the action was begun with the intention of going to another State, and that the affiant had not since heard from him although he had made inquiries. *Stein v. Bowman*, 13 Pet. 209, 223. If the witness lives within 100 miles the party offering the deposition must prove that he has used due diligence to procure his attendance, and has made inquiries at his last and usual place of abode in order to have him served with a *subpœna*. *Pettibone v. Derringer*, 4 Wash. 215; *Read v. Bertrand*, Id. 558; *Jones v. Greenolds*, 1 Cranch C. C. 339; *Patapsco Ins. Co. v. Southgate*, 5 Pet. 604; *Banert v. Day*, 3 Wash. 243; *Penns v. Ingraham*, 2 Id. 487; *Park v. Willis*, 1 Cranch C. C. 357. Proof that the witness cannot attend personally may be given without issuing a *subpœna*. *Park v. Willis*, 1 Cranch C. C. 357; *Leatherberry v. Radcliffe*, 5 Id. 550. But see *Brown v. Galloway*, Pet. C. C. 291.

The appearance of the party or his attorney and the examination or cross-examination of the witness without protest or in silence are a waiver of objections to formal defects. *Shutte v. Thompson*, 15 Wall. 151; *Dinsmore v. Maroney*, 4 Blatch. 416. But the mere presence of the attorney is not a waiver. *Harris v. Wall*, 7 How. 693. By cross-examining a witness objections to his known incompetency are waived, but otherwise if unknown. *United States v. One Case*, 1 Paine, 400. Objection to formal defects must be made by motion to suppress before going to trial. *Claxton v. Adams*, 1 MacArthur, 496. It cannot be made after the cause is set down for hearing in a case on file three years (*Bank v. Travers*, 4 Biss. 507); nor after it has been read in evidence. *Brown v. Tarkington*, 3 Wall. 377. On depositions without notice, the court may grant a continuance for cross-examination, or may suppress. *Dade v. Young*, 1 Cranch C. C. 123; *Straas v. Insurance Co.*, Id. 343; *Barrell v. Simonton*, 3 Id. 681; *Allen v. Blunt*, 2 Wood. & M. 121. If suppressed, the case may be continued to allow taking another. *Moore v. Nelson*, 3 McLean,



383; *Luther v. The Merritt Hunt*, Newb. Adm. 4. A waiver of all objections operates as a waiver at a subsequent trial. *Edmondson v. Barrell*, 2 Cranch C. C. 228. Waiver of form and manner of taking it is not a waiver of its return. *Livingston v. Pratt*, Brown Adm. 66. A deposition once taken or admitted with the acquiescence of a party cannot afterwards be objected to. *Evans v. Hettich*, 7 Wheat. 453; *Sergeant v. Biddle*, 4 Id. 508; *Buddicum v. Kirk*, 3 Cranch, 293. See also § 866, as to waiver.

SECT. 866. — See note, § 847. This section applies to criminal cases (*United States v. Cameron*, 15 F. R. 794; *United States v. Wilder*, 14 Id. 393); to suits at law (*Peters v. Prevost*, 1 Paine, 64); and to suits in equity. *Bischoffsheim v. Baltzer*, 10 F. R. 1. In a foreign country depositions can be taken only under a commission. *Stein v. Bowman*, 13 Pet. 209. See *Bischoffsheim v. Baltzer*, *supra*. The examination must be under a commission although the witness has been previously examined under a commission here. *Winthrop v. Insurance Co.*, 2 Wash. C. C. 7. Depositions taken without a commission or rule of court, but conforming in all respects to § 30 of the Judiciary Act of 1789, may be read in evidence (*Pettibone v. Derringer*, 4 Wash. 215); and depositions may be taken after the expiration of a rule. *Buckingham v. Burgess*, 3 McLean, 368. Depositions in equity were allowed which did not follow certain rules of court in *Russell v. McLellan*, 3 Wood. & M. 161.

Section 866 should be strictly construed as being in derogation of the common law. No commission should be issued under it unless necessary to prevent a failure or delay of justice, and then only in accordance with common usage. *United States v. Parrott*, McAll. 456. A deposition taken under a *dedimus potestatem* according to common usage, whether the witness resides within the jurisdiction of the court or beyond it, is absolute, and can under no circumstances be regarded as taken *de bene esse*. *Sergeant v. Biddle*, 4 Wheat. 508. What is a failure or delay of justice is in the discretion of the court. *United States v. Cameron*, 15 F. R. 794; *Warren v. Younger*, 18 Id. 859. The residence of witnesses hundreds of miles away, and the inability of the party to bring them to the place of trial, were held to show the necessity for a *dedimus potestatem*; a deposition not being possible under § 863, as it was a criminal case. *United States v. Cameron*, *supra*. It was held that depositions under § 863 should not be allowed where they could be taken under a commission; that there was seldom any necessity for having recourse to *ex parte* testimony. *Walsh v. Rogers*, 13 How. 286. Depositions cannot be taken under this section if they can be taken under §§ 863, 864; nor can a *dedimus potestatem* be granted to take a defendant's deposition where the only object apparent in applying for it is to find out what he will swear to. *Turner v. Shackman*, 27 F. R. 183. A commission to take the deposition of a person about to leave the jurisdiction was refused, as the judge said it could be taken *de bene esse* under § 863. *Id.* But see *Warren v. Younger*, 18 F. R. 861; *Walsh v. Rogers*, 13 How. 286. The cases in which a *dedimus* may issue are prescribed by the Rev. Stats., and a commission may be allowed where the statute so provides, although the State statutes do not authorize it. *Jones v. Oregon R. Co.*, 3 Sawyer, 523. Depositions cannot be taken where the attendance of the witness can be enforced. *Rhoades v. Selin*, 4 Wash. 724. See note, § 876.

The usage is what was understood to be common usage when the act of 1789 was passed, but the usage may change. *United States v. Pings*, 4 F. R. 714. Common usage means the usage at common law, or under statutes of the State in which the trial is held. *Buddicum v. Kirk*, 3 Cranch, 293; *United States v. Cameron*, 15 F. R. 796; *Jones v. Oregon R. Co.*, *supra*; *Rhoades v. Selin*, 4 Wash. 723. Common usage, when reference is meant by that term to a suit in equity, refers to the practice in courts of equity. Under it the practice was to examine witnesses abroad by written interrogatories. *Bischoffsheim v. Baltzer*, 10 F. R. 1; *United States v. Parrott*, McAll. 447. It is not according to common usage to examine a party by written interrogatories before trial.



*Ex parte Fisk*, 113 U. S. 713. Common usage cannot be established by a State statute, so as to permit the deposition of the defendant which is not permissible under § 863. *Turner v. Shackman*, 27 F. R. 183. A deposition is not taken according to common usage where the attorney for one party writes down the answers for the commissioner in the absence of the other party or his attorney. *United States v. Pings*, 4 F. R. 714, not following *Nicholls v. White*, 1 Cranch C. C. 58; *Atkinson v. Glenn*, 4 Id. 134.

In common-law actions where depositions may be taken under the acts of Congress, the parties may follow, in respect to the manner of taking them, either the provisions of the State law or of the act of Congress, as they may elect, where the provisions of the State do not conflict with any special provision of the acts of Congress (*Flint v. Comm'r*, 5 Dillon, 481); even though the State laws have not been adopted by rule of court (*Id.*); and State regulations as to modes of issuing the commission and the authority and directions to be contained therein will be followed. *Jones v. Oregon R. Co.*, 3 Sawyer, 523. As to notice, see *Buddicum v. Kirk*, 3 Cranch, 297; *Sutton v. Mandeville*, 1 Cranch C. C. 115. The adoption of the State law refers only to the form and mode of taking depositions. *Curtis v. Railway Co.*, 6 McLean, 403. The mode of executing the commission is not governed by State statute. *United States v. Pings*, 4 F. R. 714. A commission is not issued in a suit at law where the witness lives within 100 miles. *Wellford v. Miller*, 1 Cranch C. C. 485; *Gustine v. Ringgold*, 4 Id. 191; *Rhoades v. Selin*, 4 Wash. 715; *Curtis v. Railway Co.*, 6 McLean, 403; *Randall v. Venable*, 17 F. R. 162; *Sergeant v. Biddle*, 4 Wheat. 512. *Contra*, if the State law allows it. *Warren v. Younger*, 18 F. R. 862, where the State law was held to prevail. Examiners in an equity case may be appointed under a rule of court outside its jurisdiction (*Railroad Co. v. Drew*, 3 Woods, 692); and although the witness lives within 100 miles. *Wellford v. Miller*, 1 Cranch C. C. 485; *Russell v. McLellan*, 3 Wood. & M. 157. This section prescribes the cases in which a commission may issue, and §§ 863, 864, 865 have no application to the granting or execution of a *dedimus*. *Jones v. Oregon R. Co.*, 3 Sawyer, 523.

A commission must be applied for to the court. *Randall v. Venable*, 17 F. R. 162. Notice of the motion for a commission may be served on the attorney of the adverse party. *Potts v. Skinner*, 1 Cranch C. C. 57; *Bowie v. Talbot*, Id. 247; *Irving v. Sutton*, Id. 575; *Wheaton v. Love*, Id. 429; *Buddicum v. Kirk*, 3 Cranch, 293. The motion must be made in open court, and not in chambers. *Peters v. Prevost*, 1 Paine, 64. It must show that the evidence is material. *United States v. Parrott*, McAll. 447. It will be granted only on cause shown by affidavit. Id.; *Sutton v. Mandeville*, 1 Cranch C. C. 115. The motion need not designate the place where the deposition is to be taken, but if it does, the commission should conform to it. *Rhoades v. Selin*, 4 Wash. 715. A commission may issue to take testimony in foreign country at war with this. *Peters v. Prevost*, 1 Paine, 64.

The interrogatories and cross-interrogatories must be filed in court before the commission is issued (*Cunningham v. Otis*, 1 Gall. 166); and there should be particular interrogatories followed by a general one. *Rhoades v. Selin*, 4 Wash. 715. A copy of the interrogatories and written notice of the rule, together with the names of the commissioners, should be served on the adverse party or his attorney. *Rhoades v. Selin*, 4 Wash. 715. Where cross-interrogatories are not filed, the commission may issue even without notice. *The Norway*, 1 Ben. 493; *Frevall v. Bache*, 5 Cranch C. C. 463. Exceptions must be taken before the commission issues. *Cocker v. F. H. & B. Co.*, 1 Story, 169. If the form of the interrogatories cannot be agreed upon, they may be referred to a master to settle the form, with the right of appeal. Id. If the application does not designate the place of taking the deposition, the party or the commissioner should give notice to the adverse party (*Rhoades v. Selin*, 4 Wash. 715); unless no cross-interrogatories have been filed after due notice. *Merrill v. Dawson*, Hempst. 563; 11 How. 375. Notice of the time and place of taking the deposition may be served on the party or his attorney (*Merrill v.*



Dawson, *supra*); or by leaving a true copy at his usual place of abode (*Id.*); but a notice sent by mail is insufficient if received after the deposition is taken. *Walker v. Parker*, 5 Cranch C. C. 639. The notice may be waived. *Buddicum v. Kirk*, 3 Cranch, 293. An hour's notice in the place where the attorney resides is sufficient. *Nicholls v. White*, 1 Cranch C. C. 58. The affidavit of service of the notice need not state that the person with whom the notice was left was informed of the purport of the notice. *M'Call v. Towers*, 1 Cranch C. C. 41. When the commission is issued by consent and without interrogatories, the deposition cannot be read if notice was not given the adverse party of the time and place of taking it. *Dunlop v. Munroe*, 1 Cranch C. C. 536. Whether the names of the witnesses shall be inserted in the commission lies in the discretion of the court, and they are not required when the commission is taken out to prove pedigree. *Parker v. Nixon*, Bald. 291. The commission issues *ex parte* on a failure to file interrogatories, and interrogatories cannot thereafter be put to the witness. *Merrill v. Dawson*, Hempst. 563. It is not issued till commissioners are named. *Vanstophorst v. Maryland*, 2 Dall. 401; *Randall v. Venable*, 17 F. R. 162. A commission may be issued to a woman, although she is the wife of the witness. *The Norway*, 2 Ben. 121. The commissioner under a *dedimus* may be an officer of any kind, or not an officer. *Jerman v. Stewart*, 12 F. R. 271. The authority of the commissioners is special and must be strictly pursued. *Guppy v. Brown*, 4 Dall. 410; *Armstrong v. Brown*, 1 Wash. 43; *Boudereau v. Montgomery*, 4 *Id.* 186. A commission issued to several, but conferring powers on any one, may be taken by any. *The Griffin*, 4 Blatch. 203; *Lonsdale v. Brown*, 3 Wash. C. C. 404. If it is issued to several, and executed only by a part, the deposition is inadmissible (*Guppy v. Brown*, 4 Dall. 410; *Armstrong v. Brown*, 1 Wash. 43; *Munns v. Dupont*, 3 *Id.* 31); and also if taken by the commissioner in conjunction with one not named in the commission. *Willings v. Consequa*, Pet. C. C. 301; *Banert v. Day*, 3 Wash. 243. The commissioner is not the agent of the person nominating him. *Gilpins v. Consequa*, Pet. C. C. 85. A deposition taken in a foreign country by a judge in the presence of the commissioners is admissible, when the commissioners were not allowed to take it. *Winthrop v. Insurance Co.*, 2 Wash. 7.

The proceedings under a commission are in the discretion of the court. *Cunningham v. Otis*, 1 Gall. 166. The examination may be oral. *Egbert v. Citizens' Ins. Co.*, 7 F. R. 51. The deposition must be taken at the time and place designated. *Boudereau v. Montgomery*, 4 Wash. 186; *Rhoades v. Selin*, *Id.* 715. The notice must name the year in which it is to be taken. *Knode v. Williamson*, 17 Wall. 586. On adjournment from day to day the commissioner cannot pass over an intermediate day. *Buddicum v. Kirk*, 3 Cranch, 293. Witnesses whose names and testimony were not discovered till after the commission was issued, were examined under it in *The Infanta*, Abb. Adm. 263. And see *Parker v. Nixon*, Bald. 291. Regulations of court determine the mode in which the witness should be sworn or qualified. *Jones v. Oregon R. Co.*, 3 Sawyer, 523. The interrogatories may be shown to the witness before he is called upon to give his testimony, but answers cannot be prepared beforehand by counsel. *Railroad Co. v. Drew*, 3 Woods, 692.

A deposition is inadmissible if the witness omits to answer any interrogatory. *Nelson v. United States*, Pet. C. C. 235; *Ketland v. Bissett*, 1 Wash. 144; *Winthrop v. Insurance Co.*, 2 *Id.* 7. It is admissible if an interrogatory is not put, when the answer to it would not be legal evidence. *Bell v. Davidson*, 3 Wash. 328. A deposition is inadmissible if no answer is given to the general interrogatory. *Richardson v. Golden*, 3 Wash. 109; *Dodge v. Israel*, 4 *Id.* 323; *Merrill v. Dawson*, Hempst. 563. But the material evidence may be brought out under the general interrogatory. *Rhoades v. Selin*, 4 Wash. 715. The deposition cannot be admitted if the cross-interrogatories are not put to the witness (*Gilpins v. Consequa*, Pet. C. C. 88); but they need not be put to any witness till after the direct interrogatories have been answered by the last witness. *Id.*



The deposition is admissible when reduced to writing by the magistrate, or by the deponent in the presence of the magistrate (*Stockwell v. United States*, 3 Cliff. 284); or whosever the handwriting (*Keene v. Meade*, 3 Pet. 1); or although not signed by the witness (*Ketland v. Bissett*, 1 Wash. 144); or of an alien, though written in English, without it appearing that there was a sworn interpreter. *Gilpins v. Consequa*, *supra*. But the deposition is inadmissible where the answers are written down by the counsel at the request of the commissioner, and the other side is not represented at the hearing. *United States v. Pings*, 4 F. R. 417. But see *Nicholls v. White*, 1 Cranch C. C. 58; *Atkinson v. Glenn*, 4 Id. 134. The deposition cannot be admitted if the answers are prepared and signed by the witness before the oath is administered: *Dodge v. Israel*, 4 Wash. 323; *Railroad Co. v. Drew*, 3 Woods, 692.

The return is sufficient if it shows that the commissioner took the oath, that being sufficient evidence that the oath was properly administered. *Winter v. Simonton*, 3 Cranch C. C. 104. A return by a commissioner of a circuit court need not show that he was sworn. *Hoyt v. Hammekin*, 14 How. 346. The return need not show that the witness was cautioned before being sworn, nor set out the form of oath. *Keene v. Meade*, 3 Pet. 1; *Jones v. Oregon R. Co.*, 3 Sawyer, 523. A return that the witness was duly sworn is sufficient. *Id.* The deposition is admissible, although it does not certify in whose handwriting the deposition was taken down (*Jones v. Oregon R. Co.*, *supra*); or although the name of one party in the commission is omitted where the caption says it was taken in pursuance of the commission (*Merrill v. Dawson*, Hempst. 563); or although there is a wrong middle letter in the name of one party (*Keene v. Meade*, 3 Pet. 1); or although it is directed to the chief judge of the court. *Frevall v. Bache*, 5 Cranch C. C. 463. The deposition is inadmissible where the return does not show that the commissioner took the oath annexed to the commission (*Frevall v. Bache*, *supra*; but see *Gilpins v. Consequa*, *supra*); and where it does not appear by the return or other evidence that the examination was conducted at the time and place designated. *Jones v. Oregon R. Co.*, 3 Sawyer, 523; *Rhoades v. Selin*, 4 Wash. 715. If the deposition is opened before it comes into the hands of the clerk, it may be set aside and a new commission issued. *United States v. Price*, 2 Wash. 356. The certificate of the commissioners is *prima facie* evidence of facts stated (*Winter v. Simonton*, 3 Cranch C. C. 104; *Boudereau v. Montgomery*, 4 Wash. 186), but not of due performance of acts not stated. *Id.* Exhibits referred to by a witness should be annexed to the deposition with marks or references to show that they are the identical ones referred to. *Dodge v. Israel*, 4 Wash. 323.

A deposition not taken according to law may be objected to (*Evans v. Eaton*, 7 Wheat. 356, 426); but the party cannot object to his own omission, such as lack of notice to the plaintiff (*Yeaton v. Fry*, 5 Cranch, 335); or a failure to annex a document in the power of the commissioner or of the objecting party. *Winans v. Railroad Co.*, 21 How. 88. A person joining in a commission cannot afterwards object to the deposition on the ground that the witness lives within 100 miles (*Sergeant v. Biddle*, 4 Wheat. 508; *Ridgeway v. Ghequier*, 1 Cranch, C. C. 4); or that the commission was issued improperly or improvidently. *Id.* Objection for defects and irregularities which might have been obviated by retaking a deposition, are waived if not noted when the deposition is taken, or by motion to suppress, or otherwise, before trial. *Doane v. Glenn*, 21 Wall. 33; *York Co. v. Railroad Co.*, 3 Id. 113; *Shutte v. Thompson*, 15 Id. 160; *Buddicum v. Kirk*, 3 Cranch, 293. Waiver of notice may be inferred from conduct of a party or his attorney (*Buddicum v. Kirk*, *supra*); and there is a waiver of irregularities by appearing and cross-questioning a witness (*Mechanics' Bank v. Seton*, 1 Pet. 299; *Shutte v. Thompson*, 15 Wall. 151; *Plimpton v. Winslow*, 9 F. R. 365; *Andrew v. Graves*, 1 Dillon, 108); but not by attending and refusing to take part in the proceedings. *Harris v. Wall*, 7



How. 693. A party may take exceptions not taken at the time it was returned and opened. *Walker v. Parker*, 5 Cranch C. C. 639. An altered deposition must be re-sworn to before it is filed. *Re Walther*, 14 N. B. R. 273. A stipulation waiving "all objections as to the form and manner of taking," does not waive objections to the return of the deposition into court. A deposition left for several months in the hands of the defendant, and placed on file on the morning of trial, was not admitted in *Livingston v. Pratt*, Brown Adm. 66. On an objection to an answer to a leading interrogatory, the deposition was referred to a master to inquire if the interrogatory was leading. *Boudereau v. Montgomery*, 4 Wash. 186. In *Alsop v. Insurance Co.*, 1 Sumner, 451, an answer to a cross-interrogatory was read, although the answer to the direct was suppressed. There is a waiver by not objecting to the competency of a witness at the examination (*United States v. One Case of Hair Pencils*, 1 Paine, 400); unless such incompetency was not known at that time. *Id.* A motion to suppress depositions brings up the regularity of an order directing them to be taken, as well as the competency of witnesses. *Eslava v. Mazange*, 1 Woods, 623. A motion to suppress for irregularities comes too late after depositions have been on file for three years. *Danville Bank v. Travers*, 4 Biss. 507. A deposition taken by one party may be read by the other, although the notice was irregular. *Yeaton v. Fry*, 5 Cranch, 335. Exhibits annexed to a deposition may be taken from the file and annexed to a commission on filing copies. *Daly v. Maguire*, 6 Blatch. 137. The court is not bound, on request of the jury, to construe an ambiguous answer to a question in a deposition. *Insurance Co. v. Young*, 5 Cranch, 187. Defects in a deposition read without objection are deemed waived on appeal. *The Samuel*, 1 Wheat. 9; *Evans v. Hettich*, 7 Id. 453; *Brown v. Tarkington*, 3 Wall. 377. But there is no waiver of objections to a deposition filed after trial. *Id.* Depositions read by consent, in a case afterwards reversed, can be read on the new trial. *Vattier v. Hinde*, 7 Pet. 252; *Edmondson v. Barrell*, 2 Cranch C. C. 232. On a general consent to the reading of the deposition, both competent and incompetent evidence can be read. *Harris v. Wall*, 7 How. 705. On error, the party is confined to the objections set forth. *Burton v. Driggs*, 20 Wall. 125.

SECT. 867. — This does not prevent the admission of testimony *in perpetuum* under § 866. *New York Polishing Co. v. Polishing Co.*, 20 Blatch. 174; 9 F. R. 578. See same case, 11 F. R. 813. If the matter in dispute between the parties can be immediately passed upon by the court, a bill for the taking of testimony under this section will not be granted. *Id.* For what must be proved to allow a deposition *in perpetuum*, see *Richter v. Jerome*, 25 F. R. 679; *Richter v. Union Trust Co.*, 115 U. S. 55.

Depositions taken according to State law are not admissible in evidence in a Federal court if such law conflicts with the statutes of the United States on the subject. *Randall v. Venable*, 17 F. R. 162. Unless all the essential provisions of the State statutes have been complied with, a deposition taken thereunder will not be evidence in a Federal court. *Gould v. Gould*, 3 Story, 516, 541. See *Whitford v. Clark County*, 119 U. S. 522.

SECT. 868. — This section was intended to authorize the procuring by a commission of any evidence procurable on a trial. *Re Shepard*, 18 Blatch. 225; 3 F. R. 12. The commission must be accompanied by written interrogatories, and furnish information as to the inquiry, or the court cannot determine the question as to the witness's refusal to answer a proper question. *Re Glaser*, 2 N. B. R. 398. See note, § 725.

SECT. 869. — See notes, §§ 724, 725. A *subpœna duces tecum* may issue to a witness to be examined on a commission. *Re Shepard*, *supra*. This section is confined to providing for the production of "any paper or writing or written instrument or book or other document." *Id.* And a witness cannot be compelled by a *subpœna* to bring patterns for a stove. *Id.* A *subpœna duces tecum* will not be granted in aid of an action for trespass for violation of a copyright. *Atwill v. Ferrett*, 2 Blatch. 39. The officers of a corporation



may be compelled to produce books and papers of the corporation in a suit in equity to which it is not a party. *Wertheim v. Railroad Co.*, 15 F. R. 716. A *subpœna* to an officer of a telegraph company to produce certain messages need describe the messages with only such practicable certainty that the witness may know what is required of him; and the officer must use reasonable diligence to find and produce the required instruments if they are within his custody. *United States v. Babcock*, 3 Dillon, 566. The officer of a foreign corporation may be compelled to produce books of his corporation in his custody. *United States v. Tilden*, 10 Ben. 170. But he will not be compelled to produce books not in his custody. *Re Sykes*, 10 Ben. 162. The writ should be addressed to the president, or other head, or the principal officers of the corporation. *Id.* On a *subpœna duces tecum* to a consul of France, the court should require the party to show that the document is not an official paper protected by law from examination and seizure. *Re Dillon*, 7 Sawyer, 561.

SECT. 874. — The revisers (1 Com. D. 485) observed that this does not state whether “the fees provided by law” are those of the State where the suit is pending or of the United States, but no change was made in the original act by the Revision.

SECT. 875. — Amended by 19 St. 240, ch. 69, § 1, par. 12, by adding at the end of the section —

“When letters rogatory are addressed from any court of a foreign country to any circuit court of the United States, a commissioner of such circuit court designated by said court to make the examination of the witnesses mentioned in said letters, shall have power to compel the witnesses to appear and depose in the same manner as witnesses may be compelled to appear and testify in courts.”

Depositions under the letters rogatory are not subject to the strict rules of taking deposition. *Nelson v. United States*, Pet. C. C. 235. Letters rogatory will be issued to take testimony when the government under which the witness resides will not allow a commission to be executed. *Id.* This case sets forth a copy of the letters rogatory issued. Before the enactment of the above-quoted amendment of § 875, a court had no power to issue process to compel a witness to appear and testify upon a commission issued by a foreign court. *Re Spanish Consul*, 1 Ben. 225.

SECT. 876. — A witness whose place of residence is more than 100 miles from the place of trial is beyond the coercive power of a *subpœna*, whether such place is in the district in which the court sits or not. *Russell v. Ashley*, Hempst. 546; *Henry v. Ricketts*, 1 Cranch C. C. 580. The circuit court of the District of Columbia was invested with all the powers of a circuit court of the United States, and could send an attachment into any other district for a witness who refused to attend in a criminal case. *United States v. Williams*, 4 Cranch C. C. 372. In determining the distance at which the witness lives from the place of trial, the court must regard the actual distance by the usual routes, and not the imaginary rules adopted for the benefit of mail contractors. *Ex parte Beebees*, 2 Wall. Jr. 127. In *United States v. Ralston*, 17 F. R. 897, the court took judicial notice of distances. This section has been held to allow taxing the fees of a witness who has travelled more than 100 miles. *United States v. Sanborn*, 28 F. R. 299, 303. *Contra*, *Spaulding v. Tucker*, 2 Sawyer, 50; *The Syracuse*, 36 F. R. 830; *Anon.*, 5 Blatch. 134; *Beckwith v. Easton*, 4 Ben. 357. See § 848. The privilege of a witness protects him so as to give him a reasonable time after the disposition of the cause to go home. *Atchison v. Morris*, 11 F. R. 582. A party going into another State as a witness, or as a party under process of a court, is exempt from process in such State when necessarily attending there in respect to the trial. *Brooks v. Farwell*, 4 F. R. 167; *Parker v. Hotchkiss*, 1 Wall. Jr. 269; *Juneau Bank v. McSpedan*, 5 Biss. 64; *Re Healy*, 24 Alb. L. J. 529; *Hurst's Case*, 1 Wash. 186; 4 Dall. 387. A party in another State attending a regular examination of witnesses is privileged. *Plimpton v. Winslow*, 9 F. R. 365. As to privileges of witnesses and suitors, see also note, § 739; *Larned v. Griffin*, 12 F. R. 590; *Atchison v. Morris*, 11



Id. 582; *Matthews v. Puffer*, 10 Id. 606. Members of Congress are not exempt, even while Congress is in session, from *subpœna* to testify in a circuit court. *United States v. Cooper*, 4 Dall. 341. The defendant in a criminal suit has no right to compulsory process against ambassadors or consuls. *Re Dillon*, 7 Sawyer, 561. In States where the courts enforce obedience to a *subpœna* served by a private person, such service is legal on *subpœna* issued by the Federal court. *Cummings v. Akron Cement Co.*, 6 Blatch. 509. As to districts, see *Patapsco Ins. Co. v. Southgate*, 5 Pet. 604; *Dreskill v. Parish*, 5 McLean, 241; *Russell v. Ashley*, Hempst. 546; *Re Woodward*, 12 N. B. R. 297.

SECT. 877. — As to the practice under this section, see *U. S. v. Ralston*, 17 F. R. 901.

SECT. 879. — Sect. 33 of the act of 1789, in authorizing the recognizance of witnesses, did not specifically describe them as witnesses against the prisoner, but such appears to be its intention by the context, and that construction is implied in the act of 1842; and an express grant of discretionary power as to sureties is here inserted, being recognized in St. 1846, although not provided for in terms in St. 1789. 1 Com. D. 487. By 18 St. 193, ch. 396, § 2, that section applies to courts created by act of Congress in the District of Columbia.

SECT. 882. — "The volume of public documents, printed by authority of the Senate of the United States, containing letters to and from various officers of state, communicated by the President of the United States to the Senate, is as competent evidence as the original documents themselves." *Whiton v. Albany Ins. Co.*, 109 Mass. 30. For a case where engineers' reports themselves were held inadmissible to prove, as between the parties, the facts stated therein, see *Cushing v. Nantasket Railroad*, 143 Id. 77. Copies of papers and documents in addition to the public records relating to lands or patents have been admitted in evidence, but copies of recommendations for office should not be furnished unless the applicant appears to have been directly affected thereby. 15 A. G. Op. 342. The record itself is still admissible. *Bruce v. Railroad Co.*, 19 F. R. 342. But original documents other than official must be produced and proved. *Block v. United States*, 7 Ct. Cl. 413, 414; see *United States v. Percheman*, 7 Pet. 51; *Winn v. Patterson*, 9 Id. 663; *James v. Gordon*, 1 Wash. 333. The mode of authentication must conform to the statute. *Smith v. United States*, 5 Pet. 300; *Bleecker v. Bond*, 3 Wash. 531; *United States v. Harrill*, McAll. 243; *Wickliffe v. Hill*, 3 Litt. (Ky.) 330. Papers which were "a part of the archives of the late so-called Confederate Government" must be proved by proper testimony. *Schaben v. United States*, 6 Ct. Cl. 230. A certificate by the acting commissioner of Indian affairs whose official character is certified by the Secretary of the Interior is sufficient. *Stephens v. Westwood*, 25 Ala. 716. So that of the Secretary of State under seal of his department is evidence to the official character of an accredited minister and of the date of his recognition. *United States v. Benner*, Bald. 234; *United States v. Liddle*, 2 Wash. 205. The original cancelled register of a lost vessel has been held to come within the statute. *Catlett v. Pacific Ins. Co.*, 1 Paine, 612. Accounts and papers from the office of the Quartermaster-General of the United States, properly authenticated, &c., are admissible. *Thompson v. Smith*, 2 Bond, 320; see *Crowell v. Hopkinton*, 45 N. H. 9. The government produces copies, if wanted. If any one else wants them the law provides the means of production. They are the best evidence, and must be produced unless good cause is shown. And the government will furnish them only upon proper demand and tender of fees. *Barney v. Schneider*, 9 Wall. 253; see *United States v. Scott*, 25 F. R. 470; *United States v. Benner*, Bald. 234. The certificate that an account in a Treasury transcript is one between the United States and the Collector of Internal Revenue makes the transcript *prima facie* evidence of indebtedness certified. *United States v. Hunt*, 105 U. S. 183; *White v. Saint Guirons*, Minor (Ala.), 331; *Chadwick v. United States*, 3 F. R. 750. An assistant secretary of the Treasury may authenticate. Id. Where the paper is in the Treasury and not connected with the papers in the same matter in the register's office, it is properly certified by the Secretary. Id. *Smith v.*



United States, 5 Pet. 291. In an old case, an army register and general order were rejected when offered to establish the pay and emoluments of officers, although evidence, when properly authenticated, of the facts they may contain. *Wetmore v. United States*, 10 Pet. 647. That the certificate of the secretary of the Spanish governor of Florida is *prima facie* evidence of the existence of a grant of land, see *United States v. Wiggins*, 14 Pet. 334; *United States v. Acosta*, 1 How. 24. See further, *Griffin v. Reynolds*, 17 Id. 609; *New York Dry Dock v. Hicks*, 5 McLean, 111; note, § 886.

SECT. 885.—A certificate is sufficient in the absence of any evidence that there is any other bank of the same name at the same place. *National Bank v. Lee*, 112 Mass. 521. See *National Bank v. Kidd*, 20 Minn. 234; *Merchants' Bank v. Glendon Co.*, 120 Mass. 97.

SECT. 886.—Sect. 2 of the act of 1797 extended to every delinquency. *Bechtel v. United States*, 101 U. S. 597. But this section is narrower. *Id.* 599; *United States v. Lee*, 2 Cranch C. C. 462; *United States v. Lent*, 1 Paine, 417. This section applies to sureties as well as to principals. *United States v. Gaussen*, 19 Wall. 198; 2 Woods, 92. A form of certificate by the auditor, authenticated under the seal of the Treasury Department affixed by the Secretary, is given in *United States v. Bell*, 111 U. S. 477. The mode of authentication must be strictly pursued. *United States v. Smith*, 5 Pet. 292; *United States v. Harrill*, McAll. 243. Both the certificate of the auditor and the seal of the department are necessary. 5 Pet. 292. But the signature of the Secretary of the Treasury is not necessary, and therefore it is immaterial that his chief clerk signs the secretary's name. The seal may be affixed by the auditor. *Id.* 302. The official certificate of the proper officer should show that the transcript exhibits the final adjustment of the accounts of the delinquent, as shown, not by mere copies of original papers on the files, but upon the books and records of the department. *United States v. Pinson*, 102 U. S. 548; *Smith v. United States*, *supra*; *United States v. Buford*, 3 Pet. 12; *Cox v. United States*, 6 Id. 172; *United States v. Jones*, 8 Id. 375; *Gratiot v. United States*, 15 Id. 336; *Hoyt v. United States*, 10 How. 109; *Bruce v. United States*, 17 Id. 437; *United States v. Bell*, 111 U. S. 477; *Curtis v. Banker*, 136 Mass. 357. In an action on the bond of a special Indian agent, a Treasury transcript of a charge, "for government property received at the W. agency and not properly accounted for," without showing the nature of the property or how the value was ascertained, will not warrant a judgment for the value of such property, and is not aided by a paper attached describing the property by items, apparently compiled from original returns and other documents on file. *United States v. Smith*, 35 F. R. 490. But the transcript is competent to show what public moneys the defendant received, and what disbursements made by him have been approved. *Id.*; *United States v. Allen*, 36 F. R. 174. The effect of this section is to require that the transcripts shall be admitted as competent evidence, to be allowed such weight as the court and jury shall in each cause determine. *United States v. Ralston*, 17 Id. 895. Treasury settlements are only *prima facie* evidence of the correctness of the balance; and the accounting officers may correct mistakes and restate the balance. *Soule v. United States*, 100 U. S. 11; *United States v. Eckford*, 1 How. 263; *United States v. Eggleston*, 4 Sawyer, 201. See *United States v. Hunt*, 105 U. S. 187; *United States v. Collier*, 3 Blatch. 325; *Ex parte Randolph*, 2 Brock. 447. Transcript from the books includes charges of money advanced or paid by the department to the agent, and claims suspended, rejected, or placed to his credit; and the decision on the vouchers exhibited, and the statement of the amount due, constitute in part the proceedings. *Smith v. United States*, 5 Pet. 292; *United States v. Pinson*, *supra*. It is not evidence of any item that has not come into his hand in any of the regular operations of the government. *Id.* An objection disclosed by comparison with other transcripts offered by the defendant lies to the effect and not to the competency of the evidence; and it is not a valid objection to the introduction, *in the first*



*instance*, by the sureties of the transcripts that they do not establish errors upon which the plaintiff relies, but require further evidence. *United States v. Stone*, 106 U. S. 525. Balances struck by the Treasury and charged as such are not evidence. The items should be stated. *United States v. Hilliard*, 3 McLean, 324; *United States v. Edwards*, 1 Id. 467; *United States v. Jones*, *supra*. See *United States v. Kuhn*, 4 Cranch C. C. 401; *United States v. Vanzandt*, 2 Id. 338; 11 Wheat. 184. This section is not applicable to proceedings in the Court of Claims in favor of claimants. *McKnight v. United States*, 13 Ct. Cl. 311. It applies only to suits against persons accountable for public moneys as such. *United States v. Radowitz*, 8 Repr. 263. See *United States v. Griffith*, 2 Cranch C. C. 366. The government need not show that the party had notice of the adjustment or of the balance against him in the transcript. *Watkins v. United States*, 9 Wall. 759. Where one is to be held liable for the act of his agent, the agency must appear by a duly certified copy of the power. *United States v. Jones*, 8 Pet. 382. Sureties are liable only for money received during the term. *United States v. Eckford*, 1 How. 250; *United States v. Stone*, *supra*. The report of an auditor of a balance due is not evidence. *United States v. Patterson*, Gilpin, 44. A party disputing charges by a proper application, &c., could obtain the original vouchers, if necessary for his defence and show that the debit against him was erroneous. *Bruce v. United States*, 17 How. 437. Copies certified under § 882 are not available if they should have been certified under this section. *United States v. Humason*, 7 Sawyer, 252; 8 F. R. 71. See *Chadwick v. United States*, 3 Id. 750. What is admissible is a copy from the books, not of the books; but it must be clear and correct, not mutilated or garbled. *United States v. Gaussen*, 19 Wall. 198; 2 Woods, 92. See *United States v. Corwin*, 1 Bond, 149.

SECT. 888. — Where the items have been estimated and made up from hearsay they are not evidence. *United States v. Forsythe*, 6 McLean, 584. A certificate that the copy is a true and correct one of the account as audited and adjusted is sufficient. *United States v. Harrill*, McAll. 243. A transcript is not inadmissible because the statement of account omitted, allowed, or disallowed credits. *Id.*; *United States v. Hodge*, 13 How. 478. The certified account must contain the original items of the accounts or balances admitted to be right by the defendant's returns. *United States v. Hilliard*, 3 McLean, 324. It is sufficient if the account as stated shows the balance struck and acknowledged by the postmaster in his return, to be the sum due. If the surety is charged with receipts of the principal for a part of the quarter, the return for the whole is evidence to show an average liability for a part. *Lawrence v. United States*, 2 McLean, 581. The settled account is all that need be set out. *Postmaster-General v. Rice*, Gilpin, 554. See *United States v. Snyder*, 14 F. R. 554. A copy of a bond duly authenticated is competent. *United States v. Wilkinson*, 12 How. 246.

SECT. 889. — The basis of the action against a postmaster on his bond is its breach, and not the transcripts or the quarterly returns. The Treasury transcripts, when offered in evidence in such an action, need not contain the statement of credits claimed by the postmaster, and disallowed, in whole or in part, by the government officers; nor are they to be rejected because the balances of returns charged in the accounts do not there purport to be balances acknowledged by the postmaster or supported by proper vouchers. *United States v. Hodge*, 13 How. 478; *Lawrence v. United States*, 2 McLean, 581; *United States v. Snyder*, 14 F. R. 554. See preceding note.

SECT. 891. — *Bullion Mining Co. v. Eureka Mining Co.*, 11 Pac. Rep. 525, 526. This section does not include copies of all books, &c., but only official documents. *Block v. United States*, 7 Ct. Cl. 406. The contents of the lost original may be shown if the record or transcript is not a true copy; and the defective record in the General Land Office does not deprive one of his rights. "The names need not be fully inserted in the record, but it must appear in some form that the names were actually signed to the patent when it



issued." *McGarrahan v. Mining Co.*, 96 U. S. 323; 49 Cal. 331; *Smith v. Mosier*, 5 Blackf. 51; *Stephenson v. Wait*, 8 Id. 508. A party is not deprived of his title because of a defective record, if he has a perfect patent. A perfect record of a perfect patent proves the grant; but a perfect record of an imperfect patent, or an imperfect record of a perfect patent has no such effect. In such a case, if a perfect patent has in fact issued it must be proved in some other way than by the record. *McGarrahan v. Mining Co.*, *supra*; *Campbell v. Laclede Gas Co.*, 119 U. S. 449. A perfect record of a perfect patent is presumptive evidence of its delivery to and acceptance by the grantee. *McGarrahan v. Mining Co.*, 96 U. S. 323. Inaccuracies in a transcript from the patent office may be shown by another transcript duly certified. *Brooks v. Jenkins*, 3 McLean, 432. A copy of the record signed and countersigned and verified by the General Land Office is competent evidence. *Bowser v. Warren*, 4 Blackf. 522. The form of the certificate is regulated by the acts of Congress, and is not affected by State laws. *Gilman v. Riopelle*, 18 Mich. 145. A certificate by the acting commissioner under seal of the General Land Office is sufficient. *Stephens v. Westwood*, 25 Ala. 716. The seal and signature of the commissioner *prima facie* prove themselves. *Harris v. Barnett*, 4 Blackf. 369; *Bowser v. Warren*, Id. 522. The commissioner should make erroneous copies of a patent conform to the patent and the record. *Woodworth v. Hall*, 1 Wood. & M. 260. A paper authenticated in due form is admissible, although containing matters not covered by the certificate. *Gilman v. Riopelle*, 18 Mich. 145. A copy of a plat and description duly authenticated is admissible. *Harris v. Barnett*, *supra*. The documents which make up the original title-papers belong to the public archives, and a duly certified copy thereof is competent evidence, although some of these documents may contain private stipulations between the parties concerned. *Hanrick v. Barton*, 16 Wall. 166. A certificate of the receiver that a party has made full payment is evidence that he has taken the necessary steps for a pre-emption. *McDonald v. Edmunds*, 44 Cal. 328. But a copy of a final certificate and an assignment thereof are not competent evidence to prove the assignment. *Scott v. Hancock*, 3 Stew. & P. 44. A letter of a commissioner to a register and receiver not duly authenticated is not admissible to prove the facts therein stated. *Bovee v. McLean*, 24 Wis. 225. As a patent is not required by law to be recorded in the county records, a certified copy from the recorder of a county is not evidence; the patent should be recorded in the General Land Office and a certified copy from that office produced. *Lyell v. Maynard*, 6 McLean, 15. The records of the register of the General Land Office are evidence of the facts lawfully recorded, and of the titles which the records exhibit. *Galt v. Galloway*, 4 Pet. 331. An extract from the books of the surveyor-general of the land office, is not evidence. *Griffiths v. Evans*, Pet. C. C. 166. A connected plat of sundry tracts of land, made and put together by an officer of the land-office, not being a copy of any record in his office, is not admissible. *Griffith v. Tunckhouser*, Id. 418. An entry in the books of the land-office, that the balance of the purchase-money was paid by the person "to whom the patent had issued" is evidence that a patent issued, although it is not produced. *Willis v. Bucher*, 3 Wash. 369.

"*Evidence equally.*"—This does not mean that in all cases the copy shall have the same probative force as the original, but requires it to be regarded as of the same class, in the grades of evidence, as to written and parol, and primary and secondary; it does not mean that on a question as to some particular word or figure the copy is as convincing as the original. *Campbell v. Laclede Gas Co.*, 119 U. S. 449; 84 Mo. 352; 9 Mo. App. 571. See *Galt v. Galloway*, 4 Pet. 331. A *prima facie* case made by State statute by a copy of a patent recorded in the State is not overcome by a copy of the patent from the records of the General Land Office showing no seal. Id.

SECT. 892.—An exemplification of a patent and a specification are admissible, although the drawing is not exemplified. *Peck v. Farrington*, 9 Wend. 44. But a copy of the



specification alone is not competent, the proper evidence being the patent itself duly authenticated. *Davis v. Gray*, 17 Ohio St. 330. A transcript of certain documents on file is competent, although not a transcript of the whole proceeding. *Toohy v. Harding*, 1 F. R. 174. It is not evidence of the fact that there are not other records. *American D. Co. v. Sheldon*, 17 Blatch. 210. A transcript that is defective may be corrected by one that is complete; the former cannot affect the latter. *Brooks v. Jenkins*, 3 McLean, 432. Letters written by a party to an action applying for a patent, certified under the seal of the department as papers remaining therein, are admissible in evidence. *Pettibone v. Derringer*, 4 Wash. 215, 219. A certified copy of an assignment is *prima facie* evidence of the genuineness of the original (*Lee v. Blandy*, 1 Bond, 361; *Brooks v. Jenkins*, 3 McLean, 432; *Parker v. Haworth*, 4 Id. 370), and of the absolute correctness of the copy of the record. *Parker v. Haworth*, *supra*. But a certified copy of a transfer not required by law to be recorded is not proof of the transfer. *Sherman v. Champlain Trans. Co.*, 31 Vt. 162. Proof that there is no record must be made by deposition or attendance of the proper officer, and a mere certificate that diligent search has been made is not sufficient. *Stoner v. Ellis*, 6 Ind. 152; *Bullock v. Wallingford*, 55 N. H. 619. A clerk whose employment is to examine in relation to assignments and records is a competent witness. *Sone v. Palmer*, 28 Mo. 539. Certified copies of patents are admissible in evidence in all cases where the originals would be admitted. *Schoerken v. Swift Co.*, 19 Blatch. 209; 7 F. R. 469. A signature by a person calling himself "acting commissioner" is sufficient. *Woodworth v. Hall*, 1 Wood. & M. 248. A certified copy of a patent surrendered and cancelled is admissible to show that an improvement subsequently patented is not original, though it does not specify when it was cancelled, or how, or for what defect. *Delano v. Scott*, Gilpin, 489. One who desires a copy of papers filed in the patent office must make demand therefor in a proper manner, without insulting or abusing the officers; if a second demand is properly made, the commissioner cannot refuse to comply because of the applicant's previous improper conduct. *Boyden v. Burke*, 14 How. 575.

SECT. 893. — A copy of a French patent, certified by the Director of the National Conservatory of Arts and Manufactures, under its seal, and verified by the Ministers of Agriculture and Commerce, and of Foreign Affairs, under their seals, but not under the great seal of France, is, under §§ 892, 893, *prima facie* evidence of the granting of the French patent and of its date and contents. *Schoerken v. Swift Co.*, 19 Blatch. 209; 7 F. R. 469.

SECT. 896. — See note, § 1707. The certificate of a consul is competent to prove his official acts, but not acts which are not official or not within the consul's personal knowledge. *Brown v. The Independence*, Crabbe, 54. This applies to the arrival and departure of a vessel, and the refusal of the master to deposit the register. *Levy v. Burley*, 2 Sumner, 355. It is not competent to prove facts to justify imprisonment of a seaman by the master in a foreign port (*Johnson v. The Coriolanus*, Crabbe, 239); or to authenticate the record of the condemnation of a vessel in a court of vice-admiralty (*Catlett v. Pacific Ins. Co.*, 1 Paine, 594); or to prove a foreign law or the correctness of a translation. *Church v. Hubbard*, 2 Cranch, 187. It is not evidence of any fact as between third persons, unless made so by statute. *Levy v. Burley*, *supra*; *Church v. Hubbard*, *supra*; *United States v. Mitchell*, 2 Wash. 478; *The Alice*, 12 F. R. 923; *Stein v. Bowman*, 13 Pet. 209. Thus a certified copy of a bill of lading in another's possession is not made admissible in evidence by the consul's certificate. *The Alice*, *supra*. It is competent to prove that the ship's papers were lodged with him (*United States v. Mitchell*, *supra*); or that a seaman was discharged in a foreign port with his own consent. *Lamb v. Briard*, Abb. Adm. 367. It is *prima facie* evidence of the violation of law by a master in refusing to receive a destitute seaman in a foreign port when



it sets out all the essential facts. *Matthews v. Offley*, 3 Sumner, 115. A certificate with an undecipherable seal and a vague signature is not admissible. *The Atlantic*, Abb. Adm. 451.

SECT. 898. — The revisers observe that the special provisions made for copies of the records in the statutes establishing new terms or districts, in Illinois (11 St. 4, ch. 18, § 2), Wisconsin (16 St. 172, ch. 175, § 10), and Virginia (16 St. 404, ch. 35, § 10), being executed, are not matters of revision, but that their rule of evidence, being prospective, would continue to operate. 1 Com. D. 493.

SECT. 899. — Secondary evidence of a judgment is admissible where the record is destroyed. *Cornett v. Williams*, 20 Wall. 226.

SECT. 902. — St. Jan. 31, 1879, ch. 39 (20 St. 277), strikes out to "anywhere" in the fifth line, and substitutes therefor the following, the rest of the section remaining unchanged : —

"In any proceeding in conformity with law to restore the records of any court of the United States which have been or may be hereafter lost or destroyed, the notice required may be served on any non-resident of the district in which such court is held."

SECT. 903. — Amended by the same act to read as follows : —

"A certified copy of the official return, or any other official paper of the United States attorney, marshal, or clerk, or other certifying or recording officer of any court of the United States, made in pursuance of law, and on file in any department of the government, relating to any cause or matter to which the United States was a party in any such court, the record of which has been or may be lost or destroyed, may be filed in the court to which it appertains, and shall have the same force and effect as if it were an original report, return, paper, or other document made to or filed in such court; and in any case in which the names of the parties and the date and amount of judgment or decree shall appear from such return, paper, or document, it shall be lawful for the court in which they are filed to issue the proper process to enforce such decree or judgment, in the same manner as if the original record remained in said court. And in all cases where any of the files, papers, or records of any court of the United States have been or shall be lost or destroyed, the files, records, and papers which, pursuant to law, may have been or may be restored or supplied in place of such records, files and papers, shall have the same force and effect, to all intents and purposes, as the originals thereof would have been entitled to."

SECT. 904. — Amended by the same act to read as follows : —

"That whenever any of the records or files in which the United States are interested of any court of the United States have been or may be lost or destroyed, it shall be the duty of the attorney of the United States for the district or court to which such files and records belong, so far as the judges of such courts respectively shall deem it essential to the interests of the United States that such records and files to be restored or supplied, to take such steps, under the direction of said judges, as may be necessary to effect such restoration or substitution, including such dockets, indices, and other books and papers as said judges shall think proper. Said judges may direct the performance, by the clerks of said courts respectively and by the United States attorneys, of any duties incident thereto; and said clerks and attorneys shall be allowed such compensation for services in the matter and for lawful disbursements as may be approved by the Attorney-General of the United States, upon a certificate by the judges of said courts stating that such claim for services and disbursements is just and reasonable; and the sum so allowed shall be paid out of the judiciary fund."

SECT. 905. — This section not only provides for the admission of judicial records in evidence, but declares that they shall have the same effect as in the court of the State whence they were taken. *Mills v. Duryee*, 7 Cranch, 481; *Hampton v. McConnel*, 3 Wheat. 234.

No greater effect can be given a State judgment by the Federal courts than it would receive in the courts of the State where it was rendered. *Pennoyer v. Neff*, 95 U. S. 714; *Sharon v. Hill*, 26 F. R. 346. Only pleas which would be good to a suit upon a judgment in the courts of the State where it was rendered, can be pleaded in defence of such judgment in any other court. *Hampton v. McConnel*, 3 Wheat. 234. This section applies to all



courts within the United States. *Mills v. Duryee*, *supra*. The provision concerning the method of authenticating the records and judicial proceedings of State courts does not apply to district courts of the United States. *Turnbull v. Payson*, 95 U. S. 418. This section does not require any greater effect to be given a judgment in any other jurisdiction than in that where it was rendered. *Public Works v. Columbia College*, 17 Wall. 521. It does not affect the jurisdiction either of the court in which the judgment is rendered or of the court in which it is offered in evidence. *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 292; *Sewall v. Sewall*, 122 Mass. 156. It is not necessary for the record of a judgment to be authenticated in the mode prescribed by the act of Congress in order to make it admissible in the Federal courts. The district court of the United States, even out of the State composing the district, is to be regarded as a domestic court, and its records may be proved by the certificate of the clerk, under the seal of the court, without the certificate of the judge that the attestation is in due form. *Turnbull v. Payson*, *supra*. A transcript of a decree of naturalization is admissible in evidence though not accompanied by a sealed certificate of the clerk that the judge of the court was duly commissioned and qualified. *St. Paul R. Co. v. Burton*, 111 U. S. 788. The judge must certify that the attestation is in due form according to the laws of the State. *Craig v. Brown*, Pet. C. C. 352; *contra*, *Taylor v. Carpenter*, 2 Wood. & M. 1. See *Burnell v. Weld*, 76 N. Y. 103; *Wells v. Davis*, 105 Id. 670; 12 N. East. Rep. 42. Courts cannot know the forms in use in the courts of another State, and the certificate of the presiding judge must conform to the act of Congress. *Trigg v. Conway*, Hempst. 538; *Kinseley v. Rumbough*, 96 N. C. 195. The judgment is to have the same effect elsewhere, as to the merits of the subject-matter involved in the action, as it would receive in the State of the forum. It is not given the force and effect of a domestic judgment. *M'Elmoyle v. Cohen*, 13 Pet. 312; *Barrett v. Failing*, 3 F. R. 471. Parties, like the stockholders of a corporation, who are not affected by a judgment in the jurisdiction in which it was rendered, are not subject to it in any other jurisdiction. *Sumner v. Marcy*, 3 Wood. & M. 105. The record of a judgment against an administrator appointed in one State is not sufficient evidence of the debt of another administrator of the same estate appointed in another State. *Hill v. Meek*, 18 How. 16; *Stacy v. Thrasher*, 6 Id. 44. But it may be evidence that a demand has been reduced to judgment, and that other executors were precluded from pleading the statute of limitations as to the original cause of action. *Hill v. Tucker*, 13 How. 458.

The record of a judgment in a State court is sufficiently authenticated by the certificate of the clerk and the seal of the court to be received in evidence in a Federal court sitting in the same State. *Mewster v. Spalding*, 6 McLean, 24. And, it seems, in any Federal court. *Bennett v. Bennett*, Deady, 299. If a surrogate acts as his own clerk and certifies under his seal, he must also act in the capacity of judge and certify as the statute requires. *Catlin v. Underhill*, 4 McLean, 199. If the laws of the State show that the court in which the judgment was rendered consisted of but a single judge, it is not material that the certificate to the attestation of the clerk did not show that the certifying officer was the sole judge, chief justice, or presiding magistrate. *Bennett v. Bennett*, *supra*. A copy of letters testamentary, proved by the oath of the clerk and register of the proper court to be a copy of the original, which he could not send, has been held admissible. *Owings v. Hull*, 9 Pet. 607.

A judgment in one State against two joint defendants, one duly summoned and the other not, which is valid and enforceable by the law of that State only against the former, will not support an action against him in another State. *Renaud v. Abbott*, 116 U. S. 277. One member of a dissolved partnership has no authority, in a suit brought against the firm, to enter an appearance for a non-resident partner upon whom process has



not been served; and a judgment based upon such an appearance is not conclusive upon the partner not served, in a suit brought on it in another State, although the law of the State where it was rendered authorized it. *Hall v. Lanning*, 91 U. S. 160; *Burt v. Delano*, 4 Cliff. 611. Judgment rendered under such circumstances is binding and enforceable in another State against the person actually served, if the statutes of the State in which it was rendered so provide. *Burt v. Delano*, *supra*. The record of the judgment of a State court is not admissible in evidence in a Federal court sitting in another State unless attested as provided in this section. The certificate must show that the person who signed it as judge was, when he signed, the judge, chief justice, or presiding magistrate of the court in which the judgment is of record. *United States v. Biebusch*, 1 McCrary, 42; 1 F. R. 213. This section does not prohibit the States from adopting other modes of authenticating the records of their courts; and any mode which may be adopted will be recognized in the Federal courts. *Gribble v. Pioneer Press Co.*, 15 F. R. 689. It is for the court to determine whether judicial proceedings have been proved according to the statute. *Wittemore v. Malcomson*, 28 F. R. 605. A certificate by the clerk of a court at the foot of a paper which purports to be a record that the foregoing is truly taken from the record of proceedings of his court, properly certified by the judge, raises a presumption that the paper is in due form and is a full copy of the proceedings; but if it proves to be a mere transcript of minutes taken from the docket of the court, it is not admissible. *Ferguson v. Harwood*, 7 Cranch, 408. The certificate of the judge does not comply with the act if it merely appears therefrom that he is "one of the judges" of a court. It must show that he is the chief justice, or presiding judge or magistrate. *Stewart v. Gray*, Hempst. 94. If the judge's attestation is attached to the clerk's certificate, the presumption is that the latter is in proper form. *Ferguson v. Harwood*, *supra*. The seal must be annexed to the record. It is not a compliance with the statute to annex it to the judge's certificate. *Turner v. Waddington*, 3 Wash. 126. If the court from which the record is certified has no seal, the fact should be recited in one of the certificates. *Craig v. Brown*, Pet. C. C. 352. An unsealed printed pamphlet containing the laws of a State is not competent evidence. *Id.*

Federal courts take judicial notice of the general laws of the several States. *Owings v. Hull*, 9 Pet. 607. Copies of State laws authenticated by the seal of the State are conclusive evidence of their verity in all courts in the United States, without other formality. In the absence of all proof to the contrary, the presumption is that the seal was affixed by the proper officer. *United States v. Amedy*, 11 Wheat. 392. If the printed copy so certified has written interlineations and erasures in ink, not so made as to afford absolute certainty that it is the copy to which the seal was affixed, the presumption is that it is in the same state it was when the sealing was done. *Id.* When the court of one State is asked to give faith and effect to a public law of another State, the effect of such law, in the State where it is in force, must be proved as a fact. *Chicago R. Co. v. Wiggins Ferry Co.*, 119 U. S. 615; 108 Id. 18; *Chase v. Curtis*, 113 Id. 452. The statute of limitations in force in the State where the judgment of a court of another State is sued is a defence to an action on such judgment. *M'Elmoyle v. Cohen*, 13 Pet. 312; *Bacon v. Howard*, 20 How. 22. The lack of jurisdiction is a defence to an action on a judgment rendered in another jurisdiction. *Christmas v. Russell*, 5 Wall. 290; *Maxwell v. Stewart*, 22 Id. 77. A judgment is void unless process was served or the party appeared. *D'Arcy v. Ketchum*, 11 How. 165. A recital in the sheriff's return that personal service was made may be disproved. *Knowles v. Gaslight Co.*, 19 Wall. 58; *Thompson v. Whitman*, 18 Id. 457. A judgment will not be enforced on property in another State where jurisdiction was obtained by a substituted service, unless the statute providing for it was strictly followed. *Galpin v. Page*, 18 Wall. 350. A joint debtor resident in another State is not concluded by a judgment rendered against him and his co-debtors, he not being served, notwith-



standing the law of the State in which the judgment was rendered permitted it to be rendered against all the debtors on service made upon one. *D'Arcy v. Ketchum*, 11 How. 165. Mere errors cannot be set up in defence of an action on the judgment of a State court, as that the case was tried by the court; the right to a trial by jury not having been waived. *Maxwell v. Stewart*, 22 Wall. 77. If a judgment is recovered against a corporation by a wrong name, there may be a recovery in a suit on such judgment in another State brought against it with the proper name. *La Fayette Ins. Co. v. French*, 18 How. 404. The judgment of a State court cannot be impeached in a Federal court because of the fraud of the attorney of the party against whom it was rendered. *Amory v. Amory*, 3 Biss. 266. Fraud is no defence to a suit on a judgment unless it would be a defence in the court where the judgment was rendered. *Barras v. Bidwell*, 3 Woods, 5.

SECT. 906.—This section does not make an award or judgment which may be final against a State either binding in law or conclusive as evidence against the United States. *Williams v. United States*, 22 Ct. Cl. 116. Where a deed of land situated in T. was executed in L. and recorded in a notary's books in L., and a copy of it was proved by a witness who had examined the original, and who testified that he was familiar with the handwriting of the deceased notary, and that the deed from which he copied was genuine, such copy was held properly proved and admissible in evidence according to common-law principles and under this statute. *White v. Burnley*, 20 How. 235, 250. This section indicates the proper mode of authentication, and the attestation must be correct in form. *Drummond v. Magruder*, 9 Cranch, 122; *Pennel v. Weyant*, 2 Harr. (Del.) 501; *Ewing v. Savary*, 4 Bibb, 424; *Johnson v. Fowler*, Id. 521; *Brown v. Edson*, 23 Vt. 435; *Warren v. Wade*, 7 Jones (N. C.), 494. It does not apply to court records (*Tarleton v. Briscoe*, 1 A. K. Marsh. 67); or to recorded copies of private deeds, wills, or powers of attorneys. *Russell v. Kearney*, 27 Ga. 96; *Hylton v. Brown*, 1 Wash. 298; *Ewing v. Savary*, *supra*; *Karr v. Jackson*, 28 Mo. 316; *State v. Engle*, 21 N. J. L. 347; *Henthorn v. Shepherd*, 1 Blackf. 157; *Powell v. Knox*, 16 Ala. 364; *Carlisle v. Tuttle*, 30 Id. 613; *King v. Dale*, 2 Ill. 513.

SECT. 907.—*Ten Cases v. United States*, 34 F. R. 101; *Chadwick v. United States*, 3 Id. 753.

SECT. 908.—See note, § 386.

SECT. 909.—Under § 70 of the cited act of 1799, seizures could be made under any revenue act, and the revisers assumed that the acts "respecting the revenue," referred to in that section, were acts *ejusdem generis* with St. 1799, especially as the power of seizure was given to the officers of the customs. 1 Com. D. 498.

This section is a permanent feature of the revenue system, and the burden of proof is upon one who claims goods which have been seized under later laws, though such laws do not in terms adopt this section. *Cliquot's Champagne*, 3 Wall. 114. Where the claimant has it in his power to produce satisfactory evidence to repel the presumption which the law makes against him, and does not do so, it will be presumed that such evidence is unfavorable. *Clifton v. United States*, 4 How. 242; *Buckley v. United States*, Id. 251; *The Luminary*, 8 Wheat. 405. It is a question of law whether probable cause is established. Id.; *Taylor v. United States*, 3 How. 197. The words "probable cause" here signify less evidence than would justify condemnation, and imply a seizure made under circumstances which warrant suspicion. *Locke v. United States*, 7 Cranch, 339; *United States v. An Open Boat*, 5 Mason, 232. They mean reasonable ground of presumption that the accusation is well founded,—a clear *prima facie* case which requires of the claimant such testimony as will satisfactorily rebut the presumption of guilt which it raises. The *John Griffin*, 15 Wall. 33; *Averill v. Smith*, 17 Id. 82; *Wood v. United States*, 16 Pet. 342; *The Luminary*, *supra*; *3880 Boxes v. United States*, 9 Sawyer, 259; 8 Id. 129; 23 F. R. 367; 12 Id. 402; *The Recorder*, 2 Blatch. 119.



SECT. 910. — This section makes it unnecessary for the plaintiff in an action of ejectment, brought to recover possession of a mining claim, to show a legal title thereto. *Aurora Hill Mining Co. v. Mining Co.*, 12 Sawyer, 355; 34 F. R. 515. Prior to this act, the mining locator, as between himself and the United States, was technically a mere trespasser upon the public domain, and, as against a new-comer, his right rested merely upon possession. *Duggan v. Davey*, 26 N. W. Rep. 890.

## CHAPTER XVIII.

### PROCEDURE.

SECT. 911. — This section does not apply to the Territories. *Hornbuckle v. Toombs*, 18 Wall. 648. It is always held obligatory on the parties and the courts. *Thompson v. Railroad Cos.*, 6 Wall. 134. A summons or notice to the defendant for the commencement of a suit is process. It must issue from the court, be signed by the clerk, and have the seal of the court affixed. *Dwight v. Merritt*, 4 F. R. 614; *Peaslee v. Haberstro*, 15 Blatch. 472. The provisions of this section are not abrogated by Rev. Stats. § 914. *Id.* A writ of *venditioni exponas*, issued out of the circuit court, and otherwise regular, is not void because it was signed by the deputy clerk in his own name. The defect cannot be taken advantage of in a collateral proceeding. *Griswold v. Connolly*, 1 Woods, 193. See *Bragg v. Lorio*, *Id.* 209. A garnishee summons is process, and if issued by an attorney, instead of by the clerk, is void. *Middleton Paper Co. v. Rock River Paper Co.*, 19 F. R. 252. A warrant in admiralty, signed merely by the judge without the signature of the clerk and seal of the court, is void. *Bowler v. Eldridge*, 18 Conn. 1. A paper purporting to be a *venire facias*, tested in the name of the deputy clerk, is void. *United States v. Antz*, 16 F. R. 119. The requirement that a writ of error must bear the *teste* of the chief justice is mandatory, and if it bears merely the *teste* of the clerk it is void. *Wells v. McGregor*, 13 Wall. 188. See also p. 287, *post*.

SECT. 912. — It is no objection to a writ of error that it bears *teste* on the day of its issue. *Atherton v. Fowler*, 91 U. S. 143.

SECT. 913. — This section applies to Louisiana, even since the act of May 26, 1824 (4 St. 62). *Livingston v. Story*, 9 Pet. 632; *Story v. Livingston*, 13 Id. 359; *Ex parte Whitney*, *Id.* 404; *Bein v. Heath*, 12 How. 168; *Gaines v. Relf*, 15 Pet. 9. The words "the forms and modes of proceedings in suits," as used in a somewhat similar statute, were said to embrace the whole progress of the suit, and every transaction in it, from its commencement to its termination, and to include the conduct of the officer in serving process. *Wayman v. Southard*, 10 Wheat. 1, 32. The practice of the English courts of chancery as it existed at the time of the passage of the Judiciary Act is adopted, and is the basis of the forms and modes of proceeding in equity causes in the Federal court (*Vattier v. Hinde*, 7 Pet. 252; *Pennsylvania v. Wheeling Bridge Co.*, 18 How. 421; *Nickerson v. Atchison R. Co.*, 30 F. R. 85; *Smith v. Burnham*, 2 Sumner, 612; *Manro v. Almeida*, 10 Wheat. 473; *Livingston v. Story*, 9 Pet. 632; *Van Hook v. Pendleton*, 2 Blatch. 85; *Motte v. Bennett*, 2 Fish. Pat. Cas. 642; *Hubbard v. Turner*, 2 McLean, 519); and not the practice of the exchequer. *Smith v. Burnham*, 2 Sumner, 612. Jurisdiction in equity is vested in the Federal courts, and is to be exercised uniformly throughout the United States. State legislation does not affect it, neither does the practice of State courts which possess similar powers. *Green v. Creighton*, 23 How. 90, 105; *Nickerson v. Atchison R. Co.*, 30 F. R. 85; *United States v. Howland*, 4 Wheat. 108; *Mayer v. Foulkrod*, 4 Wash. 349; *Boyle v. Zacharie*, 6 Pet. 648; *Fariners' Loan & Trust Co. v. Railroad Co.*, 2 F. R. 656. Federal



courts can adopt State law as to trials at law, but equitable rights must be presented and tried according to the rules prescribed by the Supreme Court for pleadings and practice in equity (*Bennett v. Butterworth*, 11 How. 669); although the State law has no distinction between cases at law and cases in equity (*Bennett v. Butterworth*, 11 How. 669); and although the State law provides for only a single form of action. *Thompson v. Railroad Cos.*, 6 Wall. 134. New remedies given by a State statute for equitable rights can be enforced in the Federal courts in equitable actions. *Wells, Fargo & Co. v. Miner*, 25 F. R. 533. The distinction between remedies at law and in equity must be preserved without regard to State statutes. *Fenn v. Holme*, 21 How. 481. A bill in equity cannot be treated as a petition for a writ of *mandamus*. *Heine v. Levee Commissioners*, 19 Wall. 655. A circuit court has power, if its rules so provide, to issue writs of sequestration in the nature of an attachment. *Steam Stone-Cutter Co. v. Sears*, 9 F. R. 8; *Steam Stone-Cutter Co. v. Jones*, 13 Id. 567. If the Supreme Court has not exercised its power to prescribe the forms of writs and process in suits in equity, any circuit court may do so in any manner not inconsistent with law. It may adopt the rules of the State courts or those prescribed by State laws. *Id.* *Bein v. Heath*, 12 How. 168, holds that even by a rule of a circuit court equity practice cannot be departed from. *Gaines v. New Orleans*, 27 F. R. 411.

A State statute declaring the effect of an injunction does not apply to an equity case in a Federal court (*Boyle v. Zacharie*, 6 Pet. 648); neither does a law requiring the complainant to answer the interrogatories propounded by the defendant in his answer (*McDonald v. Smalley*, 1 Pet. 620); nor one granting a new trial instead of a rehearing (*United States v. Curry*, 6 How. 106); nor one prohibiting the foreclosure of a mortgage, unless an execution has been returned unsatisfied. *Dow v. Chamberlin*, 5 McLean, 281. And on a foreclosure the circuit court cannot enter a decree for the balance remaining unsatisfied by the proceeds of the mortgaged estate. *Noonan v. Lee*, 2 Black, 499.

The State practice as to awarding damages against the surety on an injunction bond, sustained in consequence of the issuing of the injunction and not awarded at the trial, is contrary to that of the Federal courts. *Bein v. Heath*, 12 How. 168; *Deakin v. Stanton*, 3 F. R. 435. Nothing in English equity practice authorized the institution of a proceeding in equity by the filing of a stipulation of the parties to the effect that the court shall try the cause and render a decree without pleadings. A State law authorizing that mode of proceeding in the State courts does not give a Federal court jurisdiction nor change its practice. *Nickerson v. Atchison R. Co.*, 30 F. R. 85. Where property has been released from a lien by a bond, a decree cannot be made at once against the sureties on the decree against the principal, in the absence of an express stipulation. *Phillips v. Gilbert*, 101 U. S. 721. State statutes of limitations are not followed in equity. *Johnston v. Roe*, 1 F. R. 692. Circuit courts have power to appoint masters in chancery, or examiners in chancery, or commissioners to take testimony. *Van Hook v. Pendleton*, 2 Blatch. 85. See also note, § 629 (p. 94, *ante*).

The admiralty practice which was referred to in the act of May 8, 1792, ch. 36, § 2 (1 St. 276), was the admiralty practice of America, as engrafted upon the English practice. The former is known to have had some peculiarities which were adopted before the act of 1792 was passed; hence, where there is a conflict, the American practice must prevail. The Delaware, *Olc.* 240; *Manro v. Almeida*, 10 Wheat. 473, 490. See, generally, *Ex parte Phenix Ins. Co.*, 118 U. S. 610, 620; *Watts v. Camors*, 115 Id. 353, 362. Stipulators against whom a decree has been rendered cannot be compelled by the district court to appear in supplementary proceedings. *The Blanche Page*, 16 Blatch. 1. Powers as ample as legislation can give are conferred by law on district courts in cases of admiralty and maritime jurisdiction as to the forms and modes of proceedings, subject only to existing laws and the rules of the Supreme Court. Hence in a collision case where the vessel sued alone is entitled to contribution or an apportionment of damages against another vessel equally liable, the court may allow



process to issue against such vessel on petition of the one proceeded against. *The Hudson*, 15 F. R. 162, 175. Irregularities of pleading in admiralty are to be treated according to the rules and practice for pleadings and proofs in admiralty. *McKinlay v. Morrish*, 21 How. 343. Where both in the libel and answer the issue is made on the improper stowage of the cargo and carelessness in landing, reloading, and re-storing, under a deck which was leaky, the court cannot inquire into the seaworthiness of the vessel, or any other cause of injury than the one put in issue. *McKinlay v. Morrish*, 21 How. 343.

*"Not inconsistent with the laws of the United States."*—These words were not in the statutes from which this section was taken. *Ex parte Phenix Ins. Co.*, 118 U. S. 620.

SECT. 914. — See notes, §§ 691, 721, 727, 858, 861, 862, 863; *Witters v. Sowles*, 34 F. R. 119; *Robostelli v. Railroad Co.*, Id. 719; *Parsons v. Marye*, 23 Id. 121; *New Hampshire Land Co. v. Tilton*, 29 Id. 764; *Morgan v. Eggers*, 127 U. S. 66; *Arkansas Smelting Co. v. Belden Co.*, Id. 387. This section had its origin in the code enactments of many States, and its purpose was to remedy the inconvenience of studying and practising in one State under both code and common law. *Nudd v. Burrows*, 91 U. S. 441; *Railroad Co. v. Horst*, 93 Id. 291; *Bills v. Railroad Co.*, 13 Blatch. 227; *Lamaster v. Keeler*, 123 U. S. 388. The practice, &c., must be "as near as may be." *Whalen v. Sheridan*, 10 F. R. 662; *Robinson v. Insurance Co.*, 16 Blatch. 201; *United States v. Brawner*, 7 F. R. 90; *Railroad Co. v. Horst*, 93 U. S. 291; *Perry v. Insurance Co.*, 11 F. R. 478. It is not to be as near as may be *possible*, nor as near as may be *practicable*. This indefiniteness gives the judge power to reject any subordinate provision which in his judgment would unwisely encumber the administration of the law, or tend to defeat the ends of justice. *Railroad Co. v. Horst*, 93 U. S. 301; *Hat-Sweat Manuf. Co. v. Sewing Machine Co.*, 31 F. R. 296; *Lowry v. Story*, Id. 769. This section does not apply where Congress has legislated (*Easton v. Hodges*, 7 Biss. 324; *McNutt v. Bland*, 2 How. 17; *United States v. Pings*, 4 F. R. 715; *Dwight v. Merritt*, Id. 616; *Beardsley v. Littell*, 14 Blatch. 102; *United States v. Hutton*, 25 Int. Rev. Rec. 57); as in proceedings to restore a lost record. *Turner v. Newman*, 3 Biss. 307. Where Congress has legislated the statutes must be followed. *Parsons v. Bedford*, 3 Pet. 433; *Teese v. Phelps*, McAll. 17. This section does not repeal any statute expressly providing a particular mode of proceeding (*Wear v. Mayer*, 6 F. R. 660); and does not extend jurisdiction over persons and causes not before within it. *Bath Co. v. Amy*, 13 Wall. 244; *Main v. National Bank*, 6 Biss. 26; *Toland v. Sprague*, 12 Pet. 300; *Picquet v. Swan*, 5 Mason, 35. The statutes make a distinction between common-law cases, and equity and admiralty cases. *Steam Stone-Cutter Co. v. Sears*, 9 F. R. 9; *Sanford v. Portsmouth*, 2 Flippin, 105; *Nudd v. Barrows*, 91 U. S. 426. This section does not affect equity suits either by inclusion or exclusion (*Steam Stone-Cutter Co. v. Jones*, 13 F. R. 582); but applies solely to common-law suits. *Blease v. Garlington*, 92 U. S. 1; *The Blanche Page*, 16 Blatch. 5; *Brooks v. Railroad Co.* 14 Id. 471; *Taylor v. Holmes*, 14 F. R. 498; *Martindale v. Waas*, 11 Id. 551; *Butler v. Young*, 5 Chic. Leg. News, 146. As to the distinction between law and equity procedure in Federal courts, see cases cited in *Whitenton Manuf. Co. v. Packet Co.*, 19 F. R. 282.

The adoption with the State laws of the local interpretation which may have been given them is not required. The body of the local law thus adopted must be construed in the Federal courts "in the light of their own system of jurisprudence, as defined by their own constitution as tribunals, and of other acts of Congress on the same subject." It can hardly be supposed that it was the intent of Congress to place the Federal courts in each State, in reference to their own practice and procedure, upon the footing merely of subordinate State courts, required to look from time to time to the supreme court of the State for rules for their guidance. *Erstein v. Rothschild*, 22 F. R. 61, 64. The practice, &c., adopted is that only which arises from the statute of the State, and not that arising from judicial construction of common-law remedies. *Sanford v. Portsmouth*, 2 Flippin,



105. The word "practice" has no broader meaning in this section than when used in § 917 or § 918, and does not relate to the subject of evidence. *Randall v. Venable*, 17 F. R. 165; see also *Ex parte Fisk*, 113 U. S. 713. This section must be taken in connection with § 918, and circuit courts can adopt rules of their own on subjects not covered by State statutes or rules of the State courts. And the mere practice of a State court not provided for by statute or rule of court need not be followed, *e. g.*, as to the time of calling up a demurrer. *Osborne v. Detroit*, 28 F. R. 385. This section, so far as it applies, should be construed to overrule the provisions of § 918. *Morrison v. Bernards Township*, 35 F. R. 400, *per* Bradley, J. It adopts or prescribes any State statute authorizing suits to be brought in the name of the real party in interest. *May v. County of Logan*, 30 F. R. 253; *Weed Sewing Mach. Co. v. Wicks*, 3 Dillon, 261. A State statute authorizing a person with whom, or in whose name, a contract is made, for the benefit of another, to sue thereon, will be followed by the Federal courts. *Albany Co. v. Lundberg*, 121 U. S. 451; *Sawin v. Kenny*, 93 Id. 289; *United States v. Tracy*, 8 Ben. 1. This section and § 4920 are to be construed together, and the pleadings and practice in an action on the case for damages for the infringement of a patent are to follow the State law. *Celluloid Manuf. Co. v. American Co.*, 34 F. R. 744. A Federal court will not enforce against a marshal a penalty given by a State law against a sheriff for similar acts. *Lowry v. Story*, 31 F. R. 769. This section does not follow a State statute, allowing suits under State penal laws after the death of the offender so as to affect suits in the Federal courts for the recovery of penalties imposed by an act of Congress. *Schreiber v. Sharpless*, 110 U. S. 80. A State statute cannot annul or operate to prevent the application and enforcement of a statutory provision of a penal character. *National Bank of Auburn v. Lewis*, 81 N. Y. 15. The form, &c., of proceedings in the name of the United States for penalties must follow those in actions by the "People," &c., for penalties. *United States v. Rose*, 14 F. R. 681; *United States v. Elliot*, 25 Int. Rev. Rec. 319. Though process be in accordance with the State statute, if it does not run in the name of the people, when that is required by the State constitution, it is void. *Manville v. Battle M. S. Co.*, 17 F. R. 126. This section does not deprive the government of the right to file an information in an action to recover a penalty, although such is not the State practice. *United States v. Elliot*, 25 Int. Rev. Rec. 319. The practice of the Federal courts in *mandamus* proceedings is not substantially affected by this section. It does not confer original jurisdiction of such proceedings. *United States v. Union P. R. Co.*, 2 Dillon, 527. Federal courts do not follow a State law which decides that *mandamus* is the only proper remedy on municipal bonds. *Sanford v. Portsmouth*, 2 Flippin, 105. This section does not compel the adoption of a State statute which would defeat jurisdiction once lawfully attached (*Stewart v. Dunham*, 115 U. S. 61; *Phelps v. Oaks*, 117 Id. 239); and does not adopt unconstitutional statutes. *Poindexter v. Greenhow*, 114 U. S. 270. It applies to actions of replevin. *Gibbs v. Usher*, 1 Holmes, 348. It will not be so construed as to bring about a conflict of jurisdiction between State and Federal courts. Hence a writ of replevin will not be issued to take from the possession of a State officer property in his hands under process, though the State statutes allow that to be done in some cases (*Senior v. Pierce*, 31 F. R. 625); and no action of replevin lies where the State law permits none. *Baltimore R. Co. v. Hamilton*, 16 F. R. 181. A State statute allowing replevin, between courts of a State, of property in the hands of an officer holding it by legal process is not adopted so far as to allow a marshal to replevy property in the custody of a State officer. *Melvin v. Robinson*, 31 F. R. 634; *Senior v. Pierce*, Id. 625. See *Gumbel v. Pitkin*, 124 U. S. 31. If a State statute authorizing the bringing of an anomalous action has been repealed, such action is no longer maintainable in a Federal court. *Harvey v. Virginia*, 20 F. R. 411. An arrest made under § 3492 is governed as to its subsequent proceedings by the State law. *United States v. Griswold*, 11 F. R. 810.



The form of actions in State courts must be adopted in Federal courts. *Gibbs v. Usher*, 1 Holmes, 348; *Taylor v. Brigham*, 3 Woods, 377; *Featherman v. Louisiana State Seminary*, 2 Id. 71; *Bank v. Labitut*, 1 Id. 11. The State mode of trying the title to land must be followed in Federal courts. *Sears v. Eastburn*, 10 How. 187. This section adopts a State statute abolishing fictitious proceedings and establishing an action of trespass to try title to lands. *Sears v. Eastburn*, 10 How. 187. The practice of a State in allowing ejectment on equitable grounds is not followed (*Fenn v. Holme*, 21 How. 481; *Hooper v. Scheimer*, 23 Id. 249; *Sheirburn v. Cordova*, 24 Id. 423; *Robinson v. Campbell*, 3 Wheat. 212); and a party with a mere equitable title cannot maintain an action at law. *Bennett v. Butterworth*, 11 How. 669; *Penns v. Klyne*, Pet. C. C. 497, note; *Jones v. McMasters*, 20 How. 8; *Greer v. Mezes*, 24 Id. 268; *United States v. King*, 7 Id. 833. The State laws govern as to interventions (*Bank v. Labitut*, 1 Woods, 11; *Featherman v. Louisiana State Seminary*, 2 Id. 71); as to allowing an application by an administrator to be made a party (*Barker v. Ladd*, 3 Sawyer, 44); as to the joinder of parties (*Fullerton v. Bank*, 1 Pet. 604; *United States v. Tracy*, 8 Ben. 1); as to the effect of misjoinder (*Perry v. Insurance Co.*, 11 F. R. 482); as to allowing a suit by the principal in his own name on a bond made to an agent (*Weed Sewing Mach. Co. v. Wicks*, 3 Dillon, 261); as to allowing a suit by an assignee by oral transfer of a right of action of the insured after a loss (*Bennett v. Insurance Co.*, 17 Alb. L. J. 363); as to allowing one suit on a bond against the executor of a deceased obligor and surviving obligor (*United States v. Tracy*, 8 Ben. 1; *United States v. Lawrence*, 14 Blatch. 229), and permitting a joint action against the maker and indorser. *Fullerton v. Bank*, 1 Pet. 604.

This section adopts the form and modes of service of State process only so far as the persons are rightfully within the reach of such process. It does not enlarge the jurisdiction of the courts. *Main v. Second Nat. Bank*, 6 Biss. 26; *Toland v. Sprague*, 12 Pet. 321. It adopts the effect as well as the form. *Bank of U. S. v. Halstead*, 10 Wheat. 51. It applies to a writ of *scire facias* in reciting a judgment on a prior *scire facias* (*Brown v. Chesapeake Co.* 4 F. R. 771); and to *mandamus*. *Moran v. Elizabeth*, 9 Id. 72; *Laird v. Mayor*, 25 Id. 76. It does not repeal § 911. *Dwight v. Merritt*, 18 Blatch. 305; 4 F. R. 614; *Peaslee v. Haberstro*, 15 Blatch. 472. It includes forms of process for commencement of suits, except as to signature, which is provided for by § 911. *Brown v. Pond*, 5 F. R. 37; *Ricard v. New Providence*, Id. 434; *Peaslee v. Haberstro*, 15 Blatch. 472; *Dwight v. Merritt*, 18 Id. 305; 4 F. R. 614; *Brownell v. Railroad Co.*, 18 Blatch. 243; *Springer v. Foster*, 2 Story, 383; *Perkins v. Watertown*, 5 Biss. 320. It adopts attachment process and procedure. *Steam Stone Co. v. Sears*, 9 F. R. 8; see note, § 915. A State law allowing the summons in a garnishee process to be issued by an attorney cannot be followed by the Federal courts, as § 911 prescribes that all processes shall be signed by the clerk of the court. *Middleton Paper Co. v. Rock River Paper Co.*, 19 F. R. 252; *Martin v. Criscuola*, 10 Blatch. 211. If process substantially complies with the laws of the State, it will not be set aside. *Johnson v. Healy*, 9 Ben. 318. A defective affidavit on which a writ of attachment was issued may be amended, although the State statute forbids it. *Erstein v. Rothschild*, 22 F. R. 61. The rule of the Federal courts relating to the indorsement of process in actions to recover statutory penalties is modified by this section so as to conform to the State practice. *Brown v. Pond*, 5 F. R. 31. If the indorsement is not made, the defect is not amendable. Id.; *United States v. Rose*, 14 F. R. 681. State laws as to the sufficiency of the service of process are adopted. *Lung Chung v. Railway Co.*, 19 F. R. 254; *Hat Sweat Manuf. Co. v. Davis Sewing M. Co.*, 31 Id. 294; *Brownell v. Railroad Co.*, 18 Blatch. 245; *Dwight v. Merritt*, Id. 305; *Springer v. Foster*, 2 Story, 383; *Perkins v. Watertown*, 5 Biss. 320. State laws cannot govern the service of Federal process if they conflict with Federal statutes. Hence, original process directed to the marshal cannot be served by a private person, though similar State



process might be so served. *Schwabacker v. Reilly*, 2 Dillon, 127. This section adopts State law allowing service by a private person (*Cummings v. Akron Co.*, 6 Blatch. 509; *Schwabacker v. Reilly*, *supra*); but even then the marshal or his deputy may make the service. *Schwabacker v. Reilly*, *supra*. A State statute as to service on an agent of a foreign corporation appointed according to a State law to receive process is followed. *Brownell v. Railroad Co.*, 18 Blatch. 245. If there is uncertainty as to the mode of serving process under State laws, a rule of a Federal court regulating the service of its process is binding on its officers, and not in conflict with this section. *Lowry v. Story*, 31 F. R. 769. The Federal courts will not follow a State law making the reading of a summons a sufficient service. *Id.*

While the provisions of a State code in regard to pleadings in civil suits *in personam* apply to like causes in the Federal courts therein, they do not apply to suits *in rem* by the United States for the forfeiture of property, after its seizure for the violation of a revenue law, because there are no "like causes" known to State laws. Hence this act has not changed the rule announced before its passage, that where land has been seized and proceeded against as forfeited to the government under a confiscation act, the proceedings are to be in general conformity to the course in admiralty. *Coffey v. United States*, 117 U. S. 233. The rule of construction applicable to pleadings under a State code will be applied to cases in the Federal courts. *United States v. Parker*, 120 U. S. 89, 94. This section applies to rules of pleading (*Oscanyan v. Winchester Arms Co.*, 15 Blatch. 87; *Taylor v. Brigham*, 3 Woods, 377; *Lewis v. Gould*, 13 Blatch. 216); and questions on pleadings will be decided according to the ruling of the highest State court. *Taylor v. Brigham*, 3 Woods, 377. The State law governs as to the time of filing a declaration after being returned summoned (*Ricard v. New Providence*, 5 F. R. 434); but not as to the signature to a bill. *Stinson v. Hildrup*, 8 Biss. 376. A State law which requires a clerk of court to enter at rules a dismissal of any suit in which the declaration or bill has not been filed within three months after the defendant was summoned, whether he had appeared or not, and giving the court power at the next term to set aside such dismissal, is more than a rule of practice, and affects the common-law rights of suitors. Such a law is not binding on the Federal courts, because it would control their discretion and deprive them of the power to try causes on their merits. *Mutual Building Fund v. Bossieux*, 1 Hughes, 386. It seems that it is competent for a Federal court to direct a judgment of nonsuit upon reserved points of law after a verdict has been rendered (*Gunther v. Liverpool Ins. Co.*, 34 F. R. 501); but a Federal court cannot order a peremptory nonsuit against the will of the plaintiff. *Elmore v. Grymes*, 1 Pet. 471; *Castle v. Bullard*, 23 How. 172; *Insurance Co. v. Folsom*, 18 Wall. 250. If a rule to plead is not employed in State practice, it will not be granted by a Federal court. *Bills v. New Orleans R. Co.*, 13 Blatch. 227. State practice as to interpleading is adopted. *Harris v. Hess*, 10 F. R. 263. The right to interplead adverse claimants, given by State laws, may be enforced in equity cases by the Federal courts. *Wells v. Miner*, 25 F. R. 533. Although State laws may enlarge the powers of the Federal courts to allow amendments, they cannot diminish the powers given by § 948; so held of a writ returnable on Sunday instead of Monday. *Norton v. Dover*, 14 F. R. 106. This section adopts the laws of States in which the system of special demurrers (see § 914, Rev. Stats.) does not prevail concerning the amendment of complaints after demurrers have been filed thereto. *Rosenbach v. Dreyfuss*, 1 F. R. 391. After the removal of an action to a Federal court, amendments may be made to the declaration by inserting new counts for the same cause of action according to the law of the State. *West v. Smith*, 101 U. S. 263. Amendments will be allowed after verdict in cases where they are allowable under the local law. *Whitaker v. Pope*, 2 Woods, 463. See, generally, *Henderson v. Louisville R. Co.*, 123 U. S. 61. A suit at law cannot be prosecuted in a Federal court under pleadings adapted



to a court of equity, though the statutes of the State in which the action was begun provide that no action shall fail for any defect in the form of the pleading, and allow a suit upon the facts of the case. *Whittenton Manuf. Co. v. Memphis Co.*, 19 F. R. 273. In an action on the case for an infringement, the laws of the State as to the verification of the pleadings must be followed. *Cottier v. Stimson*, 18 F. R. 689. If, under State law, a defence is not open to a defendant who has not verified his pleadings, he cannot make it in a Federal court except on the same condition. *Iron Mountain Ry. v. Knight*, 122 U. S. 79, 96. This section adopts the State law as to setting up the statute of limitation by demurrer. *Chemung Canal Bank v. Lowery*, 93 U. S. 72. It does not adopt State laws as to the time of pleading to the jurisdiction of the court (*Cuthbert v. Galloway*, 35 F. R. 466); although objections to the jurisdiction of a court may be made in accordance with the State practice, as by motion. *Nazro v. Cragin*, 3 Dillon, 474. This section does not allow equitable defences. *Montejo v. Owen*, 14 Blatch. 324; *Parsons v. Denis*, 7 F. R. 317; *Church v. Spiegelburg*, 31 Id. 601; 24 Blatch. 540; *Herklotz v. Chase*, 32 F. R. 433; *Northern Pacific R. Co. v. Paine*, 119 U. S. 561. If the defendant has equitable grounds for relief against the plaintiff, he must seek to enforce them by a separate suit in equity. If his equitable grounds are deemed sufficient, he may stop the further prosecution of the action at law, or be furnished with matter which may be set up as a legal defence to it. *Northern Pacific R. Co. v. Paine*, *supra*; *Dwight v. Merritt*, 18 Blatch. 305; *Insurance Co. v. Williams*, 3 Biss. 370. The State law determines the sufficiency of the pleadings (*Castro v. De Uriarte*, 12 F. R. 250; *United States v. Tilton*, 7 Ben. 306; *Church v. Spiegelburg*, 31 F. R. 601); but cannot deprive a person without his consent of a trial by jury. *Howe Machine Co. v. Edwards*, 15 Blatch. 402. On removals, no other or different pleadings are necessary (*Merchants' Bank v. Wheeler*, 13 Blatch. 218; *West v. Smith*, 101 U. S. 263), except where an action at law had taken the form of a suit in equity in the State court, in which case a repleading is necessary. *Whittenton Manuf. Co. v. Packet Co.*, 19 F. R. 273. Pleadings not authorized in the State court in a like suit will be set aside on motion. *Lewis v. Gould*, 13 Blatch. 216. These provisions do not apply to set-offs in suits by the government against public officers. *United States v. Robeson*, 9 Pet. 319.

Federal courts cannot send a common-law action to a referee for trial without the consent of the parties to it, although State courts have such power. *Howe Machine Co. v. Edwards*, 15 Blatch. 402. A stipulation for the trial of an action before a referee is to be considered as referring to the practice of the State courts. *Robinson v. Mutual Benefit L. Ins. Co.*, 16 Blatch. 194. A new trial may be granted in such an action. *Id.* A State law regulating the filing of a *lis pendens* does not apply to Federal courts. *Majors v. Cowell*, 51 Cal. 478; see *United States v. Stevenson*, 1 Abb. U. S. 495. Notice of hearing on a demurrer in a common-law action must be given for the same length of time as is required by the laws of the State. A rule of court providing for a shorter notice is abrogated by this section. *Rosenbach v. Dreyfuss*, 2 F. R. 23. This section applies to ordering a proceeding to substitute one defendant for another (*Harris v. Hess*, 10 F. R. 263); and to motions required by the practice at a special term of the State court. *Emma S. M. Co. v. Park*, 14 Blatch. 411; *Nazro v. Cragin*, 3 Dillon, 474; *Insurance Co. v. Williams*, 3 Biss. 370. Statutes depriving the courts of power to control the application of rules of practice according to their discretion, are not adopted. Held thus, of a law forbidding a cause dismissed to be reinstated after a certain time. *Mutual Building Fund v. Bossieux*, 1 Hughes, 386. A State statute allowing the production of books, &c., before issue joined, is not adopted, as § 724 provides for such production. *United States v. Hutton*, 10 Ben. 280. A strict adherence to State laws in drawing jurors is not required. State officers need not be employed to draw them. *United States v. Collins*, 1 Woods, 499. See § 800. State laws are followed which allow a plaintiff to draw a juror and



discontinue. *Wolcott v. Studebaker*, 34 F. R. 13. If it is so provided by State law a Federal court may direct that a part of the issues arising under several pleas may be tried before the others. *Norton v. Portsmouth*, 31 F. R. 326. A State statute, which prohibits judges from expressing an opinion upon the facts of a case pending before a jury, does not apply to Federal judges. *Hathaway v. East Tennessee R. Co.*, 29 F. R. 489. See *Racker v. Wheeler*, 127 U. S. 85. This section does not include State statutes requiring instructions to the jury to be reduced to writing, or permitting such instructions and certain papers read in evidence to be taken by the jury when they retire, or requiring a jury to be directed, if they return a general verdict, to find specially upon particular questions of fact involved in the issues. *Martindale v. Wass*, 11 F. R. 551; *Hankin v. Squires*, 5 Biss. 186; *Nudd v. Burrows*, 91 U. S. 426; *Sawin v. Kenny*, 93 Id. 289; *Indianapolis R. Co. v. Horst*, Id. 291; *West v. Smith*, 101 Id. 263; *United States v. Train*, 12 F. R. 852; *Ex parte Chateaugay Iron Co.*, 128 U. S. 553.

This section does not modify Rev. Stats. § 721, in so far as the latter makes it the duty of the courts of the United States in trials at common law to enforce—except where the laws of the United States otherwise provide—the rules of evidence prescribed by the laws of the State in which they sit. *Connecticut Mut. L. Ins. Co. v. Union Trust Co.*, 112 U. S. 250, 256. This section does not extend to matters of evidence on which Congress has legislated. *Insurance Co. v. Schaefer*, 94 U. S. 458; *Ex parte Fisk*, 113 Id. 713; and see *Ex parte Chateaugay Iron Co.*, 128 Id. 554. This section does not apply to the competency of witnesses (*Insurance Co. v. Schaefer*, 94 U. S. 458); nor to the examination of witnesses. *Ex parte Fisk*, 113 U. S. 713; *Beardsley v. Littell*, 14 Blatch. 102; *Easton v. Hodges*, 7 Biss. 324; *Corbett v. Gibson*, 16 Blatch. 336. As to the mere mode of procuring a deposition, the parties may follow the provision either of the State law or of the act of Congress. *Flint v. Comm'rs*, 5 Dillon, 481; *McLennan v. Railway Co.*, 22 F. R. 198; but see *Ex parte Chateaugay Iron Co.*, 128 U. S. 554. If a State law concerning the taking of depositions conflicts with the statutes of the United States, the latter must be followed, or the depositions will be inadmissible. *Randall v. Venable*, 17 F. R. 162. The taking of depositions being expressly provided for by Rev. Stats. § 866, the State practice relating thereto is not adopted by this section. *United States v. Pings*, 4 F. R. 714; *Sage v. Tauszky*, 6 Cent. L. J. 7; *United States v. Tilden*, 25 Int. Rev. Rec. 352. A statute authorizing the examination of a party before trial when called by the opposing party to a suit, does not apply to suits in equity in a Federal court. *Pennsylvania R. Co. v. Alleghany V. R. Co.*, 25 F. R. 115; *Dravo v. Fabel*, Id. 116. Nor to an action at common law. *Ex parte Fisk*, 113 U. S. 713; *contra*, *Smith v. Railroad Co.*, 2 Cin. Law Bul. 243; *Bryant v. Leyland*, 6 F. R. 125. A defendant in a common-law action cannot be examined as a witness for the adverse party before trial, although such is the State practice (*Beardsley v. Littell*, 14 Blatch. 102; *Corbett v. Gibson*, 16 Id. 336); except in cases where depositions before trial are specially authorized. *Easton v. Hodges*, 7 Biss. 324. The practice as to the production of books and papers in evidence in actions at law is controlled by Rev. Stats. § 724, and not by State laws. *Gregory v. Chicago, &c., R. Co.*, 3 McCrary, 374; 10 F. R. 529; *Easton v. Hodges*, 7 Biss. 324; *United States v. Hutton*, 10 Ben. 269. See also, as to evidence, notes on §§ 858, *et seq.*

State laws concerning the forms of verdicts are not within the scope of this section. *Abbott v. Curtis Co.*, 25 F. R. 402. A State law which provides that a verdict shall not be set aside or reversed on the ground of any defective count, if one or more of the counts in the declaration shall be sufficient to sustain it, governs proceedings in Federal courts sitting in a State where it is in force. And the rule prescribed by it will be applied to a judgment lawfully rendered without a verdict. *Bond v. Dustin*, 112 U. S. 604. *Quære* as to the power of directing a verdict. *Gunther v. Insurance Co.*, 34 F. R. 501. This section adopts the State mode of entering and recording judgments. *Morrison v. Bernards Town-*



ship, 35 F. R. 400. In the following cases the State practice, &c., in like cases is followed : In entering judgment according to facts alleged and proved without regard to the form of pleading (*Whalen v. Sheridan*, 10 F. R. 661); in entering judgment against one of several defendants (*Sawin v. Kenny*, 93 U. S. 289); in entering judgment against a marshal on a motion for money not paid over (*Gwin v. Breedlove*, 2 How. 29), but not for a penalty given by a State statute (*Gwin v. Breedlove*, 2 How. 29); in authorizing summary judgments to be rendered against sureties on an appeal bond (*Hiriart v. Ballou*, 9 Pet. 156; *Smith v. Gaines*, 93 U. S. 341); in holding that an order in a proceeding in aid of an execution directing a garnishee to pay money is not a judgment finally determining the garnishee's liability. *Atlantic R. Co. v. Hopkins*, 94 U. S. 11. Judgment may be entered on the report of the referee without application to the court, if that is the practice of the State courts. *Fourth National Bank v. Neyhardt*, 13 Blatch. 393. A statute which provides that a judgment may be good if it is sustained by one good count, though other counts are bad, is a rule of practice applicable to the Federal courts. *Townsend v. Jemison*, 7 How. 706, 722. A judgment rendered on default will be set aside under such circumstances as would afford ground therefor in the State courts (*Brown v. Philadelphia R. Co.* 9 F. R. 183); and the proceedings therein must conform to State practice. *Republic Ins. Co. v. Williams*, 3 Biss. 370. But see *Ex parte Chateaugay Iron Co.*, 128 U. S. 554. The amendment of judgments is not a matter of procedure, and Federal courts are not governed therein by State laws or State decisions. *Bronson v. Schulten*, 104 U. S. 410. This section does not apply to any proceedings to enforce or revise a judgment. *Oregonian Ry. Co. v. Oregon Ry. Co.*, 27 F. R. 284; *United States v. Train*, 12 Id. 852; *Ex parte Chateaugay Iron Co.*, 128 U. S. 554. It does not apply to a motion for a new trial, nor affect the power of the circuit court to grant or refuse a new trial at its discretion. *Id.*; *Newcomb v. Wood*, 97 U. S. 581. A State law allowing a new trial in a suit to recover the value of personal property cannot be followed. *Newcomb v. Wood*, 97 U. S. 581; *Coffey v. United States*, 117 Id. 235. As to procedure on motions for a new trial, on a case tried by a referee, see *Robinson v. Insurance Co.*, 16 Blatch. 194. The practice and rules of the State court do not apply to proceedings in the circuit court taken for the purpose of review in the Supreme Court, and such rules and practice, embracing the preparation, perfecting, settling, and signing of a bill of exceptions, are not within the "practice" or provided for by this section. *Ex parte Chateaugay Iron Co.*, 128 U. S. 553. The manner or the time of taking proceedings as a foundation for the removal of a case, by a writ of error, from one Federal court to another, is a matter to be regulated exclusively by acts of Congress, or where they are silent, by methods derived from the common law, from ancient English statutes, or from the rules and practice of the courts of the United States. The only regulation made by Congress as to bills of exceptions is that contained in § 953. *Town of Lyons v. National Bank*, 8 F. R. 369; *Whalen v. Sheridan*, 18 Blatch. 324; *United States v. Train*, 12 F. R. 852; *Ex parte Chateaugay Iron Co.*, *supra*.

The State law as to the effect of judgments and decrees as liens is adopted. *Ward v. Chamberlain*, 2 Black, 430; *Williams v. Benedict*, 8 How. 107; *Bank v. Horn*, 17 Id. 160. The lien of a judgment will be suspended during appeal or error where a State law adopted by a rule of court under § 916 so provides. *United States v. Sturgis*, 14 F. R. 810. See *Myers v. Tyson*, 13 Blatch. 242. See § 967, and the act of Aug. 1, 1888, there stated. Remedies upon judgments in common-law causes under State laws are not applicable to Federal courts. They are only at liberty to afford remedies in accordance with § 916. *Lamaster v. Keeler*, 123 U. S. 376. See *Moran v. Elizabeth*, 9 F. R. 72; *United States v. Keokuk*, 6 Wall. 514; *Wisdom v. Memphis*, 8 Cent. L. J. 109. As to remedies on judgments, see also note, § 916. It seems that in an action at law the lien given to an attorney by State statutes attaches to an action in the Federal courts. *Wilkinson v. Tilden*, 14 F. R. 778, 781. If the costs and expenses incident to a view of the *locus in quo* by the jury are allowed in common-law suits by State practice, they may be allowed by the



Federal courts, though their allowance is not provided for by Federal statutes. *Huntress v. Epsom*, 15 F. R. 732. Any practice of giving credit for the fees incident to litigation which may prevail in the State courts is not binding on the Federal courts where a specific regulation has been enacted on the subject. *O'Neil v. Kansas City R. Co.*, 31 F. R. 663. The Rev. Stats. have made no change in the law as to costs. *Pentlarge v. Kirby*, 20 F. R. 898, disapproving *United States v. Treadwell*, 15 Id. 532; *Cooper v. Steamboat Co.*, 18 Id. 588. See *Huntress v. Epsom*, 15 F. R. 732.

SECT. 915. — See note, § 916. This section does not forbid attachments in equity suits. *Steam Stone Cutter Co. v. Jones*, 13 F. R. 582. The remedies are to be understood as they are defined in the State laws, and subject to the same conditions and limitations. *Gumbel v. Pitkin*, 124 U. S. 155. State laws were followed in *Third Nat. Bank v. Teal*, 5 F. R. 503; *Lehman v. Berdin*, 5 Dillon, 340; *Bankers' Tel. Co. v. Carpet Co.*, 28 F. R. 398. The State law as to the amount of the security, and the qualifications and residence of the sureties, must be followed. *Singer Manuf. Co. v. Mason*, 5 Dillon, 488. Although a State law allows a justice of the peace to issue an attachment, yet a commissioner of a circuit court cannot. *Chittenden v. Darden*, 2 Woods, 441. This section does not affect the question of what shall be competent evidence of the ownership of stock in national banks. *Sibley v. National Bank*, 133 Mass. 518. This section, in connection with § 739, authorizes an attachment or garnishment only when the court has acquired jurisdiction of the person of the defendant. *Chittenden v. Darden*, 2 Woods, 437; *Saddler v. Hudson*, 2 Curtis, 6; *Nazro v. Cragin*, 3 Dillon, 474; *Levy v. Fitzpatrick*, 15 Pet. 171; *Toland v. Sprague*, 12 Id. 300; *Ex parte Railway Co.*, 103 U. S. 794; *Anderson v. Shaffer*, 10 F. R. 266; *Lovejoy v. Insurance Co.*, 11 Id. 63. A writ of attachment issued on a defective affidavit may be amended although the State court would have had no power of amendment. *Erstein v. Rothschild*, 22 F. R. 61. See *Tilton v. Cofield*, 93 U. S. 163; *Fitzpatrick v. Flannagan*, 106 Id. 648; *Matthews v. Densmore*, 109 Id. 216. State laws as to the dissolution of attachments are adopted. § 933; *Mather v. Nesbit*, 13 F. R. 872; 4 McCrary, 505; *Lafolnye v. Carriere*, 24 F. R. 346. A State statute authorizing State judges to discharge attached property during the vacation of court, does not apply to Federal courts or judges, and such judges will not exercise that power in vacation. *Clafin v. Steinberg*, 2 Dillon, 324. The jurisdiction here conferred upon Federal courts draws to itself everything properly incidental to the administration of the attachment laws of a State, even though it brings into court, for the adjudication of their rights, parties not otherwise subject to its jurisdiction. The rule which determines the rights of parties who make successive attachments by the same officer, acting as the executive of different courts, or by different officers acting independently of each other, can be adopted as between Federal and State tribunals acting concurrently in the administration of the same laws, and its adoption is authorized by this statute. Hence, where the State law so provides, as between State officers levying successive writs, a constructive levy may be permitted by State officers upon property in the possession of the marshal, and also the intervention of the attaching creditors under State process in proceedings in the circuit court of the United States for the same district. *Krippendorf v. Hyde*, 110 U. S. 284; *Bates v. Days*, 17 F. R. 167; *Gumbel v. Pitkin*, 124 U. S. 131, 150, 155. When property attached by a marshal is afterwards attached by a sheriff, the State laws govern as to the priority of the liens. *Bates v. Days*, 17 F. R. 167; 5 McCrary, 342. A State law providing that judgment may be rendered for or against one or more of several defendants, will be applied to proceedings under this section where an attachment is sued out against two or more persons jointly. *Allen v. Clayton*, 11 F. R. 73. No attachment can issue against a national bank until after judgment. *Pacific Bank v. Mixer*, 124 U. S. 726. See § 4 of St. March 3, 1887; 24 St. 554 (*ante*, p. 126). Property in the hands of an assignee under an assignment for the benefit of creditors is not in the custody of



the law. *Boltz v. Eagon*, 34 F. R. 445. A Federal court cannot interfere with property in the custody of a State court even on the ground that the State court was imposed upon. *Attleborough Bank v. Northwestern Manuf. Co.*, 28 F. R. 113.

SECT. 916. — It is settled by the decisions of the Supreme Court that the power of Congress, under the Constitution, as well as that of the courts acting under its authority, extends to the adoption of the laws of the several States, not only as to the nature and form of writs of execution for the enforcement of judgments, but also as to all proceedings thereupon, including proceedings supplementary to execution under such laws for the enforcement of a judgment rendered in a common-law action. *Ex parte Boyd*, 105 U. S. 652, and cases there cited. This provision merely embodies and extends the principle contained in § 14 of the act of Sept. 24, 1789 (1 St. 81). *Id.* Only State laws in force when the act of June 1, 1872 (17 St. 196), was passed or re-enacted in this section, or such subsequent State laws as are adopted by a general rule, are to be followed. *Lamaster v. Keeler*, 123 U. S. 389. The State laws, as existing at the time of the passage of the act, remain until a change has been made by general rules. *Springer v. Foster*, 2 Story, 387; *Wayman v. Southard*, 10 Wheat. 1; *United States Bank v. Halstead*, *Id.* 51; *Re Freeman*, 2 Curtis, 491; *Howe v. Freeman*, 14 Gray, 578. State laws regulating final process do not apply unless adopted by an act of Congress. *Wayman v. Southard*, 10 Wheat. 1; *Ross v. Duval*, 13 Pet. 45; *Boyle v. Zacharie*, 6 *Id.* 648. See note, § 916. Both the form and effect of executions are adopted. *Koning v. Bayard*, 2 Paine, 251; *United States Bank v. Halstead*, 10 Wheat. 51; *United States v. Graves*, 2 Brock. 379. Section 721 does not apply to the practice of the court, or to the conduct of the officer, in the service of an execution. *Wayman v. Southard*, 10 Wheat. 1. This section applies to executions in favor of the United States. *Fink v. O'Neil*, 106 U. S. 279. It adopts garnishment proceedings authorized by the State laws (*Street R. Co. v. Hart*, 114 U. S. 661), and applies to proceedings supplementary to execution to examine the judgment debtor in regard to his property. *Ex parte Boyd*, 105 U. S. 647; *Street R. Co. v. Hart*, *supra*. This section means that the remedies by execution or otherwise upon judgments in the Federal courts shall be the same as are provided by the State laws for judgments in suits of the like nature; *i. e.*, in order to determine what remedy the judgment creditor shall have, the court in the first place examines the judgment, and sees what is the nature of the thing recovered, whether money or land, or a right to some office, or to have some act done that should be enforced by a *mandamus*; and that then, in the second place, the creditor shall have the same remedies to enforce his judgment in the Federal court as he would have in the State court, in judgments of a like nature belonging to that class. Hence, where a judgment has been rendered against a municipal corporation for a sum of money, a legislative act abolishing the right to the writ of *fiery facias* for the enforcement of judgments against that particular municipality, is inoperative as to an antecedent debt, and is not binding upon the Federal courts by virtue of this statute. *New Orleans v. Morris*, 3 Woods, 115, 123; *Street R. Co. v. Hart*, 114 U. S. 654; *Hart v. New Orleans*, 12 F. R. 292. The remedies supplementary to judgment provided by State laws, and adopted by this section, are those applicable to like causes, and a statute which makes an exception as to a particular corporation is inapplicable. Hence, garnishment proceedings authorized by State laws may be taken by the judgment creditor of a municipal corporation, although a special State act makes it unlawful to issue any writ of execution or *fiery facias* from a State court against the corporation defendant. *Street R. Co. v. Hart*, 114 U. S. 654; *Hart v. New Orleans*, 12 F. R. 294; *New Orleans v. Morris*, 3 Woods, 115. State laws as to equitable relief are not adopted. *Hall v. Mining Co.*, 1 Woods, 544. See also as to executions, notes, §§ 701, 709, 962, 985–987, 989–991, 993, 994, 1002, 1040, 1041. If a court adopts the process provided by State laws, it must do so in substantial accord with such laws. A rule adopting a part thereof only is not authorized. *McCracken v. Hayward*,



2 How. 608. See *Dobbin v. Allegheny County*, 2 Pittsb. 120. Under § 3 of St. 1828, empowering circuit courts to alter final process so as to conform it to any change in State legislation, no rule made by a district judge was binding unless such judge exercised circuit court powers. *Ames v. Smith*, 16 Pet. 303. The act of 1828 was a legislative sanction of the rule announced in *Wayman v. Southard*, 10 Wheat. 1, and *United States Bank v. Halstead*, Id. 51. The power given thereby to make rules concerning final process extended to future State legislation, as well as to the modes of proceeding on executions, as on the forms of writs. *Ross v. Duval*, 13 Pet. 45; *Beers v. Haughton*, 9 Id. 329. The form of process may be changed so as to subject land to sale on execution which has been so subjected by State law enacted after the original act of Congress which adopted the State law. *United States Bank v. Halstead*, 10 Wheat. 51. The general operation and effect of writs of execution issued from the Federal courts are not controlled by collateral regulations and restrictions which State laws have imposed upon State courts to govern them in the actual use, suspension, or superseding of them. *Boyle v. Zacharie*, 6 Pet. 648; *Wayman v. Southard*, 10 Wheat. 1.

The lien of the judgment is determined by the State law. *United States v. Morrison*, 4 Pet. 124; *Williams v. Benedict*, 8 How. 107; *Ward v. Chamberlain*, 2 Black, 430; *Carroll v. Watkins*, 1 Abb. U. S. 474; *Koning v. Bayard*, 2 Paine, 251; *Barth v. Makeever*, 4 Biss. 206; *United States v. Humphreys*, 3 Hughes, 201; *Pollard v. Cocke*, 19 Ala. 188; *Trapnall v. Richardson*, 13 Ark. 543; *United States v. Duncan*, 12 Ill. 523; *Simpson v. Niles*, 1 Ind. 196; *Lawrence v. Belger*, 31 Ohio St. 175. See also p. 291, *ante*. A judgment of a Federal court in Virginia is a lien upon real estate there, although not recorded. *United States v. Humphreys*, 3 Hughes, 201. State laws, prescribing what acts are necessary to make the judgment of a State court a lien, do not apply to the judgments or decrees of Federal courts. These become liens as soon as they are docketed in the court which renders them, and without the filing of a transcript extend to the lands of the defendants in whatever political subdivision of the district they are situated. *Cropsey v. Crandall*, 2 Blatch. 341; *United States v. Scott*, 3 Woods, 334; *Shrew v. Jones*, 2 McLean, 78; *Carroll v. Watkins*, 1 Abb. C. C. 474. See *Lombard v. Bayard*, 1 Wall. Jr. 196. A law requiring that State judgments, in order to be a lien on lands, must be filed in the county where the lands were situated, does not affect a Federal judgment rendered before the enactment of such State law. *Massingill v. Downs*, 7 How. 760. The lien extends through the whole State although there is more than one district therein, provided process runs throughout the State. *Manhattan Co. v. Evertson*, 6 Paige, 457. The effect of a judgment as a lien is to be determined by the State law. If it is provided thereby that the proceeds of the estate of a deceased insolvent shall be distributed among his creditors, and that no execution shall issue upon a judgment against the estate, a judgment of a Federal court against the administrator obtained before the estate was declared insolvent is not a lien. *Williams v. Benedict*, 8 How. 107. A decree of a Federal court *in personam* for damages caused by a collision of vessels is a lien on land under a State law which makes the judgments and decrees of State courts in equity liens thereon. *Ward v. Chamberlain*, 2 Black, 430. Under Rev. Stats. § 985, providing that all writs of execution issued out of district courts, where there are two or more in the same State, may be executed throughout the State, an attachment on real estate in one district is a lien upon it in another district in the same State. *Prevost v. Gorrell*, 5 W. N. C. (Penn.) 151. Under its power to make rules (see Rev. Stats. § 917) the Supreme Court may not make the judgments or decrees of inferior Federal courts liens on lands where there is no express authority of law to that effect. *Ward v. Chamberlain*, 2 Black, 430, 436, disapproving remarks of a contrary tendency in *Beers v. Haughton*, 9 Pet. 360. If the State statute has been adopted by a court of equity as to the mode to be pursued in creating a lien, the method of serving the writ must conform to such statute. *Steam Stone Cutter Co. v.*



Jones, 13 F. R. 567. The lien of a judgment resting upon State laws and practice may be modified or suspended pursuant thereto. Hence, a district court may suspend the lien of a judgment during an appeal or writ of error. *United States v. Sturgis*, 14 F. R. 810. See *Myers v. Tyson*, 13 Blatch. 242, and note § 967. If, pursuant to State laws, a Federal court has issued a *mandamus* to compel the levy of a tax by a municipal corporation, an injunction from a State court against such levy is inoperative. *United States v. Keokuk*, 6 Wall. 514. And *mandamus* when authorized by State laws will issue upon a Federal judgment against a municipality notwithstanding a State court has enjoined its officers from making a levy. *Riggs v. Johnson Co.*, 6 Wall. 166. A *mandamus* to compel a municipal corporation to provide for the payment of a judgment will not be issued until the requirements of the laws of the State have been complied with. *Moran v. Elizabeth*, 9 F. R. 72.

Substantial compliance with State law is sufficient. *Johnson v. Healy*, 9 Ben. 318. A sale on execution, not made conformably to State laws, is irregular and void, and a marshal's deed conveys no title. *Smith v. Cockrill*, 6 Wall. 756. Where an act of Congress provided that the mode of proceedings in civil cases in United States courts in L. shall be conformable to the laws directing the mode of practice in the district courts of L., a sale of lands under an execution issued out of a Federal court, without being advertised as required by State law, was held irregular. *Moncure v. Zunts*, 11 Wall. 416. This section adopts State laws as to exemption from levy and sale on execution. *Re Vogler*, 2 Hughes, 297; *Re Appold*, 6 Phila. 469; *Re Ruth*, Id. 438; *Williams v. Benedict*, 8 How. 107; *Fink v. O'Neil*, 106 U. S. 279. All property subject to levy under State law may be taken. *Georgia v. Railroad Co.*, 3 Woods, 434. A levy and sale of lands under a *pluries* execution while a prior one remains undisposed of is a mere irregularity, which can only be taken advantage of in apt time. *Kerr v. South Park Comm'rs*, 8 Biss. 276. A suit *in rem* for a forfeiture for violation of the internal revenue law is a common-law cause. A Quantity of Tobacco, 10 Ben. 447. This section adopts the State law as to the notice and mode and time of sale. *Moncure v. Zunts*, 11 Wall. 416; *Smith v. Cockrill*, 6 Id. 756; *Pollard v. Cocke*, 19 Ala. 188; *Merchants' Bank v. Evans*, 51 Mo. 335. Judgment may be obtained in a Federal court although under State law it can be collected only in a particular State court. *Yonley v. Lavender*, 21 Wall. 276; *Kittredge v. Race*, 92 U. S. 121. A return of property taken on a *fi. fa.* on execution of a forthcoming bond is governed by State law. *Amis v. Smith*, 16 Pet. 303. An attachment on a judgment allowed by the State law is allowed by the Federal court. *Pearce v. Winter Iron Works*, 32 Ala. 68. An execution cannot affect property of a corporation in the hands of a receiver. *Levi v. Insurance Co.*, 1 F. R. 206. The State law as to appointing a receiver to carry a judgment into effect is adopted. *Naumburg v. Hyatt*, 24 F. R. 902. On a sale by the State court under a prior judgment, the surplus will be turned over to the marshal. *Coughlan v. White*, 66 N. C. 102; see *Bonaffee v. Fisk*, 21 Miss. 682. Goods delivered to a defendant on a forthcoming bond in replevin cannot be taken in replevin from Federal courts. *United States v. Dantzler*, 3 Woods, 719. See also on judgments, note § 914; *Ex parte Chateaugay Iron Co.*, 128 U. S. 554. A sale under a junior judgment of a State court will not prevent a sale under a prior judgment of a Federal court. *Andrews v. Wilkes*, 7 Miss. 554. A State statute authorizing the surrender of a debtor by his special bail applies to Federal courts. *Beers v. Haughton*, 9 Pet. 329. But a statute which is in the nature of a municipal regulation and a restraint upon the officers of the State does not apply to a Federal officer in the execution of Federal process; as where a *mittimus* is required to be issued by a magistrate before a defendant arrested in a civil action can be committed to jail. *Palmer v. Allen*, 7 Cranch, 550. A motion to vacate an order to hold to bail may be opposed according to the practice of the State courts. *McKay v. Garcia*, 6 Ben. 556. Under a statute which expressed that writs of



execution and other final process issued on decrees rendered in Federal courts, and the proceedings thereupon, shall be the same as are used in the State courts, &c., it was held that a debtor, imprisoned under a Federal execution, was entitled to jail limits as fixed by State laws. *United States v. Knight*, 14 Pet. 301. A bail-bond taken in the course of proceedings in an admiralty cause is to be regarded as an admiralty stipulation, and construed according to the rules of admiralty practice. *Lane v. Townsend*, 1 Ware, 286.

SECT. 917. — The words "in any manner not inconsistent with any law of the United States" were not in the act of Aug. 23, 1842 (5 Stat. 518). *Ex parte Phenix Ins. Co.*, 118 U. S. 620. The revisers, regarding the power of the Supreme Court to regulate the practice of inferior courts, under the cited St. of 1842, as not plenary, and as existing only where such practice had not been regulated by acts of Congress, expressed this limitation in the text in order to render the rule certain. 1 Com. D. 504. The power to make and alter rules and process is constitutional. *Wayman v. Southard*, 10 Wheat. 1.

Rules adopted by the Supreme Court have the force and effect of law upon the inferior courts, if they are not in conflict with the statutes. *The Young America*, Newb. Adm. 107; *The Asa R. Swift*, Id. 553; *The Delaware*, Olc. 240; *The Illinois*, Brown's Adm. 13, 27; *Gaines v. Travis*, Abb. Adm. 422; *Gray v. Chicago R. Co.*, Woolw. 63; *Seymour v. Phillip's Co.*, 7 Biss. 460. Rules adopted by the Supreme Court cannot affect the jurisdiction of the circuit or district courts. But they are binding upon them in matters of process and procedure in equity and admiralty causes. *Gray v. Chicago R. Co.*, Woolw. 63; *The St. Lawrence*, 1 Black, 522; *Poultney v. La Fayette*, 12 Pet. 472; *Ex parte Whitney*, 13 Id. 404. See *Ex parte Phenix Ins. Co.*, 118 U. S. 610, 620. Such rules cannot give judgments or decrees the effect of liens. *Ward v. Chamberlain*, 2 Black, 430. The equity rules adopted by the Supreme Court for the circuit courts do not deprive such courts of their power to regulate the time and manner in which parties must appear therein and answer, and to extend such time if the interests of justice require it. *Poultney v. La Fayette*, 12 Pet. 472. The Supreme Court has power to make new rules at any time. *The St. Lawrence*, 1 Black, 528. After the Supreme Court has adopted rules for the government of inferior Federal courts, the latter cannot refuse to be governed by them and follow contrary rules which govern the State courts. *Poultney v. La Fayette*, 12 Pet. 472; *Ex parte Whitney*, 13 Id. 404; *Bein v. Heath*, 12 How. 168; but see now § 914. Such rules cannot be modified by the circuit or district courts in any way contrary to their spirit, nor can they adopt rules of their own inconsistent with them. *Story v. Livingston*, 13 Pet. 359; *Gaines v. Relf*, 15 Id. 9; *United States Bank v. White*, 8 Id. 262; *Bein v. Heath*, 12 How. 168; *Jenkins v. Greenwald*, 1 Bond, 136. The equity rules of the Supreme Court do not prevent the adoption of other rules by circuit and district courts which do not conflict therewith. *Van Hook v. Pendleton*, 2 Blatch. 85. It is competent for the Supreme Court to regulate the details of equity practice by the rules it may adopt. *Pierpont v. Fowle*, 2 W. & M. 23. Substantial rights resting upon a statute must be given even as against a rule of the courts. *Brine v. Insurance Co.*, 96 U. S. 627. The power given to the Supreme Court by this section to prescribe modes of obtaining evidence, weakens the rule announced in *Easton v. Hodges*, 7 Biss. 324, that the laws of the United States cover the whole subject of evidence and exclude it from the domain of practice altogether. *Bryant v. Leyland*, 6 F. R. 125. But see *Ex parte Fisk*, 113 U. S. 713; *Randall v. Venable*, 17 F. R. 162.

SECT. 918. — Sect. 914, so far as it applies, overrules the provision of this section. *Morrison v. Bernards Township*, 35 F. R. 400. See *Osborne v. Detroit*, 28 Id. 385. The Supreme Court Rules, Eq. No. 89, provide as follows: "The circuit courts (both judges concurring therein) may make any other and further rules and regulations for the practice, proceedings, and process, mesne and final, in their respective districts, not inconsistent with the rules hereby prescribed, in their discretion, and from time to time alter and



amend the same." A circuit court cannot establish a practice inconsistent with the rules of the Supreme Court. *United States Bank v. White*, 8 Pet. 262. Nor can the Supreme Court a rule conflicting with an act of Congress. See note § 917. In cases governed by § 914, the circuit court can make rules where the State statutes are silent. *Osborne v. Detroit*, 28 F. R. 385. The circuit courts can make rules in equity as to matters not actually covered by the rules prescribed by the Supreme Court. *Van Hook v. Pendleton*, 2 Blatch. 85; *Steam Stone Cutter Co. v. Jones*, 13 F. R. 581; 21 Blatch. 155. In cases which are not provided for in the rules made by the Supreme Court for admiralty cases, the district courts may regulate their own practice and grant remedies according to the analogies of the procedure in such cases. *The Hudson*, 15 F. R. 162. Rules of practice in equity prescribed by the Supreme Court do not deprive the circuit court of power to mould its rules in relation to the time and manner of appearing and answering, so as to prevent the rule from working injustice. *Poultney v. La Fayette*, 12 Pet. 472. The court may suspend its rules or except a cause from their operation, in the interests of justice. *United States v. Breitling*, 20 How. 252; *Russell v. McLellan*, 3 Wood. & M. 157; *Wallace v. Clark*, Id. 359. Rules need not be written, but may result from the uniform practice of a series of years. *Fullerton v. Bank*, 1 Pet. 604; *Duncan v. United States*, 7 Id. 435; *United States v. Stevenson*, 1 Abb. U. S. 495; *Koning v. Bayard*, 2 Paine, 251; *Sellers v. Corwin*, 5 Ohio, 398. A court may establish rules by its decisions; and its own adjudication is the best evidence that it has done so. *Duncan v. United States*, 7 Pet. 444.

No authority is given by either this section or § 914 to make rules on the subject of evidence. *Randall v. Venable*, 17 F. R. 162; see *Ex parte Fisk*, 113 U. S. 713. For rules as to fees and costs, see *The Alice Tainter*, 14 Blatch. 225; *Neff v. Pennoyer*, 3 Sawyer, 335; *Jordan v. Woollen Co.*, 3 Cliff. 239. Penalties and forfeitures given by statute are to be enforced by civil suits. *Re Leszynsky*, 16 Blatch. 14. Under their inherent powers and their right to regulate their own process, Federal courts possess ample authority to prescribe rules in relation to the collection and disposition of moneys obtained under their process or order. *The Bark Laurens*, Abb. Adm. 508, 513. By consent a case may be referred to a referee. *Thornton v. Carson*, 7 Cranch, 596; *Alexandria Canal Co. v. Swann*, 5 How. 83; *Heckers v. Fowler*, 2 Wall. 123. It is competent for a circuit court to provide by rule that the plaintiff need not prove the execution of the note on which he has sued unless the defendant denies such execution by affidavit. *Mills v. Bank of United States*, 11 Wheat. 431. A rule authorizing an issue of law to be called upon five days' notice is valid, although the State practice does not permit such an issue to be tried until the next term. *Osborne v. Detroit*, 28 F. R. 385. See *Republic Ins. Co. v. Williams*, 3 Biss. 370; *Rosenbach v. Dreyfuss*, 2 F. R. 23; *Ricard v. New Providence*, 5 Id. 433. Rules can be modified, &c. *Lawrence v. Bowman*, McAll. 419. Secondary evidence, of which the proper preliminary proof has been made, cannot be excluded by virtue of a rule of court. *Patterson v. Winn*, 5 Pet. 233. It is competent for a district court to provide by rule that in admiralty proceedings a warrant to attach the goods and chattels, or in default thereof the credits of the defendant, may be granted if an arrest cannot be legally made. *Louisiana Ins. Co. v. Nickerson*, 2 Lowell, 310. The court may require that the clerk shall make up a calendar of causes which have been noticed for trial at a particular term. When this is done the clerk's fee for doing it will be taxed as costs. *The Alice Tainter*, 14 Blatch. 225. The form of bills of exceptions as known at common law was adopted by the circuit courts immediately after the organization of the judicial system, and the practice has been followed ever since. They are required to be in that form. *Pomeroy v. Indiana Bank*, 1 Wall. 592, 599.

SECT. 919. — The revisers observe that § 41 of the internal-revenue act of July 13, 1866, allows an action *qui tam*, while other provisions of such acts contemplate that, in the



very cases where such suits would be appropriate, the action shall be in the name of the United States. 1 Com. D. 505. A suit in admiralty to enforce a lien under Rev. Stats. § 4469 need not be brought in the name of the United States. *Hatch v. Steamboat Boston*, 3 F. R. 807. That all suits in which the United States are the real plaintiffs should be brought in the name of the United States, see *Benton v. Woolsey*, 12 Pet. 30; 7 A. G. Op. 50.

SECT. 921. — See notes, §§ 977, 978. The practice to consolidate under this section is common. *United States v. Railroad Co.*, 98 U. S. 605. Federal courts may order causes pending before them, involving substantially the same questions, though against several defendants, to be tried at the same time, although in consequence the defendants will be brought into antagonism (*Keep v. Railroad Co.*, 10 F. R. 454); and although one of the suits sounds in tort and the other in contract. *Id.* It is competent for the court, in actions at law or suits in equity, where a number of cases of like nature involve the same questions, to order that one of them be made a test case for all, or that they be consolidated. *Andrews v. Spear*, 4 Dillon, 470; *Wiede v. Insurance Co.*, 3 Chi. Leg. News, 353. As to the rule in proceedings *in rem* in admiralty courts, see *The Prinz Georg*, 19 F. R. 653, and cases cited; also note, § 978. The defendant only, and not the plaintiff, can move that several actions of like character abide the event of one of them. *Ferrett v. Atwill*, 4 N. Y. Leg. Obs. 215. The consolidation of several actions under this section will not defeat the right of the plaintiff to discontinue one or more of the original causes of action. *Young v. Railway Co.*, 9 F. R. 348; 10 Biss. 550. The court may order several actions against several insurance companies to be tried before the same jury, if the questions and the evidence and the counsel are the same. *Wiede v. Insurance Co.*, 3 Chi. Leg. News, 351; *s. p. Holmes v. Sheridan*, 1 Dillon, 351. If there are several causes of action which may be properly joined, the court will compel a consolidation of the cases brought thereon at the cost of the plaintiff. *Wolverton v. Lacey*, 18 Law Rep. 672. But see *Alexandria Bank v. Young*, 1 Cranch C. C. 458, apparently ruled before this statute was enacted.

SECT. 922. — If an officer has appeared, he waives the objection that the service of the writ was not by a disinterested person. *Knox v. Summers*, 3 Cranch, 496.

SECT. 923. — The general rule is that, in order to give the court jurisdiction in cases of penalties against vessels, a seizure must precede the filing of the libel; and that such seizure must be alleged in the libel. Executing a delivery bond under the act of Congress waives the irregularity. *The Lewellen*, 4 Biss. 156, 162. This and §§ 925, 926 do not apply to a suit under § 4465 by a private individual to recover the penalty there provided for. *Hatch v. The Boston*, 3 F. R. 807, 810. If no person intervenes and files a claim the court proceeds and decrees a forfeiture. This is the practice under the statute and as established by courts of admiralty. Proof of the debt may be made on a summary hearing. *The Mary Anne*, 1 Ware, 104. It was provided in § 89, act of 1799, that after a default "the court shall proceed to hear and determine the cause according to law." This made it imperative that there should be some hearing before a forfeiture can be decreed, the extent of the hearing depending upon the circumstances of each case. *United States v. Schooner Lion*, 1 Sprague, 399.

SECT. 924. — The court may allow an amendment to a defective affidavit for a writ of attachment although the practice of the courts of the State in which the case is tried is not to allow it. *Erstein v. Rothschild*, 22 F. R. 61, 66.

SECTS. 925, 926. — See note § 923.

SECT. 932. — The power of the Postmaster-General to authorize any person to apply for the attachment is here omitted as amounting to an employment of counsel, which power is taken away from him. 1 Com. D. 509.

SECT. 933. — The words "except in the cases mentioned in the preceding nine sections" were here added. 1 Com. D. 509. A State insolvent law dissolving attachments under certain contingencies dissolves attachments in the Federal courts under similar con-



tingencies. *Lafolnye v. Carriere*, 24 F. R. 346; *Mather v. Nesbit*, 13 Id. 872; 4 McCrary, 505. An attachment is not dissolved by an amendment of the writ and declaration increasing the amount claimed, made after another attachment has intervened, where the attaching creditor, on obtaining judgment and taking out execution for the increased amount, directs the sheriff to levy only for the amount originally claimed. *Cutler v. Lang*, 30 F. R. 173.

SECT. 934. — Replevin does not lie for property of the plaintiff seized under a warrant by a collector of internal revenue as the property of another. *Treat v. Staples*, 1 Holmes, 1; *O'Reilly v. Good*, 42 Barb. 521; *Brice v. Elliot*, 22 Int. Rev. Rec. 206.

SECT. 938. — See note § 941. The words "from imports or tonnage" in the third line of this section were here added. While the act of Dec. 31, 1792, ch. 1, § 29, kept § 67 of the act of 1790 in force, although the act itself was repealed by St. 1799, and St. 1794, ch. 64, § 1, which authorized the district judges to appoint commissioners before whom appraisers "may be sworn," clearly modified St. 1790, if not also the provision of 1799, which repeats its direction that appraisers be sworn in open court, yet the revisers assumed that the two provisions must stand together, and that even under St. 1799 the appraisers may be sworn by a commissioner. They also thought it advisable to here include, according to the apparent intent of Congress, seizures under the enrolment act of 1793, although it was held in *Keene v. United States*, 5 Cranch, 304, that the act of 1790, or any act, was not referred to and identified by the enrolment act, the reference therein being only by an incorrect recital of the title of the act of 1790. 1 Com. D. 511.

The value of the goods appraised after a seizure is to be ascertained at the place of importation. *Ferguson v. United States*, 19 L. Rep. 621. A bond voluntarily given is good as against sureties, although the seizure, made in good faith under color of law, was unauthorized. *United States v. 4 Pieces of Woollen Cloth*, 1 Paine, 435. The certificate of the collector should show the payment of all burdens or taxes imposed upon the property by the United States, including any sum imposed under the act of March 3, 1865. *United States v. 3 Horses*, 1 Abb. U. S. 426. The bond should be for the actual cash value of the property at the time and place of seizure, without deductions for duties paid where the property has been seized in the hands of the importers (*United States v. 3 Horses, supra*); and also where the goods seized are in the warehouse. *United States v. 12,347 Bags of Sugar*, 1 Abb. U. S. 407; *United States v. Segars*, 3 Phila. 517; *United States v. 1291 Bales of Tobacco*, 2 Lowell, 107; *contra*, *Four Cases of Silk Ribbons*, 1 Ben. 214; *Lot of Leaf Tobacco*, 2 Id. 76; *United States v. Cargo of Sugar*, 3 Sawyer, 27. The courts in seizures on land under the revenue laws have power independent of statute to discharge on bail any property in custody. *United States v. 300 Barrels of Whiskey*, 1 Ben. 15. A release on bond was refused in *United States v. 2 Tons of Coal*, 5 Blatch. 386. Property seized by a collector of customs under Rev. Stats. § 3095, and held according to § 3086, may be delivered to the claimant upon payment of the duties or the execution of a bond. *The G. G. King*, 16 F. R. 921. In civil causes in admiralty the property seized may be disposed of in accordance with admiralty practice as well as by statutory enactment, under the tenth admiralty rule. *The G. G. King, supra*; *The Alligator*, 1 Gall. 149; *McLellan v. United States*, Id. 227; *Place v. The Norwich*, 1 Ben. 89; *United States v. Ames*, 99 U. S. 35. Unless the statute prohibits it, an admiralty stipulation is preferable. A void bond may be good as such a stipulation. *The Alligator, supra*. The security may be by a sealed instrument or a stipulation in the nature of a recognizance. Id.; *McLellan v. United States*, 1 Gall. 227; *The Octavia*, 1 Mason, 149. It is competent for the court to refuse to deliver property upon a stipulation, unless upon condition that interest shall be allowed. But if the stipulation does not so provide, the principal and his sureties cannot be charged with interest. *The Santa Maria*, 10 Wheat. 431. "Whenever a stipulation is taken in an admiralty suit for the property subjected to



legal process and condemnation, the stipulation is deemed a mere substitute for the thing itself, and the stipulators liable to the exercise of all those authorities on the part of the court, which it could properly exercise, if the thing itself were still in its custody." The *Palmyra*, 12 Wheat. 1, 10; *Newell v. Norton*, 3 Wall. 266. If an amendment proposed to the libel does not change the liability of the sureties it may be allowed. *Newell v. Norton*, *supra*. If the government is interested in the proceedings, the district attorney should have notice of them and be heard as to the propriety of a delivery on bail, the appointment of appraisers, &c. *Ex parte Robbins*, 2 Gall. 320. A bond voluntarily given is good, although it is not conditioned conformably to the details of the statute. The *Struggle*, 1 Gall. 476. Under the tenth admiralty rule the court and not the collector decides how the property is to be disposed of. The decision terminates the latter's custody. The warrant or order for the delivery of the goods should run to the marshal, who will serve a certificate thereof upon the collector. The *G. G. King*, 16 F. R. 921. By virtue of its admiralty jurisdiction a district court may deliver property on bail whether the security be a bond or a stipulation. The *Alligator*, 1 Gall. 145. Judgment and execution may be awarded in a summary manner on a stipulation. The *Gran Para*, 10 Wheat. 497; The *Alligator*, *supra*; The *Baltic*, Blatch. & H. 149. The ultimate adjudication of the cause is not complete until judgment is awarded on the bond. *McLellan v. United States*, *supra*. If one of the obligors upon a joint and several bond has died, the court will proceed against those who survive, or, if the plaintiff so elects, against the representatives of the deceased also. The *Octavia*, 1 Mason, 149. Judgment ought not to be taken until after the lapse of twenty days, and, under the act of 1799, it ought to be taken in open court. *McLellan v. United States*, 1 Gall. 227. The bond is but a security, and is not separate and distinct from the original proceeding. It amounts to a stipulation, and a court of admiralty may award an execution upon it. *Id.*

SECT. 940. — The revisers regarded the cited provision of 1832 as giving the judges in vacation the same power that the court has in term time, whether the case is a government prosecution or a proceeding in admiralty by a private person. That act, after "bond" in the fifth line, contained the additional words "under the statute, as the case may be," which act was treated as referring to the proceeding under St. March 2, 1799, ch. 22, and under the registry and enrolment acts, as directed by St. Aug. 4, 1790, ch. 35, § 67, 1 Com. D. 512.

SECT. 941. — See Sup. Ct. Rules, Adm. No. 11; The *Struggle*, 1 Gall. 476; The *White Squall*, 4 Blatch. 103; *Carroll v. The T. P. Leathers*, Newb. Adm. 432; *Treat v. The Rainbow*, 1 Ben. 40; The *Monadnock*, 5 Id. 357. The original provisions appeared not to apply to prosecutions by the United States for forfeiture, which are here expressly excepted. 1 Com. D. 513. Sup. Ct. Rules, Adm. No. 11, is not imperative in all cases, and should not be followed in a prosecution under § 5283. The *Mary N. Hogan*, 17 F. R. 813.

A decree for the libellant's claim and costs may be entered against the stipulators on the release bond, although there had been a separate stipulation for costs, but the decree cannot exceed the amount of the bond. The *Madgie*, 31 F. R. 926. Sureties who have paid a decree can be subrogated to the claim of the libellant against their principal, the claimant of the vessel. *Id.* The bond, although filed in the clerk's office after its approval, is to the marshal, and he acts upon his own responsibility in staying the execution of process under it. If the case is otherwise within § 829, Rev. Stats., the marshal is entitled to his fees as there provided, although service of process was waived and the vessel was not in fact seized. The *City of Washington*, 13 Blatch. 410. If, after being discharged, a vessel returns to her owner, she is free from the lien which was the basis of the proceedings against her, and cannot, in the absence of fraud, be re-arrested. The *Old Concord*, Brown's Adm. 270; The *Union*, 4 Blatch. 93; The *White Squall*, *Id.* 103; *Train v. The Hiram Wood*, 6 Chi. Leg. News, 135; The *Huntsville*, 3 Woods, 386. See The *Jewess*,



1 Ben. 21, note. The owner takes a vessel, after her discharge, subject to all the liens and claims existing against her previous to her seizure, save that on account of which she was released, and also subject to any subsequent liens or charges in the hands of her owner or any person interested in her. *The Union*, 4 Blatch. 90. Where several libels are filed amounting to more than the value of the vessel, she can be discharged on a stipulation for her full value (*The Antelope*, 1 Ben. 521); and on an application by the owners in such a case the stipulation need not include the value of the freight. *The Vivid*, 3 Ben. 397. The customary security will be given a libellant although he seems to have much more than enough security. *The Archer*, 9 Ben. 455. A stipulation may be taken and enforced, although the vessel is not actually in the custody of the court. *The Roslyn*, 9 Ben. 119. The marshal is entitled to his commission under § 829 if process is issued and a bond given under this section, although the service of process is waived and the vessel is not actually seized under the process. *The City of Washington*, 13 Blatch. 410.

The court may postpone a decree against the sureties until the principal's time for appeal has expired, and then proceed only on notice. But the statute does not make this imperative, and a final decree in a collision suit where the *res* has been surrendered on a stipulation pursuant to this section, may be entered against the principal and his sureties at the time of its rendition. *The Belgenland*, 108 U. S. 153. Under § 1007 no execution can issue until the expiration of ten days after the entry of the decree; in this respect decrees under this section are like all others, and an appeal with *supersedeas* stays execution against the stipulators as well as the principal. *Id.* A libellant who has discontinued his cause after the vessel was discharged on bond, cannot file another libel against her on the same cause of action. The bond discharged her from the claim. *The Bark Thales*, 3 Ben. 327. If a vessel has been released on bond the libellant must look exclusively to the latter for the satisfaction of his claim. Except where there has been fraud he cannot share in the proceeds realized from the sale of the vessel under a subsequent libel. *Senab v. Steamer Josephine*, 4 Cent. L. J. 262. If the sureties on a bond were accepted by mistake or fraud, and were not bound, the vessel may be re-arrested by order of the court. *The Favorite*, 2 Flippin, 86. This section only contemplates a form of security in addition to those already existing, subject to the same incidental powers of the court as existed over the forms previously in use. It is not designed to establish a form of security which should be so far beyond the ordinary, incidental, and acknowledged powers of the court as to leave the parties practically remediless, and defeat the ends of justice. Hence, after the death of one of the sureties on a bond, his estate being insolvent, and the claimant having made an assignment for the benefit of his creditors, an additional surety will be required in place of the one deceased. *The City of Hartford*, 11 F. R. 89. See *The Monarch*, 30 F. R. 283; *The Virgo*, 13 Blatch. 255. The clerk of a district court is not authorized to take a stipulation for a vessel's discharge. *The Jeanie Landles*, 17 F. R. 91. If a stipulation is taken in court for a vessel's discharge, notice is to be given the marshal by a writ issued by the clerk. And if it is taken before a commissioner he should give similar notice by an order. The writ or order should be served on the marshal by the claimant or his attorney, and should recite the issuance of the process, and the allowance of the stipulation, and require the marshal to forbear the further execution of the process, and to surrender or deliver the property taken to the claimant on demand. *The Jeanie Landles*, 17 F. R. 91. The amount of a stipulation out of court by consent of the parties cannot be reduced in advance of the hearing. *The Monarch*, 30 F. R. 283. As to a stipulation under Admiralty Rules 5 & 15, see *The Jeanie Landles*, 17 F. R. 91. A clerk is not authorized to take a stipulation for the discharge of a vessel. *Id.* *Quære* whether the party as a matter of right can obtain a release of the vessel under this section after a default. *The Martha C. Burnite*, 10 Ben. 196. There is no statute of the United States



which authorizes or requires sureties in stipulations or appeal bonds, in a suit *in rem* in admiralty to appear before the admiralty court after a final decree in the suit to submit to an examination concerning their property, according to State law and practice. *The Blanche Page*, 16 Blatch. 1. The mode of enforcing a final decree in admiralty for the payment of money is by execution as prescribed by Admiralty Rule 21; and the property of the sureties cannot be sequestered according to the practice in equity; they cannot be punished as for a contempt in not paying, and cannot be imprisoned where the State law has abolished imprisonment for debt. *Id.* This act is not compulsory, and it rests with the court whether to appoint appraisers. *The Struggle*, 1 Gall. 476. At any time before default, property in custody may be bonded without any other condition than is prescribed in this section. *The Martha C. Burnite*, 10 Ben. 196. A vessel may be released to a claimant on a stipulation for her full value (*The Antelope*, 1 Ben. 521; *The Ann Caroline*, 2 Wall. 538; *Lane v. Townsend*, Ware, 300); and also on a stipulation for costs. *The Ann Caroline*, *supra*. The obligors in a bond given on stipulating in admiralty cannot, after obtaining the property, object to any informality. *United States v. The Little Charles*, 1 Brock. 380; *United States v. 4 Pieces of Woollen Cloth*, 1 Paine, 435. A defective execution of a stipulation will be deemed waived unless excepted to before the close of the term next after the opposite party has notice of the defect. *The Infanta*, Abb. Adm. 327. As to the bond to be given, see Sup. Ct. Rules, Adm. No. 5. Where the owner has given a stipulation he cannot afterwards insist that the ship is of less value, or that he has discharged liens. *The Virgin v. Vyfhius*, 8 Pet. 538. The stipulation limits the liability of the sureties (*The Ann Caroline*, 2 Wall. 538; *Brown v. Burrows*, 2 Blatch. 340; *The Wanata*, 95 U. S. 618); except in cases of default or contumacy (*The Wanata*, *supra*); but not the liability of the owner. *Id.* One of two stipulators is not discharged by the death of the other, and cannot resist an application for a summary judgment on the usual decree directing that the stipulators pay the value into court, on the ground that the libellant has not exhausted his remedy against the claimant. *The C. F. Ackerman*, 14 Blatch. 360. Sureties are liable on a condemnation on an amended libel. *United States v. Mosely*, 8 F. R. 688; 7 Sawyer, 265; *The Maggie Jones*, 1 Flippin, 635. To be discharged from a bail-bond or stipulation, fraud, deceit, duress, illegality of consideration, or other matter avoiding a bond at law or in equity, or entitling party to relief must be shown. *Cure v. Bullus*, Abb. Adm. 555. For other cases as to sureties, see *The Empire*, 1 Ben. 19; *The Susan E. Voorhis*, 10 Id. 380; *The Zodiac*, 5 F. R. 220; *The Belle*, 5 Ben. 57; *The Roslyn*, 9 Id. 119.

SECT. 942.—Bail cannot be demanded in an action of debt to recover a penalty imposed for the violation of a revenue law. *United States v. Mundell*, 1 Hughes, 415. If the case is one in which bail may be demanded and the defendant refuses to furnish it, the marshal may commit him. *Palmer v. Allen*, 7 Cranch, 550. It is only required that the same grounds shall exist for the arrest of a defendant as are necessary under State laws, not that the necessary papers shall be verified before the identical officers authorized by such laws to take verifications. *Fulton v. Gilmore*, 2 Flippin, 260. If the State law allows bail only after it appears that there is probable cause, the oath must show such cause. *Leonard v. Caskin*, Bee's Adm. 146.

SECT. 945.—*Barber v. United States*, 35 F. R. 886. In the absence of a rule of court providing otherwise, appeal bonds in admiralty may be taken before a United States commissioner. *The Canary No. 2*, 22 F. R. 536. But a stipulation in admiralty, authenticated by the mere certificate of a commissioner appointed in another circuit, is not authorized or binding. *Sawyer v. Oakman*, 11 Blatch. 65. A court commissioner may take the verification of the papers required by State law for the arrest of a defendant, though the law does not authorize him to do so. *Fulton v. Gilmore*, 2 Flippin, 260; 10 Chi. Leg. News, 108. An appeal bond in admiralty may be taken before a United States commissioner.



in the absence of a rule of court providing otherwise. The Canary No. 2, *supra*. See note, § 917.

SECT. 946. — This provision, though expressed in general terms in St. May 15, 1862, ch. 71, was treated as relating only to the Federal courts in Kentucky. 1 Com. D. 514.

SECT. 948. — A summons not sealed or signed by the clerk cannot be amended. *Middleton Paper Co. v. Rock River Co.*, 19 F. R. 252; *Dwight v. Merritt*, 4 F. R. 614; 18 Blatch. 305. If the only defect is the absence of the seal, it may be amended. *Peaslee v. Haberstro*, 15 Blatch. 472. Under this and § 954, good cause being shown, the court may enlarge the time for filing a transcript under § 3, act of 1875, or cure the defect by allowing it to be filed *nunc pro tunc*. *Woolridge v. McKenna*, 8 F. R. 650. The report of a referee, entitled in the wrong court, may be amended *nunc pro tunc*. *Fourth National Bank v. Neyhardt*, 13 Blatch. 393. Writs returnable on Sunday may be amended, the parties having appeared on the following day, but under protest. The power of amendment conferred upon Federal courts by this section cannot be lessened by State decisions, even though it might be enlarged. *Norton v. Dover*, 14 F. R. 106. A defect in a removal bond may be amended in the State or Federal court, or a new one may be filed *nunc pro tunc*. *Deford v. Mehaffy*, 13 F. R. 481; *Harris v. Delaware R. Co.*, 18 Id. 833. The power to amend is unconditional and positive and cannot be limited by arbitrary qualifications. It applies to proceedings under § 915 as well as under § 924. *Erstein v. Rothschild*, 22 F. R. 61. A writ of attachment on a defective affidavit may be amended although the State law does not permit an amendment in a similar case. *Id.* The power of amendment extends to the affidavit as well as the writ. *Id.*; *Tilton v. Cofield*, 93 U. S. 163. A mistake in a writ of error, whereby it is made returnable on a wrong day, may be amended by the circuit court. A decree of such court will not be reversed for an amendable defect in the form of process, unless it appears that the alleged defect may have injured the complaining party, or that he would have been prejudiced if the defect had been amended. *Semmes v. United States*, 91 U. S. 21, 25.

SECT. 949. — Prior to the act of 1870, the original of this section, the hearing of causes in the Supreme Court was regulated almost wholly by rule, and the only cases of general public interest which that court took up out of their order were those in which the question involved was of such a nature as would embarrass the operations of government while it was unsettled. *United States v. Fossatt*, 21 How. 445. This section is not imperative. It does not provide that all cases in which the execution of the revenue laws of the State is enjoined or stayed shall have preference over others, but only such as, upon a showing, the court is of the opinion should be heard out of their order. The court will determine what is sufficient reason. Preference will not be given to cases of the class included in this section, unless it sufficiently appears that the operations of the State government will be embarrassed by refusing to do so. *Hoge v. Richmond R. Co.*, 93 U. S. 1; *Central R. Co. v. Bourbon County*, 116 Id. 538. The motion must be made on behalf of a State or by one who is a party and claims under the laws thereof. *Ward v. Maryland*, 12 Wall. 163; *Central R. Co. v. Bourbon Co.*, 116 U. S. 538. Ordinances of a municipal corporation levying taxes cannot be classed as revenue laws of a State. The reasons for preference do not apply to such a corporation. *Davenport v. Dows*, 15 Wall. 390. A suit against a tax-collector for alleged wrongs done the plaintiff while he was collecting taxes, the State not being a party, and the collection of taxes not being enjoined, does not affect the revenue laws and will not be taken out of its order. *Carter v. Greenhow*, 109 U. S. 64. The motion is not granted of course even with the consent of both parties. *Miller v. State*, 12 Wall. 159. A suit in the nature of a *quo warranto* to try the title to office in a private corporation is not entitled to priority. *Miller v. State*, *supra*.

SECT. 951. — The object of the act is to adjust and liquidate all accounts between the parties. *United States v. Wilkins*, 6 Wheat. 135; *United States v. Fillebrown*, 7 Pet.



28; *Gratitot v. United States*, 15 Id. 336; *United States v. Fitzgerald*, 4 Cranch C. C. 203. This section does not apply to proceedings in the Court of Claims. *McKnight v. United States*, 13 Ct. Cl. 311. It embraces every suit between the United States and an individual. *United States v. Ingersoll*, Crabbe, 135; *United States v. Barker*, 1 Paine, 156. A claim which has not been presented and disallowed cannot be given in evidence notwithstanding its apparent equity. *Railroad Company v. United States*, 101 U. S. 543; *Halliburton v. United States*, 13 Wall. 63. A transcript from the Treasury Department duly authenticated, showing that the vouchers for the claims have been presented to the proper accounting officers and disallowed, is sufficient to authorize evidence to establish them. *United States v. Hart*, 19 Pac. Rep. 4. A claim cannot be proved until it is shown that it has been rejected by the accounting officers. The proper evidence to show that fact is a transcript from the books of the Treasury. *United States v. Gilmore*, 7 Wall. 491; *United States v. Smith*, 1 Bond, 68. No particular form is essential to the allowance or disallowance of a claim. A mere suspension of action is not a disallowance. But it is a disallowance if the government sues to recover a balance which excludes the amount claimed. *United States v. Duval*, Gilpin, 356, 381. If a claim has not in fact been disallowed it will be considered that action has been suspended. *United States v. McCall*, Gilpin, 563. An instruction that the defendant is not entitled to credits cannot be given where there is any evidence in favor of it. *United States v. Laub*, 12 Pet. 1. A credit or allowance made by a head of a department cannot afterwards be recalled by the department, but resort must be had to a suit. *United States v. Bank*, 15 Pet. 377; *United States v. Kyhn*, 4 Cranch C. C. 401. A claim can be used as a set-off against only one demand. *United States v. Prentice*, 6 McLean, 65. It is not required that the claim be presented before the commencement of suit. *United States v. Hawkins*, 10 Pet. 125. The statute contains no limitation as to the nature and origin of the claim for a credit which may be set up in a suit, and a reasonable construction of it allows the defendant the full benefit of any credit, whether arising out of the particular transaction for which he was sued, or out of any distinct and independent transaction, which would constitute a legal or equitable set-off, in whole or in part, to the debt sued for by the United States. *United States v. Wilkins*, 6 Wheat. 135, 144. An equitable claim may be admitted in set-off. *United States v. Macdaniel*, 7 Pet. 1; *United States v. Ripley*, Id. 18; *United States v. Duval*, Gilpin, 356; *Gratitot v. United States*, 15 Pet. 336; *United States v. Collier*, 3 Blatch. 325. Where a person is both debtor and creditor to the government in any form, the accounting officers are required by law to set off the one indebtedness against the other, and certify only the balance. *Taggart v. United States*, 17 Ct. Cl. 322. A claim which requires legislative action is not a proper offset either before the accounting officers or the court. But if the claim is one which it was within the discretion of the head of the department to allow, it may be sent to the jury, if it has been disallowed, though it was not a legal claim. *United States v. Macdaniel*, 7 Pet. 1, 12; *United States v. Fillebrown*, Id. 28; *Gratitot v. United States*, 15 Id. 336. Set-offs on disallowed claims extend to an officer's claim for extra compensation for extra services (*United States v. Fillebrown*, 7 Pet. 28); for commissions on disbursements (*United States v. Macdaniel*, 7 Pet. 1; *Gratitot v. United States*, 15 Id. 336); claim for costs accrued against the government in a previous suit (*United States v. Ringgold*, 8 Pet. 150); claims for salary due (*Fendall v. United States*, 12 Ct. Cl. 305); claims for fees. *United States v. Mann*, 2 Brock. 9. They do not extend to a claim acquired by purchase. *United States v. Robeson*, 9 Pet. 319.

The claim must have been made out with the proper account and vouchers, and presented to the department, and if disallowed because of absence of such account and vouchers, it cannot be used as a set-off. *United States v. Lamon*, 3 MacArthur, 204. On a claim not presented and disallowed the defendant must have vouchers he could not procure before. *Watkins v. United States*, 9 Wall. 759; *Halliburton v. United States*, 13 Id.



63; *Railroad Co. v. United States*, 101 U. S. 543; *United States v. Austin*, 2 Cliff. 325; *United States v. Ingersoll*, Crabbe, 135; *United States v. Smith*, 1 Bond, 68; *United States v. Duval*, Gilpin, 356; *United States v. Barker*, 1 Paine, 156. The rule as to set-off under United States laws cannot be affected by State laws. Hence a defendant who is the assignee of a claim against the government cannot set it off against the demand made upon him, although he could do so under the local law. *United States v. Robeson*, 9 Pet. 319. State laws as to set-off are inapplicable in actions between the government and individuals. *Reeside v. Walker*, 11 How. 272; *United States v. Eckford*, 6 Wall. 484; *Watkins v. United States*, 9 Id. 759; *United States v. Prentice*, 6 McLean, 65. The defendant cannot have judgment against the government though he has pleaded a set-off and a balance has been proved to be due him. *United States v. Eckford*, 6 Wall. 484; *Schaumburg v. United States*, 103 U. S. 667. The claim of a district attorney for a credit of costs not taxed but taxable, is included in this section (*United States v. Ingersoll*, Crabbe, 135); and of a private person, regardless of the cause of action (*United States v. Barker*, 1 Paine, 156); and of a military officer for moneys expended by him in an official capacity (*United States v. Lent*, Id. 417); and a claim for a new credit arising from another account (*Cox v. United States*, 6 Pet. 172); and a claim for a credit by the sureties on an official bond on account of their principal (*United States v. Giles*, 9 Cranch, 212); and the claim of a United States marshal for fees. *Watkins v. United States*, 9 Wall. 759. If the commissioner of internal revenue has rejected the claim of a collector of internal revenue for a credit on account of uncollected taxes which he turned over to his successor, the collector, when sued therefor, may prove the claim. *United States v. Kimball*, 101 U. S. 726. A claim for unliquidated damages is not pleadable by way of set-off. *United States v. Robeson*, 9 Pet. 319; *United States v. Buchanan*, 8 How. 83; *United States v. Williams*, 5 McLean, 133; *United States v. Wells*, 2 Wash. 161; *Ware v. United States*, 4 Wall. 617.

An officer of the government who has been injured by the conduct of another officer cannot set off the damages he has sustained as a defence to an action by the government. *United States v. Buchanan*, 8 How. 83. If the government has collected money on execution, the fact may be proved in a subsequent action on the same bond against a different surety, without making proof of the presentation of a voucher to the Treasury department. *Myers v. United States*, 1 McLean, 493. Evidence that a surety has made payments on the bond of his principal since the death of the latter may be given without any proof of compliance with this statute. *Cox v. United States*, 6 Pet. 172, 200. In an action against a marshal for not paying over money received by him on an execution in favor of the government, he may show that his claim for fees against it is greater than the amount in his hands. *United States v. Mann*, 2 Brock. 1. No set-off can be pleaded against a suit by the government to collect taxes due it, if the claim set up against it grows out of independent matters, notwithstanding its justice and the fact that it has been presented to the proper officers. *United States v. Pacific R. Co.*, 4 Dillon, 66; *Apperson v. Memphis*, 2 Flippin, 363.

SECT. 952.—Unless the conditions of this section have been complied with, or the case is within its exceptions, a set-off cannot be pleaded. *Ware v. United States*, 4 Wall. 617; *United States v. Davis*, Deady, 294. If the claim is for extra allowance under a statute authorizing the Postmaster-General to make it in his discretion, his action is final. *United States v. Davis*, *supra*.

SECT. 953.—This is the only statutory regulation concerning bills of exceptions. *United States v. Train*, 12 F. R. 852; *Ex parte Chateaugay Iron Co.*, 128 U. S. 554; see p. 291, *ante*. If the bill is otherwise good the absence of a seal is immaterial. *Generes v. Campbell*, 11 Wall. 193; *Hanna v. Maas*, 122 U. S. 24. The supreme court regards the bill as a verity. *Bingham v. Cabbot*, 3 Dall. 19. Minutes of the judge or clerk, or notes of a



stenographer, cannot take the place of a bill of exceptions, but are only memoranda by the aid of which one may afterwards be drawn up. *Hanna v. Maas*, 122 U. S. 24. Exceptions must be drawn up and settled in proper form in the trial court. They cannot be amended or redrafted in the supreme court. *Stimpson v. West Chester R. Co.*, 3 How. 553. The bill must be signed by the judge. His initials cannot be regarded as his signature, or as a sufficient authentication of the bill, or as sufficient evidence of its allowance by the judge or the court. *Origet v. United States*, 125 U. S. 240.

SECT. 954. — See notes §§ 636, 948. This remedial statute is to be construed liberally to accomplish its object. It not only enables the courts, but it enjoins it upon them as a duty, to disregard the niceties of form, which often stand in the way of justice. *Parks v. Turner*, 12 How. 39, 46. Every conceivable step to be taken in a cause, from the issuance of the writ down to judgment, is within the language of the statute. *Roach v. Hulings*, 16 Pet. 319. Civil actions brought by the United States are included in this section. *Jacob v. United States*, 1 Brock. 520, 525. If no local statute or rule of local law is involved, amendments may be made in attachment suits as well as in others. *Tilton v. Cofield*, 93 U. S. 163, 167. The defect is one of form whenever the defendant must, of necessity, be guilty of a breach of the law, and have incurred the penalty for which the suit is brought, if the allegation in the declaration is true. This constitutes the difference between form and substance. A defendant has a right to insist on a precise statement of the offence with which he is charged, that he may know how to defend himself. This right may be waived if he goes to trial without insisting upon it; the only question of substance left is whether the fact was charged in such terms that, if committed, the penalty of the law must be incurred. *Jacob v. United States*, 1 Brock. 520. The system of special demurrers which formerly obtained is not perpetuated by this section, at least in States where different and inconsistent rules of pleading have been established. There is no conflict between this statute and § 914, nor does this repeal that. Neither has this been repealed by §§ 5595, 5596. *Rosenbach v. Dreyfuss*, 1 F. R. 391. As to amendments under State laws, see notes to § 914. The court which acts upon amendments does so in the exercise of its discretion, under its own rules and modes of practice. Its action is not subject to review or control by *mandamus*. *Wright v. Hollingsworth*, 1 Pet. 165; *Walden v. Craig*, 9 Wheat. 576; *United States v. Buford*, 3 Pet. 12; *Smith v. Jackson*, 1 Paine, 453; *McGlinchy v. United States*, 4 Cliff. 312. Amendments are not allowed in penal actions and in proceedings to enforce a forfeiture with as much liberality as in ordinary civil causes. *United States v. Batchelder*, 9 Int. Rev. Rec. 98. On appeal from the district court the circuit court can permit an amendment of substance. *Warren v. Moody*, 9 F. R. 673. Defects of form must be amended. All other amendments are left entirely to the judgment and discretion of the court. *Thomas v. United States*, 15 Ct. Cl. 343. The requirement that judgment shall be given according as the right of the cause and matter in law shall appear, only authorizes amendments where there is want of compliance with matters of form. *Russell v. United States*, 15 Ct. Cl. 168.

SECT. 955. — This section prescribes the only mode of continuing a suit by a personal representative. It is a complete substitute for a continuance by journey's account. *Richards v. Maryland Ins. Co.*, 8 Cranch, 84. This section is confined to personal actions, as the power to prosecute or defend is given to the executor or administrator, and not to the heir or devisee. *Macker v. Thomas*, 7 Wheat. 530. The error of reviving a real action against an heir is not cured by his appearance under a rule to show cause. *Id.* See notes §§ 721, 914. This section does not relate to or affect suits in admiralty. The *James A. Wright*, 10 Blatch. 160. But it was treated as applying to such suits, without an adjudication on the point, in *The Norway*, 1 Ben. 493. This statute embraces all cases of death before final judgment, whether it happen before or after plea pleaded, before or after issue joined, before or after verdict, or before or after interlocutory judgment. In



all these cases the proceedings are to be exactly as if the executor was a voluntary party to the suit. *Hatch v. Eustis*, 1 Gall. 160, 164. *Quære*, as to the revivor of judgments. *Devereaux v. Brownsville*, 29 F. R. 748. If the complainant died before the decree appealed from was entered, the suit should not be abated after the mandate is returned. *Story v. Livingston*, 13 Pet. 359. The State laws must be resorted to to determine what causes of action survive. *Witters v. Foster*, 26 F. R. 737; 23 Blatch. 458; *Hatfield v. Bushnell*, 1 Blatch. 393; *Trigg v. Conway*, Hempst. 711; *Schreiber v. Sharpless*, 110 U. S. 76; 17 F. R. 589; *Warren v. Furstenheim*, 35 F. R. 691. But it is otherwise if the cause of action is founded upon a Federal statute, as for the infringement of a copyright. Such cause of action abates with the defendant's death. *Schreiber v. Sharpless*, *supra*. A suit begun by an alien, who dies while it is pending, cannot be prosecuted to final judgment by his representative unless he has taken letters from a court of the State in which the action is pending. The executor or administrator who may prosecute an action is one who was qualified to begin it. *Kropff v. Poth*, 19 F. R. 200. This section makes no distinction as to the citizenship of the executor or administrator, whether he resides in the State where the cause is pending or in another. *Clarke v. Mathewson*, 12 Pet. 164.

An executor cannot be sued, as such, in another State than that in which he was appointed, for assets received by him there. *Mellus v. Thompson*, 1 Cliff. 125. If the other party requests it, the executor must produce his letters before he can proceed with the trial. *Wilson v. Codman*, 3 Cranch, 193. The provisions of State laws concerning the mode of reviving actions by an executor or administrator are not binding upon Federal courts. This section controls them. *Fitzpatrick v. Domingo*, 14 F. R. 216. The right to proceed against the representatives of a deceased person depends merely upon the cause of action. If that survives, the practice, pleadings, &c., in State courts may be resorted to in the Federal courts for the purpose of keeping the suit alive. State laws allowing suits on its penal statutes to be prosecuted after the offender's death do not keep alive a cause of action growing out of the violation of a Federal statute imposing a penalty. *Schreiber v. Sharpless*, 110 U. S. 76.

Rule 56 of the equity rules is declaratory of the provisions of this section. The revivor of a suit hereunder in a court of equity is a matter of right and a continuation of the original suit. *Fitzpatrick v. Domingo*, 14 F. R. 216; *Clarke v. Mathewson*, 12 Pet. 164; *Hatfield v. Bushnell*, 1 Blatch. 393. The only questions for the court to consider upon a bill to revive an action are the competency of the parties and the sufficiency in form of the bill. *Bettes v. Dana*, 2 Sumner, 383. The statute does not prescribe any time within which an executor must apply to be substituted as a party, and for that reason *laches* cannot be predicated upon delay. This is especially true because the other party can compel him to come in within twenty days. *The Norway*, 1 Ben. 493. A bill of revivor will not be allowed where the deceased has not been served with process, and has not waived service thereof. *United States v. Fields*, 4 Blatch. 326. A trustee cannot be made a party, though the complainant conveyed all his interest to him and died pending an appeal. *Barribeau v. Brant*, 17 How. 43. The statute does not contemplate that a *scire facias* shall issue in order that an executor be made a party. He may come in *instantly*, on motion, and the trial may immediately proceed unless he desires a continuance. *Wilson v. Codman*, 3 Cranch, 193; *Griswold v. Hill*, 1 Paine, 483. The marriage of an administratrix who is a *feme sole* does not abate the suit of her intestate. If it abated her *scire facias*, a new one might issue in her name and the name of her husband. *McCoul v. Lekamp*, 2 Wheat. 111.

St. March 3, 1875, ch. 137, § 9 (18 St. 470), provides —

“Whenever either party to a final judgment or decree which has been or shall be rendered in any circuit court has died or shall die before the time allowed for taking an appeal or bringing a writ of error



has expired, it shall not be necessary to revive the suit by any formal proceedings aforesaid. The representative of such deceased party may file in the office of the clerk of such circuit court a duly certified copy of his appointment, and thereupon may enter an appeal or bring writ of error, as the party he represents might have done. If the party in whose favor such judgment or decree is rendered has died before appeal taken or writ of error brought, notice to his representatives shall be given from the Supreme Court, as provided in case of the death of a party after appeal taken or writ of error brought."

SECT. 956. — See preceding note. This section is substantially a copy of the act of 8 and 9 W. III., ch. 11, § 7, which, it was held in *Clarke v. Rippon*, 1 B. & Ald. 586, was applicable to writs of error. The proceeding is an action which is commenced by a writ, and the cause of the action is the damage sustained by the parties from the error in the previous judgment, and this damage equally attaches on the survivor in this as in any other action. *Moses v. Wooster*, 115 U. S. 285. The same effect was given to this section in *M'Kinney v. Carroll*, 12 Pet. 66. If, after an appeal taken, one of several of the appellants dies, and the survivors suggest his death, and notice having been given to his representatives under Supreme Court rule 15, they do not appear, the action will be allowed to proceed at the suit of the survivors. *Moses v. Wooster*, 115 U. S. 285.

SECT. 957. — All the provisions of the statute regulating the institution of suits and the recovery by judgment of unpaid balances from delinquent officers, are as much a part of their bonds as if they were recited in them; and officers and their securities are, in contemplation of law, apprised of those provisions when their bonds are executed. *United States v. Hawkins*, 10 Pet. 125. Judgment must be rendered at the return term, unless it appears that the defendant's claim for credits was disallowed. *Id.* An officer of the government who has received money due it on execution, and who has a claim against it for services, may show, in defence of a proceeding to commit him for failure to pay it over, that such fees are unpaid, and this appearing, it is cause why he should not be attached. *United States v. Mann*, 2 Brock. 1. There is no authority in this statute for a circuit court to render judgment against the United States in favor of the defendant for any excess of his set-off over his indebtedness as proved on the trial, or to determine that there is an indebtedness on that account to him. *De Groot v. United States*, 5 Wall. 432; *United States v. Eckford*, 6 Id. 484; *Reeside v. Walker*, 11 How. 290. A collector of customs who is sued upon his bond may set off expenditures made by him for office rent, fuel, clerk-hire, and stationery, where an allowance for them was contemplated by a statute, although he did not keep or transmit accounts thereof as the statute required. *Andrews v. United States*, 2 Story, 202. No limitation being prescribed as to the nature and origin of the claim for a credit which may be set up, a reasonable construction of the statute will allow the defendant the full benefit at the trial of any credit, whether arising out of the particular transaction for which he was sued, or out of any distinct and independent transaction, which would constitute a legal or equitable set-off, in whole or in part, of the debt sued for. *United States v. Wilkins*, 6 Wheat. 135, 144; *Watkins v. United States*, 9 Wall. 759, 765; *Gratiot v. United States*, 15 Pet. 336, 370; *United States v. Flanders*, 112 U. S. 88, 93. Questions of set-off in the Federal courts arise exclusively under the acts of Congress, and no local law or usage can have any influence in their determination. Claims for credit cannot be admitted in suits between the United States and individuals, unless they have been duly presented to the accounting officers of the Treasury, and have been by them disallowed. *Watkins v. United States*, 9 Wall. 759, 765; *United States v. Eckford*, 6 Id. 488; *United States v. Gilmore*, 7 Id. 491. A collector of internal revenue, appointed under the act of July 1, 1862, may set off, in a suit upon his bond, money paid by him for publishing advertisements required by § 19 of that statute, if the sum was reasonable and proper, although the claim was not formally allowed or certified by the accounting officers. *United States v. Flanders*, 112 U. S. 88. See also note § 951.



SECT. 960. — The object of this section is to secure the prompt collection of duties, indisputably ascertained. When there are errors in calculating the duties, and they are alleged on affidavits, a delay of one term is allowed. And where there is a real defence, an opportunity to obtain evidence by a continuance, according to the circumstances of the case, must be given. There cannot be a case of this description where the opportunity should be denied. *United States v. Phelps*, 8 Pet. 700.

SECT. 961. — This section is limited to cases of default, confession, or demurrer. *Farrar v. United States*, 5 Pet. 373. It has no application to a case heard on an agreed statement of facts. *Ives v. Merchants' Bank*, 12 How. 159. Sureties are not liable beyond the penalty of their bond, and if the damages are in excess thereof the judgment must not be. *Farrar v. United States*, 5 Pet. 373. In an action of tort on default, the plaintiff has no constitutional right to have the damages assessed by a jury. Such assessment is a matter of practice, and may be had according to the State practice. *Raymond v. Railroad Co.*, 14 Blatch. 133.

SECT. 962. — A judgment payable in gold (and silver) money of the United States is good; and if the judgment was originally entered payable in gold coin of the United States, it may be amended during the term by the insertion of the words "and silver." *Cheang-Kee v. United States*, 3 Wall. 320.

SECT. 966. — Ordinarily, when an admiralty decree of the district court, which includes interest, is affirmed by the circuit court, interest will be allowed on the full amount of the decree below. *Ball v. Winslow*, 18 F. R. 47. The government, under § 989, has not assumed the defendant's full liability under this section. *White v. Arthur*, 20 Blatch. 241; 10 F. R. 80; see *Schell v. Cochran*, 107 U. S. 625. A judgment bears interest notwithstanding it has been revived by *scire facias*. *Grantland v. Memphis*, 12 F. R. 287. The liability is the same for the interest on the judgment as the principal. *White v. Arthur*, *supra*. The decrees of Federal courts carry interest at the same rate as decrees for the payment of money issued by the State courts. *Railroad Co. v. Turrill*, 101 U. S. 836. Judgments rendered against the United States are not included in this section. *United States v. Sherman*, 98 U. S. 565. This statute does not include cases in equity nor judgments or decrees of the Supreme Court. If the law of the State allows the judgments of its courts to carry interest, the judgments of the circuit and district courts bear interest, although upon their face they do not purport to do so. *Perkins v. Fourniquet*, 14 How. 328.

SECT. 967. — See note, § 916. In the original act of 1840, the reading was "now cease" in the last line. By omitting "now," the rule applies to any existing condition of the State laws. 1 Com. D. 521. The only difference between this section and the act of 1840 being that the word "now," between "State" and "cease," does not appear herein, the State law adopted by the original act was that in force when it was enacted. *Myers v. Tyson*, 13 Blatch. 242. The words "by law," in this statute, refer to a fixed rule in respect to time and manner, and not to a discretion which a State court is authorized to exercise under State law. Hence, Federal courts are not authorized to order the suspension of a lien on property during the pendency of an appeal from the judgment which binds it, because State courts may do so under State laws. *Id.*; *contra*, *United States v. Sturgis*, 14 F. R. 810, stated in note § 916. Decrees of the district courts *in personam* in admiralty are included herein. *Ward v. Chamberlain*, 2 Black, 430. A State law requiring that judgments, in order to be a lien upon property, should be recorded as it prescribed, does not affect the lien of a judgment previously rendered in a Federal court. *Massingill v. Downs*, 7 How. 760. Decrees in equity and admiralty become liens upon the lands of defendants therein in States where like decrees become such liens, the same as do the decrees of the State courts. *Ward v. Chamberlain*, 2 Black, 430; *Steam Stone-Cutter Co. v. Sears*, 9 F. R. 10. See St. 1888, stated below. A State law that issuing an



execution on a judgment within a certain time is necessary to make the judgment a lien, is binding on the Federal court. *Sellers v. Corwin*, 5 Ohio, 398. So is one providing that a judgment shall not be a lien unless docketed in the county where the land lies. *United States v. Humphreys*, 3 Hughes, 201. Federal judgments and decrees are liens in all cases, and to the same extent as similar judgments and decrees of the State court. *Brown v. Pierce*, 7 Wall. 217. The pendency of a writ of error does not affect the duration of a lien. *Chouteau v. Nuckolls*, 20 Mo. 442. A purchaser at a sale under the judgment of a State court gets a good title where the lien of a judgment of the Federal court has expired. *Chouteau v. Nuckolls*, *supra*. A State law cannot have a retrospective effect so as to impair a judgment lien of a Federal court. *Massingill v. Downs*, 7 How. 760; *contra*, *Tarpley v. Hamer*, 17 Miss. 310.

St. Aug. 1, 1888, ch. 729 (25 St. 357), provides —

“That judgments and decrees rendered in a circuit or district court of the United States within any State, shall be liens on property throughout such State in the same manner and to the same extent and under the same conditions only as if such judgments and decrees had been rendered by a court of general jurisdiction of such State: *Provided*, That whenever the laws of any State require a judgment or decree of a State court to be registered, recorded, docketed, indexed, or any other thing to be done, in a particular manner, or in a certain office or county, or parish in the State of Louisiana before a lien shall attach, this act shall be applicable therein whenever and only whenever the laws of such State shall authorize the judgments and decrees of the United States courts to be registered, recorded, docketed, indexed, or otherwise conformed to the rules and requirements relating to the judgments and decrees of the courts of the State.

“SEC. 2. That the clerks of the several courts of the United States shall prepare and keep in their respective offices complete and convenient indices and cross-indices of the judgment records of said courts, and such indices and records shall at all times be open to the inspection and examination of the public.

“SEC. 3. Nothing herein shall be construed to require the docketing of a judgment or decree of a United States court, or the filing of a transcript thereof, in any State office within the same county or parish in the State of Louisiana in which the judgment or decree is rendered, in order that such judgment or decree may be a lien on any property within such county.”

SECT. 968. — Provisions for costs are gathered from the various statutes relating to particular subjects; and as the revisers suggested that reconsideration seemed desirable of the provision in St. March 3, 1847, ch. 55 (9 St. 181), as to costs in admiralty where less than \$100 is recovered, it is here omitted. 1 Com. D. 522. This section is not limited to common-law cases, but includes cases arising under the Federal Constitution and laws. *Kneass v. Schuylkill Bank*, 4 Wash. 106. If judgment is entered for less than \$500, the plaintiff will not be awarded costs (*Id.*; *Leeds v. Cameron*, 3 Sumner, 488; *Curranee v. McQueen*, 2 Paine, 109); nor if the value of the land he recovers is less than that sum; in which case he may be compelled to pay costs. *Green v. Liter*, 8 Cranch, 229. In a suit to recover royalty for the infringement of a patent, the citizenship of the parties conferring jurisdiction, if the plaintiff recovers less than \$500, neither party will be allowed costs. *McKay v. Jackman*, 17 F. R. 641. If a case has been removed from a State court, a plaintiff may recover costs in the Federal court although his judgment is for less than \$500, if he would have been entitled to do so under the laws or rules of practice prevailing in the State court. *Kreager v. Judd*, 5 F. R. 27; *Field v. Schell*, 4 Blatch. 435; *Ellis v. Jarvis*, 3 Mason, 457; *Coggill v. Lawrence*, 2 Blatch. 304. The provision that the prevailing party shall not be allowed costs when he recovers less than \$500 is imperative. The statute only confers jurisdiction to go beyond it by permitting the court, in flagrant cases, to impose an additional penalty for the fraudulent trespass upon its jurisdiction by condemning the prevailing party to pay his adversary's costs. The discretion as to costs which always belonged to a court of equity, but not to a court of law, is taken away in the class of cases included in this section. The prevailing party will not be charged with the costs of the other side if there was a reasonable



expectation that he would recover more than \$500. *Gibson v. Memphis R. Co.*, 31 F. R. 553. If, in a joint action against three defendants for the same wrong, separate verdicts are rendered against each and judgments entered thereon, and the aggregate amount of the judgments exceeds \$500, the plaintiff may recover costs, though the amount of the judgment against either defendant was less than that sum. *Johnson v. Mississippi R. Co.*, 31 F. R. 551. Judgment will not be rendered against a defendant for costs if he pays the debt sued for and interest before plea pleaded or demurrer joined. *Duquesne Nat. Bank v. Mills*, 22 F. R. 611.

SECT. 970. — See note, § 909. This statute protects district attorneys, collectors of customs, and supervisors of internal revenue. *Stacey v. Emery*, 97 U. S. 642. A certificate is never given in the admiralty except in cases under the revenue and navigation acts. *Lovett v. Bispham*, 2 Alb. L. J. 97; *The Marianna Flora*, 11 Wheat. 1; *The Palmyra*, 12 Id. 1. A certificate of probable cause cannot be granted where there has been neither claim, nor trial, nor decree, nor anything to which an appeal could lie. *The Malaga*, 2 Am. L. J. n. s. 97. Reasonable cause is synonymous with probable cause. This section makes it the duty of the court to grant officers a certificate where they have made arrests upon grounds which reasonably justify the belief that the persons arrested have violated the law. *The City of Mexico*, 25 F. R. 924. The question of malice or of good faith is not an element in the case in determining as to reasonable cause. It is not a question of motive. If the facts before the officer are such as to warrant a man of prudence and caution in believing that the offence has been committed, it is sufficient. Whether the officer seized the occasion to do an act which would injure another, or whether he moved reluctantly, is immaterial. *Stacey v. Emery*, 97 U. S. 642, 645. Probable cause imports a seizure made under circumstances which warrant suspicion. *Averill v. Smith*, 17 Wall. 82; *Locke v. United States*, 7 Cranch, 339; *United States v. Gay*, 2 Gall. 359; *The George*, 1 Mason, 24; *La Jeune Eugenie*, 2 Id. 409; *Shattuck v. Maley*, 1 Wash. 245; *United States v. One Sorrel Horse*, 22 Vt. 656; *The Reindeer*, 14 L. R. 235; *The La Manche*, 25 Id. 585. Doubt as to the true construction of a statute warrants a certificate. *Averill v. Smith*, *supra*; *United States v. Riddle*, 5 Cranch, 311; *The Paulina*, 7 Id. 52; *The Friendship*, 1 Gall. 111; *The Reindeer*, 14 L. R. 235. The question of probable cause, the facts being undisputed, is one of law. *United States v. Gay*, 2 Gall. 359. The opinion of the Attorney-General, and the instructions of the Secretary of the Treasury based thereon, constitute reasonable cause. *The Recorder*, 2 Blatch. 119. If the goods seized were not on the manifest it will be considered good cause for seizure, and costs will be denied the claimant. *United States v. A Lot of Silk Umbrellas*, 12 F. R. 412. And if such certificate is granted the claimant cannot recover costs. *Re William Stover*, 1 Curtis, 93. If the certificate of probable cause is not applied for within a reasonable time, and the claimants have brought suit, the expenses incurred by them will be payable by the officer. *The Recorder*, 2 Blatch. 119. See note § 909. Where a collector seized property, and subsequently proceedings for its condemnation were dismissed, and the certificate issued to him recited: "It appearing that the seizure, though improperly made, was made by his superior officer, the supervisor," it was held that the certificate barred a suit in trespass against the collector, and that the motive which prompted the court to grant it was immaterial and could not be regarded. *Stacey v. Emery*, 97 U. S. 642. The questions of damages and costs are entertained at the same time with the question as to the legality of the arrest. *The Malaga*, 2 Am. L. J. n. s. 97. An action to recover for a seizure cannot be begun while proceedings to enforce the forfeiture are undisposed of. *Gelston v. Hoyt*, 3 Wheat. 246; *Averill v. Smith*, 17 Wall. 82. And it is barred by the certificate provided for. *Gelston v. Hoyt*, 3 Wheat. 246; *Averill v. Smith*, 17 Wall. 82. On a decree of acquittance and denial of the certificate, the owner is entitled to full damages. *Gelston v. Hoyt*, 3 Wheat. 246; *The Apollon*, 9 Id. 362; *Averill v. Smith*, *supra*. The refusal of the



district court to grant a certificate of reasonable cause cannot be reviewed by either the circuit or Supreme Court. *United States v. Frerichs*, 16 Blatch. 547; *United States v. Abatoir Place*, 106 U. S. 160. *Quære* whether, after a refusal of the district court to grant a certificate of "reasonable cause of seizure," under this section, the circuit court can, in an action for damages for such seizure, grant a certificate of probable cause under § 989. *Frerichs v. Coster*, 23 Blatch. 74; 22 F. R. 637. The certificate protects the collector, although the marshal took the goods from him and did not deliver them to the owner. It is not the duty of either of these officers, but that of the claimant, to move for the required orders authorizing the property or its proceeds to be returned to the owner. *Averill v. Smith*, 17 Wall. 82. An unqualified acceptance of the property is a mutual release and bars all claims for damages. *The Malaga*, 2 Am. L. J. N. S. 97.

SECT. 973. — Unless a disclaimer has been filed, costs cannot be recovered where the suit is for an infringement of a patent containing several claims, some of which were abandoned on the trial. *Proctor v. Brill*, 16 F. R. 791. The plaintiff's right to costs, where he has obtained a verdict upon all his claims, is not affected by his subsequent disclaimer of some of the claims. So long as the verdict stands, he is entitled to costs. *Peek v. Frame*, 5 Fish Pat. Cas. 211. See *Elastic Fabrics Co. v. Smith*, 100 U. S. 110. If the complainant in a patent suit is successful in part because of a disclaimer filed after suit was brought, and unsuccessful as to a considerable part of his case, costs will not be allowed him. *Hayes v. Bickelhaupt*, 23 F. R. 183. A patentee is not, for an infringement, entitled to be reimbursed for counsel fees paid by him. *Parks v. Booth*, 102 U. S. 96. See, also, *Yale Lock Co. v. Sargent*, 117 U. S. 536; *Burdett v. Estey*, 19 Blatch. 1; *Bussey v. Wager*, 2 Ban. & A. 229.

SECT. 975. — A person may be an informer without being a "plaintiff on a penal statute," but such a plaintiff is an informer within Rev. Stats. § 5294. *The Laura*, 19 Blatch. 572. This section contemplates an action in the name of the informer alone, as well as in the name of the United States to the use in whole or in part of the informer. *United States v. The Planter*, Newb. 262. The United States is not liable for costs unless the informer is an officer of the United States. *Id.* An informer who is not an officer of the United States is liable for costs although the United States is a party to the record, and the court may require him to give security for the costs, and in case of a refusal, may strike his name off the record. *Id.* An action brought to recover a penalty under the civil rights act of 1875, and discontinued upon its being ruled that that act was unconstitutional, is within this section, and the defendant is entitled to his costs. *Cooper v. New Haven Steamboat Co.*, 18 F. R. 588.

SECT. 976. — The apparent object of this section, and the whole effect of its terms, are to point out the party to whom the officers of the court are to look for payment of their fees for the prosecution of this class of cases. If the informer is an officer charged with the duty of commencing such prosecutions, and he obtains a certificate of probable cause, the fees are to be paid by the government; otherwise the informer alone is liable therefor. The words "the fees of such prosecution" do not include the fees paid by the claimant to the officers of the court for services rendered him, but refer only to the costs of the prosecution. *Re Stover*, 1 Curtis, 93. The name of the informer need not be written at the foot of the indictment. *United States v. Mundell*, 1 Hughes, 415.

SECT. 977. — Two separate libels in admiralty against two vessels, involving questions which grew out of the same event, were consolidated, in *Rogers v. Hurney*, 4 Clif. 582. This and the next following section indicate that the legislation of Congress was directed to the trial of cases at the same time by formal consolidation or otherwise when the time of the court could be thereby saved, costs and expenses avoided, and the rights of parties not prejudiced. *Keep v. Indianapolis R. Co.*, 10 F. R. 454. See note, § 921.



SECT. 978. — See note, § 977. If several libels are filed by the crew of a vessel for wages, and for compensation and allowance for the reduction of provisions during the voyage, they may be consolidated, no special cause for separate libels being made to appear. *The Sarah E. Kennedy*, 25 F. R. 672. If a seaman knows that others of the crew were about to commence a suit for their wages and attempts to anticipate their action by getting out process on his own behalf a short time in advance of theirs, he will not be allowed costs. *The Cabot*, Abb. Adm. 150; *The R. P. Chase*, 3 Ware, 294. This section appears to contemplate the case of a single and not of several libellants. There is nothing in its language which leads to the conclusion that where several persons have a like cause of action founded on a several liability to each, and not on a joint liability to all, they must join under the penalty of a forfeiture of costs. *The Young Mechanic*, 3 Ware, 58, 60. So far as this act (referring to the several sections of the act of 1813) applies to proceedings in admiralty, it affirms the practice which previously prevailed in admiralty courts. *The Tangier*, 3 Ware, 110. If co-salvors file different libels without necessity, they do so at the risk of paying costs. *The Henry Ewbank*, 1 Sumner, 400.

SECT. 979. — In order to obtain possession of the property, the claimant must pay the fees of the clerk and marshal for their services in his behalf. *Re Stover*, 1 Curtis, 93.

SECT. 980. — If a body composed of several persons refuses to obey a *mandamus*, but one writ of attachment should go against them, and the district attorney should receive but one docket fee. *Durant v. Supervisors*, Woolw. 377.

SECT. 982. — Taking a vessel which has been released under one libel on a stipulation, under other successive libels, is not contrary to the spirit of this section. *The Young Mechanic*, 3 Ware, 58. The fees of a proctor who presents an unreasonable number of petitions for separate claims which might have been consolidated, will be reduced. *The Hinchman*, 7 Chi. Leg. News, 387.

SECT. 983. — See note, § 823. Prior to St. 1853, ch. 80 (10 St. 161), the actual disbursements, necessarily incurred and deemed reasonable, were allowed in the taxation of costs in accordance with State laws by virtue of rules of court. 1 Blatch. 652. St. 1853, reproduced in this section, has not always been regarded as forbidding the taxation of disbursements other than fees paid for exemplifications and copies of papers, but in the second circuit actual disbursements necessarily incurred have been taxed. *Gunther v. Liverpool Ins. Co.*, 20 Blatch. 390; *Hussey v. Bradley*, 5 Id. 210; *Dennis v. Eddy*, 12 Id. 195. When the taxation is claimed for witness fees, under § 983, the affidavit must show that they have been actually paid. *Jerman v. Stewart*, 12 F. R. 276; *Beckwith v. Easton*, 4 Ben. 357. This section does not apply to *habeas corpus* proceedings. *Re Moy Chee Kee*, 33 F. R. 379. No judgment can be rendered against the government for costs and expenses in favor of any plaintiff. *The Antelope*, 12 Wheat. 546; *United States v. Hooe*, 3 Cranch, 73; *United States v. Barker*, 2 Wheat. 395. A marshal cannot withhold property from the government under a claim that he has a lien upon it for fees. *The Antelope*, 12 Wheat. 546. But in a summary proceeding to punish him for not paying over money received under an execution he may set up the fact that he has a claim for fees in defense. *United States v. Ringgold*, 8 Pet. 150. No costs are given on a case dismissed for want of jurisdiction. *Hornthall v. The Collector*, 9 Wall. 560; *Mayor v. Cooper*, 6 Id. 247; *The McDonald*, 4 Blatch. 477; *Maxfield v. Levy*, 4 Dall. 330; *Agnew v. Dorman*, Taney, 386; *Lowe v. The Benjamin*, 1 Wall. Jr. 187; *Burnham v. Rangeley*, 2 W. & M. 417; *Abbey v. The R. L. Stevens*, 22 How. Pr. 78. It is held that if a party intends to object to a charge for fees, he must ask for a specification of the items. *Dedekam v. Vose*, 3 Blatch. 153. If there is a disagreement concerning the fees, the usual practice is to refer the matter to an auditor who shall report it to the court for decision. *Bottomley v. United States*, 1 Story, 153. Costs will not be adjudged *de novo* on appeal from their taxation. *The Caithneshire*,



Abb. Adm. 163. If there are a number of suits similar in character the costs in each are taxable. *Ferrett v. Atwill*, 1 Blatch. 151. If there are numerous defendants, several costs may be allowed. In cases of tort it is immaterial whether the pleadings were joint or several. *Crosby v. Folger*, 1 Sumner, 514. After the consolidation of several actions the prevailing party will be allowed costs as in one action only; but the costs will be taxed in each up to the time of their consolidation. *Simpson v. Caulkins*, Abb. Adm. 539. Under Rev. Stats. § 914, if the practice of State courts of record is to tax the costs and expenses of a view of the *locus in quo* by the jury, such costs and expenses may be taxed in a Federal court sitting in such State. *Huntress v. Epsom*, 15 F. R. 732. State laws do not affect the right to costs or the rates thereof. *United States v. Treadwell*, 15 F. R. 532. See *Cooper v. New Haven Steamboat Co.*, 18 F. R. 588. This and § 823 Rev. Stats. have not changed the law concerning costs as it was before the revision took effect, and it is the duty of a Federal court now, as it was before, to dismiss a case of which it has no jurisdiction, without costs. *Pentlarge v. Kirby*, 20 F. R. 898, disapproving *Cooper v. New Haven Steamboat Co.*, 18 Id. 588, and *United States v. Treadwell*, 15 Id. 532. To the same effect as the case stated are *Mayor v. Cooper*, 6 Wall. 247; *Hornthall v. Collector*, 9 Id. 560, and numerous cases in the circuit and district courts. The scope of this section in connection with §§ 823, 824 is considered in *Goodyear v. Sawyer*, 17 F. R. 2. The papers must not only be for use on trials, that is, such trials and final hearings as are elsewhere spoken of,—for this provision came from the act of 1853, and must be interpreted in the light of the other provisions of that act,—but the language implies that the copies must have been actually used on or in the trial or final hearing (or at least obtained for such use under a rule or an order or a stipulation), and the fact of such use, or the existence of such rule or order or stipulation, is evidence that the copy was necessarily obtained for use. The subject is exclusively covered by this section, and all of the class not herein provided for are excluded. Papers used on interlocutory or preliminary or incidental motions or hearings are excluded. If copies of papers necessarily obtained for use are put in evidence, and not rejected, they may be taxed for. *Wooster v. Handy*, 23 Blatch. 112; 23 F. R. 49. This section allows the amount “paid” to witnesses to be taxed. If a witness has not been paid, either before or after he has testified, the presumption is that the debt has been forgiven, in the absence of an explanation. And where he has been paid in one or more cases and not in others, the evidence is strong that payment is not to be made. *Id.* Witness fees cannot be taxed against the defeated party unless they have been paid. *Secor v. The Highlander*, 19 How. Pr. 334.

SECT. 984. — See first note, ch. 16, *ante*. The requirement that a bill of costs shall be verified applies to cases between individuals as well as to those in which the government is a party, and to the charges of a State officer for taking depositions and making transcripts of a record to be used as evidence in a Federal court. *Jerman v. Stewart*, 12 F. R. 271. A bill for commissioners’ fees must have attached an oath stating that the services charged for have been actually and necessarily performed. *Beckwith v. Easton*, 4 Ben. 357.

SECT. 985. — An execution issued to the marshal of one district may be executed by him in another district in the same State. A judgment in the circuit court will be a lien on land in another district of the same State. *Prevost v. Gorrell*, 5 W. N. C. (Penn.) 151. This section does not relieve a defendant resident in another district in the same State from giving security for costs. *Lyman Ventilating Co. v. Southard*, 12 Blatch. 405.

SECT. 986. — The original act also contained the words “or decrees” after “judgments” in the first line, and “or in the District of Columbia” after “Territory” in the third line. 1 Com. D. 526. This statute was enacted before the organization of the District of Columbia, and there can be no doubt that it then included, as it was unquestionably designed to



include, every part of the United States. Whether, under the word "territories," it includes the District of Columbia, is not free from doubt. The marshal thereof was advised to execute writs of execution issued out of the circuit court of Tennessee. 14 A. G. Op. 384; *Toland v. Sprague*, 12 Pet. 328.

SECT. 987.—See note, § 726. This statute does not abridge the right to grant new trials according to the practice at common law. Its true interpretation is that it enlarged the remedy existing thereunder, so that the technical rule by which a review was precluded after judgment should no longer obtain. A motion for a new trial need not be based upon petition, except when it is made after judgment. *Emma Silver Mining Co. v. Park*, 14 Blatch. 411, 413. If an execution has been prematurely issued, it may be recalled upon motion. *Brown v. Evans*, 18 F. R. 56. If a cause has been tried by a referee by consent under an order of reference which provided that, on filing the report of the referee with the clerk of the court, judgment shall be entered in conformity therewith, "the same as if the cause had been tried before the court," the court cannot grant a new trial under this section (*Neafie v. Cheesebrough*, 14 Blatch. 313); but it has power in such a case to grant a new trial before judgment. *Robinson v. Insurance Co.*, 16 Blatch. 203. See *The Fourth National Bank of Chicago v. Neyhardt*, 13 Blatch. 393. This statute and § 726 Rev. Stats. make it apparent that it is not the policy of the law to suspend the operation of a judgment so as to allow an application for a new trial in any case beyond a period of forty-two days from the time of its rendition. *Cambuston v. United States*, 95 U. S. 285, 288. This is not the only section under which application may be made for a new trial. This provides for a case where a party desires to obtain from the court an extension of the usual time within which to make his application, and in that case, where he obtains such time merely to apply, he must show that he has presented his petition and that it has been allowed in accordance with this statute; but if he makes his motion for a new trial without asking for the time, then he can make it independent of this section and is not affected by its provisions. *Rutherford v. Penn Mutual Life Ins. Co.*, 1 F. R. 456. This section does not authorize a judgment to be stricken out after the term at which it was rendered. *Popino v. M'Allister*, 4 Wash. 393. Final judgments cannot, by proceedings first taken after the term, be reversed or annulled for errors of fact or law, except that clerical mistakes and such mistakes of fact not put in issue or passed upon as may be corrected by writ of error *coram vobis* (or on motion in place of that writ where such practice prevails), and a mistake in the dismissal of a cause, may be corrected after that time. The appropriate remedy to set aside or enjoin the execution of a judgment at law wrongfully obtained, is by bill in equity. *Phillips v. Negley*, 117 U. S. 665; reversing 2 Mackey, 236.

SECT. 989.—See notes, §§ 629, cl. 12, 966. The certificate may be granted by another judge than the one before whom the verdict was rendered, and after an execution has issued as well as before. *Cox v. Barney*, 14 Blatch. 289. It cannot be determined whether it ought to be granted or not before the trial. *Andrae v. Redfield*, 12 Blatch. 407. The final judgment meant is the judgment as it stands after it has been pronounced by the Supreme Court, and after the court below has rendered such judgment as the mandate of that court requires. *Schell v. Cochran*, 107 U. S. 625. The effect of this statute is, when a certificate is given, practically to convert the suit against the officer into a claim against the United States. *United States v. Sherman*, 98 U. S. 565; *Hedden v. Iselin*, 31 F. R. 269; 24 Blatch. 460. The laws of Congress do not contemplate the punishment of an officer of the revenue, by penalty or otherwise, for any act done in the honest discharge of his duty, or in obedience to the direction of the head of the department. *Id.* See note, § 970. When the government has had no notice, actual or constructive, and no opportunity to defend, it is not concluded by the certificate of probable cause. *Dunnegan v. United States*, 17 Ct. Cl. 247. The words "officers of the revenue," as used in this section, mean officers of the



revenue from customs, and do not include postmasters. *Campbell v. James*, 3 F. R. 513. It is the intent of this section that the direction to the collector shall shield him only when it has been given by some officer of the government who has an undoubted authority to direct. Unless the collector is under some obligation to heed the instructions, he is not protected by them. Hence a collector who acted pursuant to the request of a revenue agent, who made his request at the direction of the chief clerk of a supervisor, is not entitled to a certificate. *Frerichs v. Coster*, 22 F. R. 637. If the district court in the original proceedings has refused a certificate of probable cause under § 970, the circuit court will not grant one under this section. *Id.* A suit against a collector is a private suit, and there is no claim against the United States until the certificate provided for in this section has been granted; after that the collector is not personally liable to pay interest on a judgment against him, and the government is not liable for interest thereon. *White v. Arthur*, 10 F. R. 80. But under rule 23 the Supreme Court, on affirming a judgment against a collector for moneys exacted and paid to him, will allow interest. *Schell v. Cochran*, 107 U. S. 625. There is no liability on the part of the government until there has been a recovery against the officer and a certificate of probable cause has issued. *United States v. Sherman*, 98 U. S. 565; *Cox v. Barney*, 14 Blatch. 289. See *Flanders v. Seelye*, 105 U. S. 718.

SECT. 990. — This act relates to the remedy and is not an impairment of the obligation of contracts. *Gray v. Munroe*, 1 McLean, 528; *Mason v. Haile*, 12 Wheat. 370. That clause of the original act which abolished imprisonment for debt applied to actions pending when it took effect. *Id.* But not where the defendant was held under proceedings which had been completed. *Wilber v. Ingersoll*, 2 McLean, 322. This section applies to courts of admiralty. *The Kentucky*, 4 Blatch. 448; *The Blanche Page*, 16 Id. 1; *Louisiana Ins. Co. v. Nickerson*, 2 Lowell, 310; *Fry v. Cook*, 8 Chi. Leg. News, 286. *Contra*, *Hanson v. Fowle*, 1 Sawyer, 497; *Gardner v. Isaacson*, Abb. Adm. 141; *Gaines v. Travis*, Id. 422; *Hodge v. Bemis*, 12 Law Rep. 470; *Marshall v. Bazin*, 7 N. Y. Leg. Obs. 342. This act, when passed, did not affect the United States and its debtors. *United States v. Hewes*, Crabbe, 307; see *United States v. Wilson*, 8 Wheat. 253. That it applies to the government, see *United States v. Tetlow*, 2 Lowell, 159; *United States v. Moller*, 10 Ben. 189. In the absence of fraud this statute is to be liberally construed. *Moan v. Wilmarth*, 3 W. & M. 399. The State law furnishes the rule of practice in proceedings of arrest on mesne process. *Re Bergen*, 2 Hughes, 513. Liability to arrest on an execution depends upon State laws. *United States v. Moller*, 10 Ben. 189; *Moan v. Wilmarth*, 3 W. & M. 399. An express exemption of discharged insolvents from imprisonment upon provable debts is a modification of the law for imprisonment for debt, within the meaning of this statute, and binds the Federal courts. *Low v. Durfee*, 5 F. R. 256. The act of 1867 adopted the modifications, conditions and restrictions upon imprisonment for debt then in force by virtue of State laws, and the course of proceedings thereon which might be subsequently adopted. The process and forms adopted by the States are binding on the Federal courts. *United States v. Tetlow*, 2 Lowell, 159; *Low v. Durfee*, *supra*. The cases of *Catherwood v. Gapete*, 2 Curtis, 94; *Re Freeman*, Id. 491, and *Campbell v. Hadley*, 1 Sprague, 470, were ruled when the Federal statute was less broad than it is now, hence they are not in conflict with the two cases last stated as they are sometimes represented to be. The papers for the arrest of a debtor may be verified before the commissioner of a Federal court instead of before a State officer. *Fulton v. Gilmore*, 10 Chi. Leg. News, 108; 2 Flippin, 260. An order of the circuit court for the payment of money cannot be enforced by proceedings for contempt, in a State where proceedings for contempt for the non-payment of moneys cannot be had, when payment can be enforced by execution and where imprisonment for non-payment of costs has been abolished. *Mallory Manuf. Co. v. Fox*, 20 F. R. 409. The extent to which State laws abolishing or restricting imprison-



ment for debt are adopted in United States courts is explained in *United States v. Walsh*, 1 Abb. U. S. 66; 6 Int. Rev. Rec. 212. It was held that, under the Supreme Court rules for the practice of circuit courts, imprisonment for debt was allowed although a State law forbade in *Gaines v. Travis*, Abb. Adm. 422. A State statute allowing imprisonment for debts fraudulently contracted is not penal and may be administered by the Federal courts. *Mewster v. Spalding*, 6 McLean, 24.

SECT. 991.—The words “in any civil action,” in the third line, were here added. The revisers regarded St. March 2, 1867, ch. 180, as disposing of the whole subject-matter, by remitting the discharge of prisoners to the rules of the several States, as superseding St. Jan. 6, 1800, ch. 4, and the amendments thereof, and as including prisoners in civil actions brought by the United States. 1 Com. D. 528. This and § 990 contemplate that a defendant shall be subject to imprisonment, and be discharged therefrom by Federal courts under the same circumstances and in the same way as under State laws. *Low v. Durfee*, 5 F. R. 256; *United States v. Tetlow*, 2 Lowell, 159. State laws are cumulative to the remedy hereby adopted. *Duncan v. Darst*, 1 How. 301. A prisoner held under Federal process cannot be discharged by a State officer acting under State law. *Id.*; *McNutt v. Bland*, 2 How. 9; *Bank v. Tyler*, 4 Pet. 366. A judgment obtained by the government in a State court in an action to recover a penalty must be enforced under State laws, and a discharge under such laws will be effectual. *Stearns v. United States*, 2 Paine, 300. Liability for the debt is not affected by a discharge from imprisonment. *King v. Riddle*, 7 Cranch, 168. A discharge does not revive the lien of a judgment which has been surrendered by levying a *capias ad satisfaciendum*. *Snead v. M’Coull*, 12 How. 407. A discharge from imprisonment under a State insolvent law by a magistrate who was disqualified to act because he held a deed of trust fraudulent as to creditors, is not a discharge in due course of law. *Slacum v. Simms*, 5 Cranch, 363. A discharge cannot be granted without a strict compliance with the State law. *Moran v. Secord*, 15 F. R. 509.

SECT. 992.—This re-enactment of the provisions of St. 1800 and St. 1828 appears to have had the effect to admit all subsequent changes in State laws down to the date when the Revised Statutes took effect. 1 Com. D. 531; *United States v. Knight*, 14 Pet. 314. A sheriff is bound to take a bond for jail limits, according to State laws, from a prisoner confined under process from a Federal court. An action for false imprisonment would lie on his refusal. Such a bond would have the same effect as if taken from a prisoner confined under State process, and would protect the sheriff and be available to the government. *United States v. Noah*, 1 Paine, 368. Debtors imprisoned under Federal executions at the suit of the government were entitled to jail limits according to State laws as these were in force when the act of Congress of 1828 was passed. *United States v. Knight*, 14 Pet. 301. The privilege of jail limits is also accorded by the act of Congress which adopted State laws regulating process in Federal courts. *Id.* As to the powers and liabilities of a marshal over and for the conduct of prisoners committed to the custody of State jails, see *Randolph v. Donaldson*, 9 Cranch, 76. See *United States v. Harden*, 10 F. R. 802.

SECT. 993.—State appraisalment laws are not adopted by this statute. This idea of it is that they are in force, and the marshal is authorized to use the persons selected by the local courts or officers to value property of which he may come into possession. *Wayman v. Southard*, 10 Wheat. 1.

SECT. 994.—A new writ may issue to the successor of a marshal who was removed after he made a levy and before sale. The rights of the judgment creditor will remain as they were under the original writ. *Doolittle v. Bryan*, 14 How. 563.

SECT. 995.—Under this section moneys received by the marshal should be deposited by him or paid to the clerk of the court, and be by him deposited. *Fagan v. Cullen*, 28



F. R. 843. Moneys in the hands of a clerk of a Federal court are not subject to attachment. *The Lottawanna*, 20 Wall. 201. See note, § 996.

SECT. 996. — If deposits are made according to § 995, the bank in which they are made is authorized and required to honor all checks drawn by the court, and to pay them generally out of such deposits. A statement, in the order or check drawing the money, of the cause in or on account of which it was drawn imposes no duty upon the bank, but only operates for the convenience of the court and its officers. Hence, though each entry of a deposit in the bank books and in the deposit book of the court had opposite it a number which the bank knew indicated a particular case, if the entire sum deposited to the credit of the court has been withdrawn, one who holds a check which bears a number to the credit of which enough had been deposited and not withdrawn on account of the case represented by the number to pay such check, cannot recover from the bank. *State-Nat. Bank v. Dodge*, 124 U. S. 333.

SECT. 997. — See U. S. S. C. Rules, Nos. 4, 5, 18, 21. A defect in the writ was formerly a fatal error (*Carroll v. Dorsey*, 20 How. 204); such as the want of a seal (*Overton v. Cheek*, 22 How. 46); or a wrong return day (*Insurance Co. v. Mordecai*, 21 How. 200); but see now Rev. Stat. § 1005. The omission of the name of the district in the address of a writ is not material, if it appears from the indorsement or attestation. *Course v. Stead*, 4 Dall. 22. A mistake in the date of a writ will not affect it, when the mistake was clearly clerical and the defendant was not misled. *Davidson v. Lanier*, 4 Wall. 447. The writ must bear the *teste* of the chief justice. *Wells v. McGregor*, 13 Wall. 188. The Supreme Court cannot entertain a writ of error in the name of the chief justice of a State court, bearing his *teste*, signed by the clerk of that court and sealed with its seal; and such a writ cannot be amended under § 1005. *Bondurant v. Watson*, 103 U. S. 278. It should name all the parties to the judgment. *Davenport v. Fletcher*, 16 How. 142; *Deneale v. Stump*, 8 Pet. 526; *Wilson v. Insurance Co.*, 12 Id. 140; *Smyth v. Strader*, 12 How. 327; *Pearson v. Yewdall*, 95 U. S. 294. But a cause will not be dismissed for the reason that the writ of error fails to name a nominal party. *Marchand v. Livandais*, 127 U. S. 775. The same rule applies to equity and admiralty cases. *The Protector*, 11 Wall. 82; *Owings v. Kincannon*, 7 Pet. 403; *Smith v. Clark*, 12 How. 21; *Holliday v. Batson*, 4 Id. 645. The writ is sufficient although it describes the parties as plaintiffs and defendants in error as they appear in the appellate court, without indicating their position below. *Mussina v. Cavazos*, 6 Wall. 355. A case brought up both by writ of error and appeal will not be dismissed. *Hurst v. Hollingsworth*, 94 U. S. 111. A writ of error must be brought in the name of a person, or corporation, or association, notwithstanding a State statute allows suits to be brought in the names of boats. *The Burns*, 9 Wall. 237. A writ and citation regularly issued and served are not affected by the subsequent issue of each which was not served. *Davidson v. Lanier*, 4 Wall. 447.

As to parties to writs of error, joinder, &c., see also *Payne v. Niles*, 20 How. 219; *McVeigh v. United States*, 11 Wall. 259; *Miller v. United States*, Id. 268; *Williams v. U. S. Bank*, 11 Wheat. 414; *Masterson v. Herndon*, 10 Wall. 416; *O'Dowd v. Russell*, 14 Id. 402; *Norwich R. Co. v. Johnson*, 15 Id. 8; *Germain v. Mason*, 12 Id. 259; *Cox v. United States*, 6 Pet. 172; *Amis v. Smith*, 16 Id. 303; *Ex parte Dorr*, 3 How. 103; *The Burns*, 9 Wall. 237; *Kellogg v. Forsyth*, 24 How. 186; *Connor v. Peugh*, 18 Id. 394; *Pearson v. Yewdall*, 95 U. S. 294; *Macker v. Thomas*, 7 Wheat. 530; *Knox v. Exchange Bank*, 12 Wall. 379; *Fielbelman v. Packard*, 108 U. S. 14; *Marsh v. Nichols*, 120 Id. 598; *Renaud v. Abbott*, 116 Id. 277; *Hanrick v. Patrick*, 119 Id. 156; *Estis v. Trabue*, 128 Id. 230.

On the death of the defendant after entry of judgment, the suit should be revived and a writ of error sued out. *McClane v. Boon*, 6 Wall. 244. The writ may be issued by the clerk of a circuit court to a State court in its district. *Buel v. Van Ness*, 8 Wheat. 312; § 1004. The writ may be allowed by the judge of a court, although the record has been



transmitted to an inferior court and judgment entered there. *Aldrich v. Aetna Co.*, 8 Wall. 491. The original writ should always be returned to the Supreme Court; but a copy may be returned when the original writ has been served before its loss or destruction (*Mussina v. Cavazos*, 6 Wall. 358); or when the clerk refuses to transmit it. *Ableman v. Booth*, 21 How. 506. A writ of error not returned before the end of the term next succeeding its filing below becomes null, and an *alias* writ is necessary. *Mussina v. Cavazos*, 6 Wall. 359; *Grigsby v. Purcell*, 99 U. S. 507; overruling *Wood v. Lide*, 4 Cranch, 180. The irregularity of docketing the cause after the return term may be waived, but a mere appearance does not amount to a waiver. *Grigsby v. Purcell*, 99 U. S. 507. A writ dismissed at a former term cannot be reinstated. *Rice v. Railroad Co.*, 21 How. 82; but see *Grigsby v. Purcell*, *supra*. A motion for a new trial is not a waiver of a writ of error. *United States v. Hodge*, 6 How. 279; *Brown v. Evans*, 18 F. R. 56; *contra*, *Cunningham v. Bell*, 5 Mason, 161; *Marine City Stave Co. v. Herreshoff Manuf. Co.*, 32 F. R. 824. The suing out a writ is not a waiver of exceptions not signed by the judge. *Hunnicut v. Peyton*, 102 U. S. 333. A writ issued in September, bearing *teste* of the previous February term, could be made returnable to the next February term instead of the August term. *Blackwell v. Patten*, 7 Cranch, 277; but see *Grigsby v. Purcell*, 99 U. S. 507. The writ by which a case is brought up from a circuit court is the writ of the Supreme Court, although it may have been issued by the clerk of the circuit court, and should always be sent up with the transcript. *West v. Barnes*, 2 Dall. 401; *Buell v. Van Ness*, 8 Wheat. 312; *Mussina v. Cavazos*, 6 Wall. 355; § 1004. Writs of error to the Supreme Court of the District of Columbia are governed by the same rules as writs to circuit courts. *Stanton v. Embrey*, 93 U. S. 548. In error to a State court, the writ may be directed to an inferior court if the Supreme Court of the State without retaining a copy remits the whole record to that court, with direction to enter a final judgment in the case. *Gelston v. Hoyt*, 3 Wheat. 246; *Atherton v. Fowler*, 91 U. S. 143, 146; *Polleys v. Improvement Co.*, 113 U. S. 82; see also note, § 1007.

"*Annexed to.*"—The clerk below is not required to furnish a transcript until a writ of error has been issued to which it can be annexed. *Ex parte Ralston*, 119 U. S. 613.

"*And returned with.*"—The original writ should always be sent with the transcript; but a copy of the writ with a transcript of the record is sufficient where the original writ has been lost or destroyed before it reached the Supreme Court. *Mussina v. Cavazos*, 6 Wall. 355. The transcript of a case dismissed for want of an appeal, or proper return day, can be used in bringing the case rightly before the court by leaving a receipt therefor with the clerk. *Ballance v. Forsyth*, 21 How. 389; *Porter v. Foley*, Id. 393. The original citation to the defendant in error, signed by the judge, must be returned. *Wilson v. Daniel*, 3 Dall. 401.

"*At the day and place therein mentioned.*"—See Rule 8, 108 U. S. 577, § 5. A rigid compliance with this is not necessary. *Mussina v. Cavazos*, 6 Wall. 359. Formerly in all cases the writ had to be made returnable the first day of the term. *Insurance Co. v. Mordecai*, 21 How. 195; *Porter v. Foley*, Id. 393; *Agricultural Co. v. Pierce County*, 6 Wall. 246. But a wrong return day can now be amended under § 1005. Unless the plaintiff in error or appellant files the record and docket the cause within the first six days of the term in a cause where the judgment or decree is rendered 30 days before the commencement of the term, the defendant in error or appellee may have the writ of error or appeal docketed and dismissed (*United States v. Fremont*, 18 How. 30; *German v. United States*, 5 Wall. 825; *Sparrow v. Strong*, 3 Id. 97); and a rule on the plaintiff to file the record will not be allowed. *Boyd v. Scott*, 11 How. 292. But a failure to docket the cause when the record is seasonably filed is only a cause of dismissal within the discretion of the court. *Edwards v. United States*, 102 U. S. 575; *Owings v. Tiernan*, 10 Pet. 447; *Van Rensselaer v. Watts*, 7 How. 784.



If no motion to dismiss is previously made, the record may be filed and the cause docketed at any time within the term. *Bingham v. Morris*, 7 Cranch, 99; *Wood v. Lide*, 4 Id. 180; *Pickett v. Legerwood*, 7 Pet. 144; *Owings v. Tiernan*, 10 Id. 24; *Gwin v. Breedlove*, 15 Id. 284; *Sparrow v. Strong*, 3 Wall. 97. Where a case is brought up both by appeal and error, both may be docketed, and neither will be dismissed, there being but one case. *Hurst v. Hollingsworth*, 94 U. S. 111. A transcript in writs of error or on appeal, filed before the end of the next term after the allowance of an appeal or filing the writ below, is necessary for jurisdiction. *Castro v. United States*, 3 Wall. 46; *Insurance Co. v. Mordecai*, 21 How. 195; *The Lucy*, 8 Wall. 309; *United States v. Gomez*, 1 Wall. 690; *Mussina v. Cavazos*, 6 Id. 358; *Edmonson v. Bloomshire*, 7 Id. 310; *Caillot v. Deetken*, 113 U. S. 215. But the bond required by § 1000 need not then be given, as it may be filed in the Supreme Court. *Edmonson v. Bloomshire*, *supra*; *Fayolle v. Railroad Co.*, 124 U. S. 519. A dismissal for not filing the transcript in season is no bar to a new writ of error or appeal. *Steamer Virginia v. West*, 19 How. 182. The failure to file a transcript before the end of the next term after the allowance of the appeal is excused, under the circumstances, where the delay was caused by a neglect of a certain duty of the clerk and the inattention of the district attorney (*United States v. Vigil*, 10 Wall. 423); or where the proceedings on appeal are suspended for the purpose of a motion in the court below to set it aside, and the clerk has also refused to return and file the transcript (*United States v. Gomez*, 3 Wall. 762; *United States v. Vigil*, *supra*; *United States v. Booth*, 21 How. 512; see also *Alviso v. United States*, 6 Wall. 457); but not merely on the certificate of the clerk that he could not "consistently with the other duties of his office" make out the transcript within that time (*Sturgess v. Harrold*, 18 How. 40); nor where there has been negligence on the part of the appellant or plaintiff in error. *Grigsby v. Purcell*, 99 U. S. 507; *Fayolle v. Railroad Co.*, 124 U. S. 519.

"*Authenticated.*"—"The clerk of the court . . . shall make return . . . under his hand and the seal of the court." U. S. S. C. Rule 8; *Martin v. Hunter*, 1 Wheat. 304. And the signature of the judge is not necessary. *Worcester v. Georgia*, 6 Pet. 515. A transcript with only a blank form of a certificate of authentication, without the seal of the court below or the signature of the clerk, gives no jurisdiction. *Blitz v. Brown*, 7 Wall. 693. The certificate of the clerk that the transcript of the record contains a true copy of all the proceedings is *prima facie* proof that it does. *The Rio Grande*, 19 Wall. 178; *Railroad Co. v. Dinsmore*, 108 U. S. 30. The signature of the deputy clerk in the name of and for the clerk is sufficient. *Garneau v. Dozier*, 100 U. S. 7. A certificate by the clerk, signed merely, "Copy, *Teste*, W. M., Clerk," is insufficient. *Wilson v. Daniel*, 3 Dall. 401.

"*Transcript of the record.*"—The following are parts of the record: The process and pleadings (*Fisher v. Cockerell*, 5 Pet. 254; *England v. Gebhardt*, 112 U. S. 502); certain evidence by oyer (*Suydam v. Williamson*, 20 How. 437); the transcript of proceedings in the State courts in cases removed (*Clinton v. Railway Co.*, 122 U. S. 474); other papers referred to by the court (cases cited *supra*); affidavits in the transcript referred to and identified in an order setting aside a judgment (*Bronson v. Schulten*, 104 U. S. 412; *England v. Gebhardt*, *supra*); affidavits, depositions, and parol evidence in common law courts by means of an agreed statement of facts, or when incorporated into or referred to and identified by a bill of exceptions, or by a special verdict, or by a demurrer to the evidence (*Railroad Co. v. Trustees*, 91 U. S. 130; *Russell v. Ely*, 2 Black, 580; *Hartman v. Wiegmann*, 121 U. S. 616; *Mumford v. Wardwell*, 6 Wall. 423); the opinion of the supreme court of Louisiana. *Railroad Co. v. Marshall*, 12 How. 165; *Murdock v. Memphis*, 20 Wall. 590. And the opinions of the court, properly authenticated, may be examined to see if any Federal question exists since the act of 1867 (§ 709), omitting the clause in the act of 1789, confining the court to the face



of the record. *Murdock v. Memphis*, 20 Wall. 633; *Gross v. United States Mortgage Co.*, 108 U. S. 486; *England v. Gebhardt*, 112 U. S. 505; *Kreiger v. Railroad Co.*, 125 U. S. 39. And while the court will fix no absolute limit to the inquiry as to the existence of a Federal question, yet no loose range of investigation is allowed, the record being the chief foundation of the inquiry. *Murdock v. Memphis*, *supra*. On an appeal the whole case, and therefore the evidence, or its substance, is a part of the record (*Johnson v. Harmon*, 94 U. S. 371; *Watt v. Starke*, 101 Id. 247; *Conn v. Penn*, 5 Wheat. 424; *New Orleans v. United States*, 5 Pet. 449); but only law now in admiralty cases (18 St. 315); so is an agreement made at the hearing, reduced to writing and entered upon the record, when certified by the clerk in the pleadings, &c., although not signed by the parties. *Burke v. Smith*, 16 Wall. 390. In a suit for an infringement where an account is prayed and decreed, the record should set out the account. *Railroad Co. v. Turrill*, 94 U. S. 695. In admiralty causes the record is confined to the pleadings, the findings of fact, and conclusions of law thereon, the bills of exceptions, the final judgment or decree, and such interlocutory orders and decrees as may be necessary to a proper review of the case. *The Adriatic*, 103 U. S. 730. A bill of exceptions, prepared and presented to the court four days before adjournment and the next day handed back by the court to be shown to the opposite counsel, and the signature not affixed till after adjournment, is valid, such circumstances being equivalent to consent of parties (*United States v. Breitling*, 20 How. 252); or when the delay is caused by the judge. *Davis v. Patrick*, 122 U. S. 143. As to what a bill of exceptions should contain, see *Hanna v. Maas*, 122 U. S. 24. Where issues of fact are tried by the circuit court under §§ 649, 700, and an opinion filed concurrently with the judgment, a formal finding of facts may be filed at a subsequent term *nunc pro tunc*, as such act is one to supply defect or want of form. *Insurance Co. v. Boon*, 95 U. S. 125. If the trial was had on an agreed statement of facts, a record of the other proceedings is necessary to make a sufficient return. *Keene v. Whittaker*, 13 Pet. 459; *Curtis v. Petitpain*, 18 How. 109. The verdict and judgment are also parts of the record. *Clinton v. Railway Co.*, 122 U. S. 474. So is an execution. *Storm v. United States*, 94 U. S. 77. The certificate of the supreme court of the State can be considered to explain the record but not to contradict it or to originate a Federal question. *Railroad Co. v. Rock*, 4 Wall. 177; *Parmelee v. Lawrence*, 11 Id. 36; *Caperton v. Bowyer*, 14 Id. 216; *Adams County v. Railroad Co.*, 112 U. S. 123. Under the act of 1878 (18 St. 470) the "record" was held to include the testimony taken and on file in a cause at the time of filing a petition and bond for removing. *Miller v. Tobin*, 18 F. R. 609.

The following are not part of the record: Copies of documents and records of a former suit attached to an answer where it does not appear that they were given in evidence on the trial (*New Orleans v. Gaines*, 22 How. 141); a paper not a part of the pleadings or process, and not acted upon by the court by a bill of exceptions or its equivalent (*Sargeant v. Indiana Bank*, 12 How. 384; *Fisher v. Cockerell*, 5 Pet. 254; *England v. Gebhardt*, 112 U. S. 505; *Redfield v. Ystalyfera Iron Co.*, 110 Id. 174); the names of the jurors (*Owens v. Hanney*, 9 Cranch, 180); the argument of counsel (*Gibson v. Choteau*, 8 Wall. 314); the opinion of the court (*Williams v. Norris*, 12 Wheat. 117; *Rector v. Ashley*, 6 Wall. 142; *Gibson v. Choteau*, 8 Id. 314; *England v. Gebhardt*, 112 U. S. 506; but see *Murdock v. Memphis*, 20 Wall. 633; *Kreiger v. Railroad Co.*, 125 U. S. 39); nor the report of the judge who tried the case at *nisi prius* (*Inglee v. Coolidge*, 2 Wheat. 363); an agreement of counsel entered on the transcript or on the minutes of the circuit court fixing alternative damages when the verdict is not in the alternative (*Lanusse v. Barker*, 3 Wheat. 147); a stipulation of counsel as to the evidence (*New Orleans v. Gaines*, 22 How. 141); a clerk's recital in a suit at law of matters proved at a hearing, and of stipulations and admissions, even although authenticated by the signature of the judge (*Knapp v. Railroad Co.* 20 Wall. 121); a clerk's unauthorized certificate that any document was read,



or any evidence given to the jury (*Fisher v. Cockerell*, 5 Pet. 248), but this does not apply to equity suits (*Burke v. Smith*, 16 Wall. 390); nor a clerk's certificate as to a motion for a new trial. *Reed v. Marsh*, 13 Pet. 153. A paper purporting to contain the charge of the court in full with a memorandum at the close that counsel excepted to certain portions, but not verified, nor contained in a proper bill of exceptions, is no part of the record (*Struthers v. Drexel*, 122 U. S. 491); nor are entries of a clerk stating the proceedings and the fact that they were excepted to (*Young v. Martin*, 8 Wall. 354); nor a statement in the form of a report of all the evidence, certified by the counsel, signed by the judge, and called a case (*Suydam v. Williamson*, 20 How. 438); nor is a decree allowed by the court to be prepared and entered by one of the parties (*Ensminger v. Powers*, 108 U. S. 301); nor a bill of exceptions allowed and signed *nunc pro tunc* at a term following that at which judgment was rendered where there was no order of court during the term at which judgment was rendered, nor consent of parties, nor special circumstances. *Muller v. Ehlers*, 91 U. S. 251; *Generes v. Bonnemere*, 7 Wall. 564; *Flanders v. Tweed*, 9 Id. 425; *Walton v. United States*, 9 Wheat. 651; *Ex parte Bradstreet*, 4 Pet. 102; *Sheppard v. Wilson*, 6 How. 275; *Coughlin v. District of Columbia*, 106 U. S. 7. A statement of facts agreed to by the parties but filed below after the case is disposed of and after the writ of error is issued, cannot be considered although both parties consent (*Kearney v. Case*, 12 Wall. 275); nor one filed by the judge without the consent of the parties even after the writ is issued. *Generes v. Bonnemere*, 7 Wall. 564; *Avendano v. Gay*, 8 Id. 376; *Williams v. Norris*, 12 Wheat. 117. Copies of orders made after the final judgment are not part of the record. *Calhoun v. Lanaux*, 127 U. S. 634. A case cannot be brought up on error on a record containing only an agreed statement of facts without any of the proceedings below except the judgment. *Keene v. Whittaker*, 13 Pet. 459; *Curtis v. Petitpain*, 18 How. 109. Documents not in the case below are not a part of the record and will not be considered, although filed in the Supreme Court by consent, as if filed under a writ of diminution. *Hoe v. Wilson*, 9 Wall. 501. The petition for the allowance of a writ of error forms no part of the record. *Warfield v. Chaffe*, 91 U. S. 690. Affidavits sent up under § 698 as original papers without the order of the court below, or the Supreme Court, are not part of the record and cannot be considered. *Craig v. Smith*, 100 U. S. 232. Depositions in an admiralty case taken under a commission from the circuit court after an appeal to the Supreme Court will not be made a part of the record unless a sufficient excuse is shown for not taking the evidence in the usual way before the courts below. *The Juniata*, 91 U. S. 366. An amended bill filed eight years after the original bill without leave of parties or consent of court is not a part of the record. *Terry v. McLure*, 103 U. S. 442. As to when a writ of error or appeal will or will not be dismissed for want of a proper transcript of the record duly filed, see *United States v. Fremont*, 18 How. 30; *German v. United States*, 5 Wall. 825; *Bingham v. Morris*, 7 Cranch, 99; *Pickett v. Legerwood*, 7 Pet. 144; *Sparrow v. Strong*, 3 Wall. 97; *United States v. Gomez*, Id. 752; *United States v. Vigil*, 10 Id. 423; *Grigsby v. Purcell*, 99 U. S. 505; *Thomas v. Purcell*, Id. 508; *State v. Demarest*, 110 Id. 400; *Killian v. Clark*, 111 Id. 784; *Veitch v. Farmers' Bank*, 6 Pet. 777; *Keene v. Whittaker*, 13 Id. 459; *Burr v. Des Moines R. Co.*, 1 Wall. 99; *Blitz v. Brown*, 7 Id. 693; *Florida Railroad Co. v. Schutte*, 100 U. S. 644; *Ackley School District v. Hall*, 106 U. S. 428; *Gumbel v. Pitkin*, 113 U. S. 545; *Crane Iron Co. v. Hoagland*, 108 Id. 5; *Mayer v. Walsh*, Id. 17; *Pacific Bank v. Mixter*, 114 Id. 463. As to supplying omissions in the record, see U. S. S. C. Rules No. 14; *United States v. Gomez*, 1 Wall. 690; *Hudgins v. Kemp*, 18 How. 530; *Field v. Milton*, 3 Cranch, 514; *Stimpson v. West Chester R. Co.*, 3 How. 553; *McGuire v. Massachusetts*, 3 Wall. 382; *Stearns v. United States*, 4 Id. 1; *Sweeney v. Lomme*, 22 Id. 208; *Hodges v. Vaughan*, 19 Id. 12; *Railroad Co. v. Dinsmore*, 108 U. S. 30; *Morgan v. Curtenius*, 19 How. 8; *Clark v. Hackett*, 1 Black, 77; *The Grace Girdler*, 6 Wall. 441; *Elmore v. Grymes*, 1 Pet. 469;



Gayler *v.* Wilder, 10 How. 510. An amendment of a clerical error in the transcript was permitted on certificate of the clerk below without a *certiorari* in Woodward *v.* Brown, 13 Pet. 1; see Stimpson *v.* West Chester R. Co. 3 How. 553. But a libel cannot be amended in the Supreme Court by the insertion of a claim of interest so as to support jurisdiction. Udall *v.* The Ohio, 17 How. 17.

*"An assignment of errors."*—An assignment of errors is not necessary for jurisdiction. Mussina *v.* Cavazos, 6 Wall. 359. It may be filed under Rule 21. Where there is no assignment of errors returned with the writ as required by § 997, and no specifications of errors as required by Rule 21, § 2 (108 U. S. 585), the judgment is affirmed under § 4 of Rule 21. Dugger *v.* Tayloe, 121 U. S. 286; Boston Mining Co. *v.* Eagle Mining Co., 115 Id. 221. The practice of filing very numerous assignments of error (*e. g.* fifty-two) was condemned as a perversion of the rule in Construction Co. *v.* Seymour, 91 U. S. 646. A writ of error will not be dismissed for failure to annex thereto or return therewith an assignment of errors. And Rule 8 does not require a copy of assignment of errors in the transcript when no such assignment was filed in the court below. School District *v.* Hall, 106 U. S. 428; Gumbel *v.* Pitkin, 113 U. S. 547. But a case will be dismissed for the want of both an assignment of errors and a brief under § 2 of Rule 21. Benites *v.* Hampton, 123 U. S. 519. For assignment of errors held good, see Clinton *v.* Railroad Co., 122 U. S. 469. An assignment of error that the court below rejected certain patents of land offered in evidence is fatally defective, if the record does not contain a copy of those patents. Clement *v.* Packer, 125 U. S. 309.

*"Prayer for reversal."*—This is not necessary for jurisdiction, and most records do not contain such a prayer. Mussina *v.* Cavazos, 6 Wall. 359.

*"With a citation to the adverse party."*—Citation should be addressed to the actual parties to the suit at the time the appeal is allowed and prosecuted; and where a party dies before the appeal is allowed and prosecuted, the suit should be revived in the subordinate court, and the citation should be addressed to the proper party in the record at that time. Davenport *v.* Fletcher, 16 How. 142; Bigler *v.* Waller, 12 Wall. 147. In error from Louisiana, it is not material that the citation describes a female defendant as the wife of a person other than her husband. Peale *v.* Phipps, 8 How. 256. It is not material that the citation omits to describe the plaintiff in error as trustee, the defendant not being misled. *Id.* Where the citation contains four persons as plaintiffs and the writ but three, the writ will be dismissed; so also where the names in the citation and the writ of error are different (Kail *v.* Wetmore, 6 Wall. 451; Kail *v.* Douglass, *Id.*); but for a case from Louisiana, where the citation is sufficient although the husband of one of the parties is wrongly named, see Peale *v.* Phipps, 8 How. 256. See § 1005. A citation with due return or waiver by general appearance or otherwise, is indispensable to jurisdiction on appeal. Bacon *v.* Hart, 1 Black, 38; Castro *v.* United States, 3 Wall. 49; Alviso *v.* United States, 5 Id. 824; Buckingham *v.* McLean, 13 How. 150; Pierce *v.* Cox, 9 Wall. 786; Sage *v.* Railroad Co., 96 U. S. 712; McDonogh *v.* Millandon, 3 How. 707. A citation is a notice to the opposing party to appear or to decline to do so, and does not authorize a rendition of judgment against him if he fails to do so. Cohens *v.* Virginia, 6 Wheat. 264. Formerly the citation was not a necessary part of the record, and it might be proved *aliunde* that one was issued. Innerarity *v.* Byrne, 5 How. 295. Where an appeal is allowed in open court during the term at which the decree is actually entered, no citation is necessary. Reily *v.* Lamar, 2 Cranch, 344; Brockett *v.* Brockett, 2 How. 238; United States *v.* Gomez, 1 Wall. 701; Milner *v.* Meek, 95 U. S. 258; Vansant *v.* Gas Light Co., 99 U. S. 213. This implies some action of the court in open session, and to be regular, should be entered on the minutes. Vansant *v.* Gas Light Co., *supra*. But an appeal otherwise regular would probably not be dismissed for want of a citation if it appeared from clear and unmistakable evidence outside the



record that the allowance was made in open court at the proper term, and that the appellant had actual notice of what had been done. *Railroad Co. v. Blair*, 100 U. S. 662. But notice of a *writ of error*, given in open court at the same term the judgment is rendered, is not the equivalent of a citation. *United States v. Phillips*, 121 U. S. 254. An appeal allowed in open court during the term at which the decree appealed from was rendered, and an order to appear and argue the cause in the Supreme Court, are the equivalent of a citation. *Dodge v. Knowles*, 114 U. S. 430. Stipulations of the parties may have the effect of renewing an allowance of an appeal in open court. *Goodwin v. Fox*, 120 U. S. 777. The object of a citation being notice, no citation is necessary where the record shows that the appellee had actual notice and full knowledge of the appellant's intention to appeal. *United States v. Gomez*, 1 Wall. 690. The indorsement by the counsel for the appellees of his approval of the bond makes a citation unnecessary. *Goodwin v. Fox*, 120 U. S. 778. The judicial allowance of an appeal in open court, at the term when the decree was rendered, dispenses with the necessity of a citation, provided the appeal bond is filed at such term. But where the appeal bond is not given at such term, a citation or its equivalent is necessary; and such citation may be issued even more than two years after the decree, provided the appeal is docketed at the proper term. *Dodge v. Knowles*, 114 U. S. 430; *Hewitt v. Filbert*, 116 Id. 143; *Goodwin v. Fox*, 120 Id. 778; *Sage v. Railroad Co.*, 96 Id. 712; *Omaha Bank v. Omaha*, Id. 737. But where an appeal is taken after the term, a citation served before the end of the term to which it must be made returnable is necessary. *Hewitt v. Filbert*, *supra*. Signing a citation constitutes an allowance of an appeal, so as to give the Supreme Court authority to order the security to be given later. *Brown v. McConnell*, 124 U. S. 489. The mere presence of counsel in court at the time of the allowance of an appeal at another term than that of the decision appealed from, and without notice of the motion, or the prayer for allowance, does not dispense with citation. *Castro v. United States*, 3 Wall. 46; *Railroad Co. v. Blair*, 100 U. S. 661. But under certain circumstances the court will not dismiss such an appeal, but will grant summary relief. *Railroad Co. v. Blair*, *supra*; *Dayton v. Lash*, 94 U. S. 112. An appeal may be allowed at a special term held after that in which the decree was made, but in such case a citation is necessary. *Richards v. Mackall*, 113 U. S. 540; *Railroad Co. v. Blair*, 100 Id. 661, 662; *Yeaton v. Lenox*, 7 Pet. 221. The want of a citation may be shown to be due to the fault of the clerk below. *Alviso v. United States*, 6 Wall. 457. A citation not served is no citation. *Lloyd v. Alexander*, 1 Cranch, 365. Merely issuing without serving another writ of error and another citation cannot prejudice a writ and citation duly issued and served. *Davidson v. Lanier*, 4 Wall. 454.

*Service.* — As to the return day, see U. S. S. Ct. Rule 8, *supra*. As to the former law, see *Villabolas v. United States*, 6 How. 90; *United States v. Curry*, Id. 112; *Insurance Co. v. Mordecai*, 21 Id. 195; *Washington v. Dennison*, 6 Wall. 496. Want of service of the citation before the return day does not deprive the Supreme Court of jurisdiction. *O'Dowd v. Russell*, 14 Wall. 402; *Dayton v. Lash*, 94 U. S. 112. The citation should be issued and served on parties to the record (*McClane v. Boon*, 6 Wall. 246; *Davenport v. Fletcher*, 16 How. 142); and where a treasurer of a State has sued out the citation, it should be served on him, and not on the governor and attorney-general. *Poydras v. Treasurer*, 17 How. 1. For cases dismissed for want of a citation, see *Bailiff v. Tipping*, 2 Cranch, 406; *Vansant v. Gas Light Co.* 99 U. S. 213. The case may be dismissed if service is not made on the proper parties. *Bacon v. Hart*, 1 Black, 38; *Brown v. Union Bank*, 4 How. 465; *Garrison v. Cass County*, 5 Wall. 823; *Ex parte Crenshaw*, 15 Pet. 119; *Hogan v. Ross*, 9 How. 602. Service on the husband of the defendant in error who marries after the judgment below, and before service of the writ of error is sufficient. *Fairfax v. Fairfax*, 5 Cranch, 19. A service of a citation of a writ of error to a court of a State made



upon the defendant in error in another State, by a marshal of the latter State, is an irregularity that can be taken advantage of only by motion to dismiss made promptly on an appearance limited to that special purpose. *Renaud v. Abbott*, 116 U. S. 277. Where, pending a writ of error to the United States Supreme Court subsequently dismissed, the defendant in error dies, and the other side wishes to take out a new writ, application should be made to the court below for the purpose of reviving the suit in the name of the representatives of the deceased. A writ of error can then regularly issue. If the court below should refuse such an application, then the writ may from necessity issue in the name of the representatives in the usual way, with service of the citation on them to appear at the next term. *Kellogg v. Forsyth*, 24 How. 186; *McClane v. Boon*, 6 Wall. 244. Service of the citation may be made on the attorney of record, and an attorney cannot withdraw from a case without the consent of court; he may also waive service and acknowledge notice on the citation. *United States v. Curry*, 6 How. 106; *Bigler v. Waller*, 12 Wall. 147. A citation indorsed, "I hereby acknowledge service of the within citation, James Alfred Jones, counsel for the defendants in this cause in the Circuit Court of the United States for the District of Virginia," is sufficient, although the citation is directed to the defendant, who has died, and whose administrator has revived the suit (*Bigler v. Waller*, 12 Wall. 142); but a service on the widow or executrix of the attorney of record is not good, nor is one on a former law partner of the attorney of record. *Bacon v. Hart*, 1 Black, 38. Notice by means of a citation may be waived, as by consent or appearance, or the fraud of the other party (*Bigler v. Waller*, 12 Wall. 147); and an appellant cannot have a case dismissed for want of a citation when the appellee is in court represented by counsel, and makes no objection to the want of one. *Pierce v. Cox*, 9 Wall. 786. Appearance of counsel at a term after that to which the appeal is returnable, and a motion to dismiss for want of filing a transcript during the return term, do not waive the citation. *Radford v. Folsom*, 123 U. S. 725. Otherwise, if there has been a general appearance during the return term. *United States v. Armejo*, cited in *Radford v. Folsom*, *supra*.

SECT. 999.—"*When the writ is issued by the Supreme Court to a circuit court, the citation shall be signed by a judge of such circuit court or by a justice of the Supreme Court.*"—The clerk has no power to sign a citation. *United States v. Hodge*, 3 How. 534; *Villabolas v. United States*, 6 Id. 81. But the defect of a citation signed by a clerk is cured by an appearance in the Supreme Court, unless the motion to dismiss is made at the term when appearance is entered. *Chaffee v. Hayward*, 20 How. 208; *Aldrich v. Ætna Ins. Co.*, 8 Wall. 491. The judge is required to sign a citation on the allowance of a writ of error, although such act is ministerial. *Insurance Co. v. Wilson*, 8 Pet. 304; *United States v. Hodge*, 3 How. 534. A mistake in a writ of error cannot be corrected by a citation from the Supreme Court. No judge or justice can issue a citation except the one who allows the writ of error. *Insurance Co. v. Mordecai*, 21 How. 195; but see *Dayton v. Lash*, 94 U. S. 112; *National Bank v. Bank of Commerce*, 99 Id. 608.

"*Judge of such circuit court.*"—The citation may be signed by the district judge when the circuit court is sitting for his district. *Sheppard v. Wilson*, 5 How. 210; *Rodd v. Heartt*, 17 Wall. 354; *Baker v. Power*, 124 U. S. 167.

"*Or by a justice of the Supreme Court.*"—The citation may be signed by any justice of the Supreme Court, and is not confined to the justice assigned to the particular circuit. *Sage v. Railroad Co.*, 96 U. S. 715. The chief justice of a Territorial court may sign a citation (*Sheppard v. Wilson*, 5 How. 210); or a judge or justice thereof. *Brown v. McConnell*, 124 U. S. 489. Writs of error to State courts have never been allowed as of right. It has always been the practice to submit the record of the State court to a judge of the Supreme Court, whose duty has been to ascertain whether any question cognizable there on appeal was made and decided in the State court, and whether the



case, upon the face of the record, will justify the allowance of the writ. *Twitchell v. Commonwealth*, 7 Wall. 321. No writ of error to a State court can issue without allowance either by the proper judge thereof or by a judge of the Supreme Court after such examination as is stated in the last paragraph. *Gleason v. Florida*, 9 Wall. 779. In allowing a writ of error from the Supreme Court of the United States to the highest court of a State, and in issuing a citation, the chief justice of that court does but exercise an authority vested by Congress in him concurrently with each of the justices of the former court. *Felix v. Scharnweber*, 125 U. S. 54. While the chief justice of a State court may feel bound to allow the writ on the ground that a Federal question has been decided against the plaintiff in error, for the purpose of having that question decided, his certificate to the effect that such was the fact cannot supply the want of evidence in the record to that effect. *Id.*

*"And the adverse party shall have at least thirty days' notice."*—The statute requires, not that the citation shall be served thirty days before the return day, but that the defendant should have at least thirty days' notice before a hearing. *National Bank v. Bank of Commerce*, 99 U. S. 608; *Yeaton v. Lenox*, 7 Pet. 220; *Lloyd v. Alexander*, 1 Cranch, 365; *Welsh v. Mandeville*, 5 Id. 321. A writ of error, on which the citation is served and made returnable less than thirty days after the writ was granted, will not be dismissed, whatever may be the ground for relief for such a service. *Seagrist v. Crabtree*, 127 U. S. 773.

*"And when it is issued by the Supreme Court to a State court, the citation shall be signed by the chief justice, or judge, or chancellor of such court,"* &c.—A district judge has no authority to sign a citation on writ of error to a State court, and if it is so signed, the writ will be dismissed on motion. *Palmer v. Donner*, 7 Wall. 541. When a Supreme Court of a State has a chief justice, he alone has power to allow a writ of error. *Bartemeyer v. Iowa*, 14 Wall. 26.

SECT. 1000.—*"Every justice or judge signing a citation on any writ of error shall . . . take good and sufficient security,"* &c.—See U. S. S. Ct. Rule 29. The authority given the justice or judge to approve the security cannot be delegated to a clerk or to a commissioner. *O'Reilly v. Edrington*, 96 U. S. 724; *Haskins v. Railway Co.*, 109 U. S. 107. See *Ex parte Railroad Co.*, 5 Wall. 190. But an appeal bond may be approved by the judge in vacation. *Hudgins v. Kemp*, 18 How. 530. The refusal of a circuit court to accept a *supersedeas* bond does not deprive a judge of that court or a justice of the Supreme Court of power to accept one afterwards. *Sage v. Railroad Co.*, 96 U. S. 715. The plaintiff in error may execute his bond after the cause has been docketed in the Supreme Court by the opposite party, in advance of the return day of the writ. *Davies v. Corbin*, 113 U. S. 687. No particular form of security is prescribed, but the security has uniformly been a bond. *Seymour v. Construction Co.*, 7 Biss. 460. The approval need not be in writing. *Davidson v. Lanier*, 4 Wall. 447. Approval of the bond may be inferred, as by justification before the judge who signs the citation, and on the same day, the day of its execution, and of the issuance of the writ. *Silver v. Ladd*, 6 Wall. 440. Signing a citation and witnessing an appeal bond is a sufficient approval (*Davidson v. Lanier*, 4 Wall. 454); so also is signing a citation merely. *Brown v. McConnell*, 124 U. S. 489. An appeal, though granted and entered on the minutes of the court, may be revoked during the term. *Goddard v. Ordway*, 101 U. S. 745. But where the allowance is the act of the justice and not of the court, his power, in the absence of fraud, is exhausted by taking security on appeal and signing a citation. *Draper v. Davis*, 102 U. S. 371. Whether the circuit court has authority, after appeal, to allow an amendment to a *supersedeas* bond, *quære*. *Ferguson v. Dent*, 29 F. R. 1. After a writ of error has been sued out and a bond given, the circuit court cannot require additional security. *Butchers' Association v. Slaughter House Co.*, 1 Woods, 50. The condition of a bond, that the appellants "shall duly prosecute their said



appeal with effect, and, moreover, pay the amount of costs and damages rendered and to be rendered in case the decree shall be affirmed in said court," meets all the requirements of this statute. *Gay v. Parpart*, 101 U. S. 391. When the appeal or writ of error is not a *supersedeas*, the court will entertain either, and will direct the time within which it shall be given. *Anson v. Railroad Co.*, 23 How. 1; *Brobst v. Brobst*, 2 Wall. 96; *Seymour v. Freer*, 5 Id. 822. When time is given, the security has generally been ordered to be approved by the judge or justice signing the citation, but in *Ex parte Railroad Co.*, 5 Wall. 188, and *Rubber Co. v. Goodyear*, 6 Id. 153, it was ordered to be approved by the clerk of the Supreme Court; and in *Brown v. McConnell*, 124 U. S. 492, and *Steward v. Masterson*, Id. 493, it was ordered to be approved by the justice of the Supreme Court allotted to a certain circuit. The taking of security below is not necessary for jurisdiction, as such security can be given in the Supreme Court. *Davidson v. Lanier*, 4 Wall. 454; *Martin v. Hunter*, 1 Wheat. 361; *Catlett v. Brodie*, 9 Id. 553; *Brobst v. Brobst*, 2 Wall. 96; *Seymour v. Freer*, 5 Id. 822; *Brown v. McConnell*, 124 U. S. 489. An objection that an appeal bond is signed by only one of several appellants can be taken only by a preliminary motion to dismiss. *Mandeville v. Riggs*, 2 Pet. 482. See *Brockett v. Brockett*, 2 How. 238. Formerly, if the record showed that no appeal bond was taken, the appeal was dismissed (*Boyce v. Grundy*, 6 Pet. 777); but now an opportunity will be afforded to give a bond in the Supreme Court. See *Dayton v. Lash*, 94 U. S. 112; *Davidson v. Lanier*, 4 Wall. 447; *Seymour v. Freer*, 5 Id. 822. The presumption of law is that every judge who signs a citation has taken a bond as required by law. *Martin v. Hunter*, 1 Wheat. 304. The bond may be lodged in the court above or below. Id. If the judgment is severable, all the defendants may join in a writ of error, and file separate bonds for a *supersedeas*. *Ex parte French*, 100 U. S. 1. The bond should be signed by sureties, although the appellant is a municipal corporation fully responsible. *American P. Co. v. Elizabeth*, 1 Ban. & A. 463. The judge may accept one surety, although the State law requires two. *Mexican Construction Co. v. Reusens*, 118 U. S. 49. The sureties may be non-residents of the district. *Ex parte Railroad Co.*, 5 Wall. 188. An affidavit of the ability of sureties is sufficient unless there is an allegation of their inability. *Hatch v. Coddington*, 5 Blatch. 523. If there is objection, there must be evidence from some reliable person acquainted with the pecuniary condition of the sureties. *Hobson v. Johnson*, 4 Biss. 505. The bond must be given to the party of record, or it will be dismissed. *Davenport v. Fletcher*, 16 How. 142. If the original parties have died and their personal representatives have been substituted, the bond should run to the latter. *Bigler v. Waller*, 12 Wall. 142. Where the bond runs to one not a party to the judgment, the writ of error will be dismissed unless the informality is corrected. *Davenport v. Fletcher*, 16 How. 142; *Bigler v. Waller*, *supra*. An appeal bond running to the relator or to the people in the alternative is good. *Spalding v. New York*, 2 How. 66. The amount of the security need not be in any fixed proportion to the amount of the decree, although in general for double that sum, but it must be sufficient. *Providence Rubber Co. v. Goodyear*, 6 Wall. 153. Where the record does not disclose the value of the matter in dispute, a bond does not operate as a *supersedeas*. *Williamson v. Kincaid*, 4 Dall. 20. An approved appeal bond is sufficient, although signed by only a part of the defendants. *Brockett v. Brockett*, 2 How. 238. So also is a bond on a writ of error where the judgment is severable. *Ex parte French*, 100 U. S. 1. If a bond recites an allowance of an appeal in open court contrary to the facts, this may be regarded as mere surplusage, and will not affect the appeal or the validity of the bond. *Sage v. Railroad Co.*, 96 U. S. 715. As to clauses in a bond which were not authorized by statute held not binding, see *Kountze v. Omaha Hotel Co.*, 107 U. S. 378. A bond containing no security for costs is insufficient for a *supersedeas* or an appeal. *Seward v. Corneau*, 102 U. S. 161. And a bond conditioned only to pay "costs and damages" cannot stay a sale of mortgaged



premises under a decree of foreclosure, the said bond being considered by the court as equivalent merely to a bond for costs. *Orchard v. Hughes*, 1 Wall. 73. The omission from an appeal bond of the statutory stipulation as to damages required to effect a *supersedeas* does not necessarily entitle the party to whom the property is adjudged, to a discharge of the receiver, and possession of the property pending the appeal. Action as to the subsequent custody is within the discretion of the court. *Ferguson v. Dent*, 29 F. R. 1. The damages, which a *supersedeas* bond given on an appeal from a decree subjecting land to the payment of a debt covers, are only damages following from the delay in the sale of the property. *Supervisors v. Kennicott*, 103 U. S. 554. The amount of the security is what in the discretion of the judge is "good and sufficient." The action of the justice within the statute and within the rules of practice adopted for his guidance upon facts existing at the time the security is taken is final, and the court will presume that every fact was presented to him. *Jerome v. McCarter*, 21 Wall. 31; *Martin v. Powder Co.* 93 U. S. 302; *Ex parte French*, 100 Id. 1; *Williams v. Claflin*, 103 Id. 753. As to the amount, see *Hatch v. Coddington*, 5 Blatch. 523; *French v. Shoemaker*, 12 Wall. 86; *Wilmer v. Railway Co.*, 2 Woods, 409; *American P. Co. v. Elizabeth*, 1 Ban. & A. 439, 463. A *supersedeas* granted on an appeal may be quashed by the court granting it, if satisfied that sufficient security was not taken; and the Supreme Court cannot review such a proceeding. *Black v. Zacharie*, 3 How. 483. In that case the *supersedeas* was quashed on the succeeding day. A change, after the security has been accepted, in the circumstances of the case, or of the parties or of the sureties, making the security not "good and sufficient," will give the Supreme Court power to change the security. *Jerome v. McCarter*, 21 Wall. 31; *Martin v. Powder Co.*, 93 U. S. 302; *Draper v. Davis*, 102 Id. 371; *Mexican Construction Co. v. Reusens*, 118 Id. 51; *Williams v. Claflin*, 103 Id. 753; *Johnson v. Waters*, 108 Id. 4; *Harwood v. Dieckerhoff*, 117 Id. 200. But the Supreme Court may set aside a bond on the ground that its acceptance was procured by fraud. *Railroad Co. v. Schutte*, 100 U. S. 644. See also as to vacating or modifying a *supersedeas*. *Power v. Baker*, 112 U. S. 710; *Railroad Co. v. Telegraph Co.*, Id. 306; *Williams v. Claflin*, 103 Id. 153; *Harwood v. Dieckerhoff*, 117 Id. 200. The Supreme Court cannot order an increased amount of security on the ground of apprehended loss. *Roberts v. Cooper*, 19 How. 373. As to enforcing a *supersedeas*, see *Goddard v. Ordway*, 94 U. S. 672; *Hunt v. Oliver*, 109 Id. 177; *Wallen v. Williams*, 7 Cranch, 278.

If the appeal is intended to operate as a *supersedeas* the amount of the bond must equal the sum of the decree, notwithstanding that the receiver appointed by the court below has given bond for a large amount, and that the persons who were in possession of the property in dispute have given security for its safe keeping and delivery. *Stafford v. Union Bank*, 16 How. 135. If bonds have been deposited as part security and the judge has required other security for twice the amount of the decree, the Supreme Court may authorize the withdrawal of such security and the substitution of an obligation for a less amount. *Rubber Co. v. Goodyear*, 6 Wall. 153. Where the property in controversy necessarily follows the event of the suit, indemnity is only required in an amount sufficient to secure the sum recovered for its use or detention, and the other incidental items, as in cases where the judgment or decree is for money. If the record does not show that the security is insufficient, it will be presumed that it is ample. *French v. Shoemaker*, 12 Wall. 86, 99. Where the property in dispute is of such a nature as requires care and skill in order that it be preserved and is in the care of a trustee or receiver, the court will require greater security than in cases where the property is of a different character or is in the hands of the owner. *Duncan v. Mobile R. Co.*, 3 Woods, 597. On an appeal from a decree ordering the sale of property, the amount of the bond will not be required to be much in excess of the interest on the value of the property during the time the sale is suspended by the decree. *Wilmer v. Atlanta R. Co.*, 2 Woods, 447. Where the plain-



tiff's debtor, being the equitable owner of realty, conveyed it to his brother with intent to defraud his creditors, and the conveyance was accepted with knowledge of such intent, and the plaintiff subsequently obtained judgment against the debtor and also a decree on a bill filed to subject this property to the satisfaction of the judgment, ordering the property to be sold to satisfy his claim, it was ruled that the money due under this decree was not "otherwise secured" by such property within the meaning of Rule 29 of the Supreme Court, and the amount of a *supersedeas* bond was fixed as the amount of the decree, with three years' interest, ten per cent damages for delay, and costs of appeal. *Hickox v. Elliott*, 28 F. R. 117. If the defendants are municipal officers and have little or no pecuniary interest, and the judgment sought to be stayed merely directs the performance of a ministerial act, Rule 29 of the Supreme Court has no application. In this case, a *mandamus* proceeding, for the levy of a sum exceeding \$5,000, the bonds were fixed at \$150 and ten per cent of the amount of the judgment, and a stay of proceedings was ordered. *United States v. Mayor*, 8 F. R. 112. Rule 29, changing the practice, as declared in *Catlett v. Brodie*, 9 Wheat. 553, as to the security on appeal in a suit for the foreclosure of a mortgage, does not mean that security must be given for the payment of all accumulations of interest on the mortgage debt pending the appeal, but only that it must provide indemnity for such loss thereof as may ensue, as, for instance, by the insufficiency of the mortgage security to cover all such accumulations. *Jerome v. McCarter*, 21 Wall. 17. The loss by an appellee of an opportunity of bidding in the property on a foreclosure sale at a reduced price and speculating on its rise, is not "damages for the delay." *Jerome v. McCarter*, 21 Wall. 32. The acceptance of the security, followed, when necessary, by the signing of a citation, is in legal effect the allowance of an appeal. *Sage v. Railroad Co.*, 96 U. S. 712. So is the mere signing of a citation. *Brown v. McConnell*, 124 U. S. 439. The appeal bond may in admiralty cases be treated as an admiralty stipulation. *The Wanata*, 95 U. S. 600. As to the liability of sureties, see *Ives v. Merchants' Bank*, 12 How. 159; *Sessions v. Pintard*, 18 Id. 106; *Babbitt v. Finn*, 101 U. S. 7; *Kountze v. Omaha Hotel Co.*, 107 Id. 378; *Tucker v. Lee*, 3 Cranch C. C. 684; *Bank v. Swann*, 4 Id. 139; *Crane v. Weymouth*, 54 Cal. 476; *Crowder v. Morgan*, 72 Ala. 535; *Bayliss v. Railroad Co.*, 9 Biss. 90; *The New Orleans*, 17 Blatch. 216.

"*Except in cases brought up by the United States or by direction of any department of the government.*" — See next note.

SECT. 1001. — No bond is required on writs of error or appeals issued from or brought to the Supreme Court by direction of the Comptroller of the Currency in suits by or against national banks or the receivers thereof. *Pacific Bank v. Mixter*, 114 U. S. 463. The United States are not required to give the bonds required by a State code in order to avail themselves of the provisions of the code. *United States v. Bryant*, 111 U. S. 500; *United States v. Ottman*, 23 Int. Rev. Rec. 294; 3 MacArthur, 73.

SECT. 1003. — A writ of error lies to a State court in both civil and criminal cases (*Twitchell v. Commonwealth*, 7 Wall. 321), and whatever may be the value involved in the controversy. *Buell v. Van Ness*, 8 Wheat. 312. Section 1008 applies to judgments of State courts, and the writ of error must be brought within two years. *Cummings v. Jones*, 104 U. S. 419. The clause in § 1007 prohibiting the issuing of an execution until after a certain time, refers only to judgments and decrees of the Federal courts and not to State courts. *Doyle v. Wisconsin*, 94 U. S. 50; *Foster v. Kansas*, 112 Id. 201. Section 1005 applies to writs to State courts. *Atherton v. Fowler*, 91 U. S. 143. This section does not lay down rules of decision. *Murdock v. Memphis*, 20 Wall. 624. The word "manner" expresses the general mode of proceeding with the case after the writ has been allowed, the means by which the exigency of the writ is enforced, as by rule on the clerk, or *mandamus* to the court, and the progress of the case in the appellate court, as filing the record, docketing the case, time of hearing, order of argument, and such other matters



as are merely incident to final decision by the court. *Murdock v. Memphis*, *supra*. "Regulations" are the rules under which the writ is issued, served, and returned, the notice to be given to the adverse party, and the time fixed for appearance, argument, &c. *Murdock v. Memphis*, 20 Wall. 623. The word "effect" means that it shall transfer the case to the Supreme Court, and with it the record of the proceedings in the court below. *Id.* The whole phrase means that such cases shall be conducted in the manner of the general course of procedure, by the same rules of practice that prevail in cases brought under writs of error to the courts of the United States. *Id.* The writ must be allowed by a justice of the United States Supreme Court, or the proper judge of the State court. *Gleason v. Florida*, 9 Wall. 779; *Bartemeyer v. Iowa*, 18 *Id.* 129. The writ should be directed to the court in which the final judgment was rendered, by whose process it must be executed, and in which the record remains, although such court may not be the highest court of the State, and although the latter court may have exercised a revisory jurisdiction over points in the case and certified its decision to the court below. *Gelston v. Hoyt*, 3 Wheat. 246; *McGuire v. Commonwealth*, 3 Wall. 382; *Green v. Van Buskerk*, *Id.* 450; *Polleys v. Black River Co.*, 113 U. S. 83. But where the record, or a transcript standing for a record, is removed to the court of review, which court has the power to render a regular judgment, the writ must be directed to such court of review. *Atherton v. Fowler*, 91 U. S. 143; *Wurts v. Hoagland*, 105 *Id.* 702. The word "regulation" is altogether confined to the writ of error, citation, &c. *Buell v. Van Ness*, 8 Wheat. 312. A writ of error will not be allowed on the application of an attorney who does not act under the authority of the applicant but at the request of his friends. *Ex parte Dorr*, 3 How. 103. The writ may bear teste of the day of its issue. *Atherton v. Fowler*, 91 U. S. 143. It cannot be brought in the name of the vessel, but must be in the name of the claimant who appeared to defend the action. *The Burns*, 9 Wall. 237. A writ issued and signed by the clerk of a circuit court, after being allowed by the judge thereof and sealed as prescribed, is regular, although it does not state that it is directed to a final judgment of a State court, or that the court is the highest court of law or equity of the State. *Buell v. Van Ness*, 8 Wheat. 312. The return is sufficient if the record is duly certified by the clerk of the State court and authenticated with the seal of the court and annexed to the writ of error. *Martin v. Hunter*, 1 Wheat. 304; *Worcester v. State*, 6 Pet. 515. Rule 8, 108 U. S. 576. It need not be certified by the court pronouncing the judgment. *Webster v. Reid*, 11 How. 437. A rule may be made requiring a clerk of the State court to make return or show cause. *United States v. Booth*, 18 How. 476. The same return is required in civil and in criminal cases. *Worcester v. State*, 6 Pet. 515. See also note, § 705.

SECT. 1004. — Formerly a clerk of the circuit court could not issue a writ of error (*West v. Barnes*, 2 Dall. 401); and now the writ of error is the writ of the Supreme Court and not of the circuit court whose clerk may actually issue it. *Mussina v. Cavazos*, 6 Wall. 355. A clerk of the circuit court has no right to change the form of a writ of error without the consent of the justices of the Supreme Court. *Barton v. Forsyth*, 5 Wall. 190. The writ to a Federal court need not be allowed by any judge. It is enough that it is issued and served by copy lodged with the clerk of the court to which it is directed. *Davidson v. Lanier*, 4 Wall. 447. Under a statute providing that writs of error from the Supreme Court of a Territory shall be allowed in the same manner as from circuit courts, the clerk of the Supreme Court of a Territory in which judgment was rendered may issue the writ. *Sheppard v. Wilson*, 5 How. 210.

SECT. 1005. — See note, § 997. "*In its discretion.*" — An amendment was refused in *Pearson v. Yewdall*, 95 U. S. 294; and was allowed under special circumstances in *Knickerbocker Ins. Co. v. Pendleton*, 115 U. S. 339.

"*Allow an amendment of a writ of error.*" — Formerly a writ of error could not be



amended. *Insurance Co. v. Mordecai*, 21 How. 195; *Porter v. Foley*, Id. 393; *Hodge v. Williams*, 22 Id. 87; *Washington v. Dennison*, 6 Wall. 495.

*"When there is a mistake in the teste of the writ."* — A writ was amended when tested in the vacation after the last term, in *Course v. Stead*, 4 Dall. 22.

*"Or a seal to the writ is wanting."* — Before this act a writ of error without a seal was void. *Overton v. Cheek*, 22 How. 46; *Washington v. Dennison*, 6 Wall. 495.

*"Or when the writ is made returnable on a day other than the day of the commencement of the term next ensuing the issue of the writ."* — See Rule 8, clause 5, 108 U. S. 577. A writ of error has been amended by inserting return day. *Mossman v. Higginson*, 4 Dall. 12; *Atherton v. Fowler*, 91 U. S. 143; *Evans v. Brown*, 109 Id. 180; but not so formerly (*Carroll v. Dorsey*, 20 How. 205); by making certain an imperfect description of the return day (*McVeigh v. United States*, 8 Wall. 640); by correcting the return day (*Hampton v. Rouse*, 15 Wall. 684), even on a writ to a State court (*Atherton v. Fowler*, 91 U. S. 143; *Texas R. Co. v. Kirk*, 111 Id. 486), though formerly it was otherwise. *Insurance Co. v. Mordecai*, 21 How. 195. A blank return day can be filled on motion. *Mossman v. Higginson*, 4 Dall. 12. An amendment is allowed where the writ is returnable in less than thirty days. *National Bank v. New York Bank of Commerce*, 99 U. S. 608. But a failure to return and enter a writ during the return term is fatal. *Hamilton v. Moore*, 3 Dall. 371. A writ of error dated before entry of judgment, but not served till after, is not void. *O'Dowd v. Russell*, 14 Wall. 402.

*"Or when the statement of the title of the action or parties thereto in the writ is defective, if the defect can be remedied by reference to the accompanying record."* — *Knickerbocker Insurance Co. v. Pendleton*, 115 U. S. 339. A writ can be amended on appeal so as to be in the name of the individuals of the firm instead of the firm. *Moore v. Simonds*, 100 U. S. 145; *Estis v. Trabue*, 128 Id. 229; but before this act a writ or an appeal could not be amended when there was a defect in the title of the parties. *Porter v. Foley*, 21 How. 393; *Hodge v. Williams*, 22 Id. 87; *The Protector*, 11 Wall. 86. An amendment is not allowed to bring in a necessary party where it is apparent that the record presents no question not well settled. *Pearson v. Yewdall*, 95 U. S. 294. A writ to a State court returnable on a wrong day, bearing *teste* and signature of the chief justice of that court, and signed by its clerk and sealed with its seal, and calling on the Supreme Court in the name of the President, was amended, and the signature of clerk of the United States Supreme Court and its seal was affixed instead of the circuit court, in *Railroad Co. v. Kirk*, 111 U. S. 486, distinguishing *Bondurant v. Watson*, 103 U. S. 278. Where there is a substantial defect in a writ of error which the court cannot amend, it has no jurisdiction to try the case, and will, of its own motion, dismiss the case without waiting the action of the party. *Wilson v. Insurance Co.*, 12 Pet. 140; *Hilton v. Dickinson*, 108 U. S. 168; *Estis v. Trabue*, 128 Id. 230. This section does not apply except where a colorable writ has been issued from the Supreme Court. *Bondurant v. Watson*, 103 U. S. 278. In that case the writ did not purport to be issued in the name of the President or under the authority of the United States. A writ of error will not be dismissed because the receiver who took it is referred to in one of the papers in the record by a wrong Christian name. *Pacific Bank v. Mixter*, 114 U. S. 463.

SECT. 1006. — If notice of appeal was filed with the clerk of the district court within thirty days next after the final decree therein, an appeal will be allowed whenever the purposes of justice require it. *The Nuestra Señora de Regla*, 17 Wall. 29.

SECT. 1007. — See notes, § 1000, and pp. 102, 301 *ante*. See *Kitchen v. Randolph*, 93 U. S. 86, for a comparison of this with previous statutes. In the last line of § 1007, 18 St. 316, ch. 80, § 1, changes "the said term of sixty," to "ten."

*"In any case where a writ of error may be a supersedeas."* — A *supersedeas* does not prevent the defendant in error from bringing a new suit on a new cause of action, but



arising out of the same general matter, and involving the same questions of law. *Spraul v. Louisiana*, 123 U. S. 516. A *supersedeas* is not obtained by virtue of any process issued by the Supreme Court, but follows as a matter of law from a compliance with the provisions of the Act of Congress. But if the court below notwithstanding the *supersedeas* attempts to execute its judgment or decree, the Supreme Court may issue a restraining writ under § 716. *Arnold v. Foster*, 9 Ben. 269; *Goddard v. Ordway*, 94 U. S. 672. There must be a strict compliance with all the conditions imposed by the statute. *Sage v. Railroad Co.*, 93 U. S. 412; *Western Air Line Co. v. McGillis*, 127 Id. 776. Where the inferior court, notwithstanding the writ, proceeds to issue final process, the Supreme Court may issue a *supersedeas*, although the application therefor precedes the return day of the writ of error. *Slaughter House Cases*, 10 Wall. 273. A *supersedeas* is a suspension of the power of the court below to issue an execution on the judgment or decree appealed from; or if a writ of execution has issued, it is a prohibition against executing the writ, and a writ of *supersedeas* must be given the officer holding the writ of execution. *Hovey v. McDonald*, 109 U. S. 159. A bond given on an appeal from a decree dissolving an injunction restraining a judgment at law does not operate as a *supersedeas* of such judgment. *Grundy v. Young*, 1 Cranch C. C. 443. If a bond has been defectively executed, the circuit court will not permit an execution to issue until the Supreme Court can act in the matter, if there is a mistake which would warrant a reformation of the bond, had the court power to reform it after an appeal is taken. *Ferguson v. Dent*, 29 F. R. 1. A writ of error to revise a judgment of ouster on a writ of *quo warranto* operates as a *supersedeas*. *United States v. Addison*, 22 How. 174. So does an appeal by the party for whom the decree is rendered as no bond is required. *Bronson v. Railroad Co.*, 1 Wall. 405. The Supreme Court will issue a *supersedeas* where an execution has been issued by the circuit court when the plaintiff in error was entitled to a *supersedeas*. *Stockton v. Bishop*, 2 How. 74. The court will issue a *supersedeas* where an appeal bond has been disallowed below for an insufficient reason. *Ex parte R. R. Co.*, 5 Wall. 188. If the record does not disclose the value of the matter in dispute, a bond does not operate as a *supersedeas*. *Williamson v. Kincaid*, 4 Dall. 20. Signing a citation more than sixty days after the judgment was rendered does not make a bond ineffectual as a *supersedeas*, the amount being sufficient. *Tiernan v. Booth*, 4 F. R. 620. There is no *supersedeas* where the citation is not served until after the return day of the writ. *Washington v. Dennison*, 6 Wall. 495. The Supreme Court cannot award a *supersedeas* where the writ of error was not sued out seasonably. *Hogan v. Ross*, 11 How. 294. There is no *supersedeas* although the failure to file in time was due to an erroneous prior proceeding by way of appeal. *Saltmarsh v. Tuthill*, 12 How. 387. To act as a *supersedeas* the appeal bond must be filed within ten days after the rendition of the decree. *Adams v. Law*, 16 How. 144; *Slaughter House Cases*, 10 Wall. 289. An appeal taken instead of a writ of error in an action at law cannot operate as a *supersedeas*. *Saltmarsh v. Tuthill*, 12 How. 387. An order of a Supreme Court suspending an attorney is not superseded by a writ of error, so as to allow him to practice pending the appeal. *Tyler v. Superior Court*, 13 Pac. Rep. 856. The operation of a judgment and decree is not suspended by an appeal to the United States Supreme Court when there is no *supersedeas* or stay of execution, so that it may not be set up as a bar to a re-trial of the same issues between the same parties. *Curtis v. Donnell*, 3 Montana, 211; *Fredericks v. Clark*, Id. 258. A restraining order cannot be issued by the trial court after a bond has been given according to the statute. *Eureka Consolidated M. Co. v. Richmond M. Co.*, 5 Sawyer, 121. A *supersedeas* does not prevent the court from issuing an attachment for the payment of a sum ordered to be paid to the master. *Myers v. Dunbar*, 12 Blatch. 380. It prevents the court from ordering the payment of the costs of a prize commissioner out of the funds in its custody. *The Peterhoff*, Blatch. Pr. Cas. 620. No sale can take place in a prize cause under a decree of condemnation after a *supersedeas* has been given.



The Sunbeam, Blatch. Pr. Cas. 638. Money cannot be paid in pursuance of a decree out of a fund in the hands of a receiver after a *supersedeas* has been taken. Goddard v. Ordway, 94 U. S. 672. If the court below issues execution after a *supersedeas* has been taken, it may be quashed by it or by the Supreme Court. Stockton v. Bishop, 2 How. 74. If a receiver is in possession of property, the party who files a *supersedeas* is not thereby entitled to a delivery of it. Schenk v. Peay, 1 Dillon, 267. The *supersedeas* has no effect if the appeal becomes inoperative. Gillette v. Bullard, 20 Wall. 571. If the circumstances of the case have changed, or the situation of the parties is materially different, the appellate court may modify a *supersedeas* so as to permit a sale of the property. Williams v. Claflin, 103 U. S. 753. Acts regularly done by the court before the bond is filed are not affected by its being filed subsequently. Commissioners v. Gorman, 19 Wall. 661. As to a bond given to suspend the execution of a warrant for commitment for contempt, see Fischer v. Hayes, 7 F. R. 96. As to the effect of a *supersedeas* on an injunction of an inferior court, see Slaughter House Cases, 10 Wall. 273; Hovey v. McDonald, 109 U. S. 161. See also Ozark Land Co. v. Leonard, 24 F. R. 658. As to a *supersedeas* issued under peculiar circumstances, see Hardeman v. Anderson, 4 How. 640. As to one not issued, see Adams v. Law, 16 How. 144.

"The defendant may obtain such *supersedeas* by serving the writ of error, by lodging a copy thereof for the adverse party in the clerk's office where the record remains, within sixty days, Sundays exclusive."—The provision concerning service does not apply where an appeal is taken; but that concerning security does, if it is desired that proceedings be stayed. Bigler v. Waller, 12 Wall. 142, 148; The Roanoke, 3 Blatch. 390. The Supreme Court cannot allow a *supersedeas* (Kitchen v. Randolph, 93 U. S. 86; Bigler v. Waller, 12 Wall. 142; Washington v. Dennison, 6 Id. 495; Railroad Co. v. Harris, 7 Id. 574; O'Dowd v. Russell, 14 Id. 402; see Sage v. Railroad Co., 93 U. S. 412); even where the parties have agreed to a stay of execution for more than sixty days. Thompson v. Voss, 1 Cranch C. C. 108. But otherwise where the court allows the appeal while in session and the appeal is entered of record, although no bond is filed till after the sixty days. Peugh v. Davis, 110 U. S. 227. If the writ is served within the sixty days, the citation may be signed afterwards. Tiernan v. Booth, 4 F. R. 620. A *nunc pro tunc* order is effectual for the purposes of a *supersedeas* only when the delay is the act of the court and not of the parties, and when injustice will not be done. *Ex parte* Railroad Co., 95 U. S. 221; Sage v. Railroad Co., 93 U. S. 412. See also Dutcher v. Woodhull, 7 Ben. 313. And if the party omits to lodge a copy of the appeal and of its allowance in the clerk's office within the sixty days, the circuit court cannot allow him after that time to file it *nunc pro tunc*. The Roanoke, 3 Blatch. 390. An allowance by the Supreme Court of an appeal improperly refused is of the date of the prayer for appeal. *Ex parte* Railroad Co., 95 U. S. 221; Thornton v. Bank, 4 Am. L. T. (U. S.) 245. The writ operates as a *supersedeas* from the time it is lodged in the office of the clerk of the court where the record remains. Foster v. Kansas, 112 U. S. 201. If no bond is filed to stay the execution of a decree, the appellant has no ground to complain on account of its being enforced. Souter v. Railroad, 1 Woolw. 80. An appeal does not supersede the execution of a decree of foreclosure by a sale of mortgaged chattels, unless a bond to secure the whole debt is given within the ten days, although the property is in the hands of a receiver. Stafford v. Union Bank, 16 How. 135; 17 Id. 275; Stafford v. New Orleans Banking Co., Id. 283. But see now Rule 29, 108 U. S. 590. A writ of error served after sixty days cannot operate as a *supersedeas* (Hogan v. Ross, 11 How. 294; Saltmarsh v. Tuthill, 12 Id. 387; Grundy v. Young, 1 Cranch C. C. 443); although the security is given within the sixty days. Railroad Co. v. Harris, 7 Wall. 574. Nor can it if served within the sixty days when not sealed until after that time. Washington v. Dennison, 6 Wall. 495, decided before § 1005, allowing amendments. As to the time running from entry of judgment, although not signed by the judges



till afterwards, see *Commissioners v. Gorman*, 19 Wall. 661. If a writ of error is dismissed for want of a citation, a second writ sued out more than ten days after entry of judgment will not operate as a *supersedeas*. *Hogan v. Ross*, 11 How. 294. The time runs from the overruling of a motion for a new trial (*Rutherford v. Insurance Co.*, 1 F. R. 456. *Re Oil Co.*, 6 Blatch. 523; *Brown v. Evans*, 8 Sawyer, 502; *Railway Co. v. Murphy*, 111 U. S. 488); or rehearing. *Nevada Bank v. Steinmiz*, 65 Cal. 219; *Slaughter House Cases*, 10 Wall. 289; *Railway Co. v. Murphy*, 111 U. S. 488. The time runs from the entry by the clerk of the rule for judgment on a written opinion denying a motion for a new trial filed with him, and not from such filing. *Hatch v. Coddington*, 5 Blatch. 523. The circuit court may during the term strike out a judgment and then enter it anew for the very purpose of allowing a writ of error to operate as a *supersedeas*. *Memphis v. Brown*, 94 U. S. 715. An appeal allowed in open court is of the date of its allowance (*Radford v. Folsom*, 123 U. S. 725); although entered as of a prior date (*Rubber Co. v. Goodyear*, 6 Wall. 153; *Seymour v. Freer*, 5 Wall. 822); or although it provides for a taxation of costs which are taxed afterwards. *Craig v. The Hartford*, 1 McAll. 91. An appeal being allowed in open court, leaving the amount of the appeal bond to be settled afterwards, the acceptance of the bond after the term and without citation does not operate as a new appeal as of the date of the acceptance of the bond. *Radford v. Folsom*, 123 U. S. 725. If the parties to a suit in equity, in which an appeal has been allowed but not perfected, stipulate that an entry may be made of an order extending the time for filing a bond and the certificate of evidence, it is the equivalent of an order of that date renewing the allowance of the appeal in open court in the presence of the parties, and it is returnable as if it were so allowed. *Goodwin v. Fox*, 120 U. S. 775. An appeal will operate as a *supersedeas* if taken within ten days either from the announcement of the decree in open court or from the settling and filing thereof. *Silsby v. Foote*, 20 How. 290. An appeal taken by the party for whom the decree is rendered acts as a *supersedeas*, as no bond is required. *Bronson v. Railroad Co.*, 1 Wall. 405. An appeal allowed and bond filed within ten days after the decision on a motion made to rescind a final decree made at the same term will act as a *supersedeas*. *Railroad Co. v. Bradleys*, 7 Wall. 575; *Memphis v. Brown*, 94 U. S. 715. The ten days begin to run only after the disposition of a petition to open a final decree filed at the time the decree is rendered (*Brockett v. Brockett*, 2 How. 238); but not of a petition of an intervenor to set aside a decree. *Sage v. Railroad Co.*, 93 U. S. 412. If parties out of caution take an appeal within ten days of the announcement of the decree in open court, and another within ten days of the settling and filing thereof, the second one will be dismissed. *Silsby v. Foote*, 20 How. 290. When a decree of a fund to be divided by a commissioner is followed by a decree on his report, either decree may be considered the date of the final decree as regards a *supersedeas*. *Rodd v. Heartt*, 17 Wall. 354.

"In the clerk's office where the record remains."—The time of the *supersedeas* runs from the entry of judgment in the court where the record remains, *e. g.* a lower State court to which the record has been returned with an order for an entry of judgment. *Green v. Van Buskerk*, 3 Wall. 448; *Brumagim v. Chew*, 21 N. J. Eq. 180. But where the record or a transcript standing for a record is removed to the court of review, which court has the power to render a regular judgment, the sixty days run from rendition of judgment in the court of review. *Wurts v. Hoagland*, 105 U. S. 701. See also *Gelston v. Hoyt*, 3 Wheat. 246; *McGuire v. Commonwealth*, 3 Wall. 382; *Polleys v. Black River Co.*, 113 U. S. 83; *Atherton v. Fowler*, 91 U. S. 143.

"After the rendering of the judgment complained of," &c.—The judgments are only those which are final. See § 691, and *Silsby v. Foote*, 20 How. 290; *Brockett v. Brockett*, 2 Id. 238; *Railroad Co. v. Bradleys*, 7 Wall. 575. For a case where a decree was held as not final, and therefore an appeal not a *supersedeas*, see *Carr v. Hoxie*, 13 Pet. 460. This



provision applies to an appeal from a final decree against an intervenor where a partial *supersedeas* is granted below, and furnishes a reason why a motion on his behalf for a full *supersedeas* should be denied. *Covington Stock Yards Co. v. Keith*, 121 U. S. 248.

"Give the security required by law within sixty days after the rendition of such judgment."—In computing this sixty days Sundays are excluded. *Danville v. Brown*, 128 U. S. 503.

"Or afterward with the permission of a justice or judge of the appellate court."—If the writ of error is sued out and served within the period of sixty days, the required security may be given after such service. *Seymour v. Freer*, 5 Wall. 822; *Kitchen v. Randolph*, 93 U. S. 86. But if the writ is not served within the sixty days, there is no *supersedeas*, although the security is given within that time. *Railroad Co. v. Harris*, 7 Wall. 574. When security is not given until after the term is over, a citation must be issued and served. *Haskins v. Railroad Co.*, 109 U. S. 106. A bond filed under order of the appellate court must be approved by one of the judges authorized to allow the appeal. *Anson v. Railroad Co.*, 23 How. 1. Docketing a cause by the defendant in error in advance of the return day does not prevent the plaintiff from doing what is necessary while the writ is in life to give it full effect, such as giving security. *Davies v. Corbin*, 113 U. S. 687. If a writ of error is served, or an appeal allowed within the sixty days, the security may be given afterwards. *Peugh v. Davis*, 110 U. S. 227, and cases cited; *Covington Stock Yards Co. v. Keith*, 121 U. S. 248. If an execution has been prematurely issued it may be recalled on motion. *Brown v. Evans*, 18 F. R. 56. If the security offered was approved and the citation signed by one of the judges of the court, the jurisdiction of the lower court ceased, and it was without power to proceed to the execution of its decree, notwithstanding a request for additional security was made after such approval, and such security was not accepted. *Draper v. Davis*, 102 U. S. 370. An appeal with a *supersedeas* stays execution against the sureties as well as against the principal (*The Belgenland*, 108 U. S. 153); and against sureties on an appeal bond executed in the district court on appeal to the circuit court. *The New Orleans*, 17 Blatch. 216. The *supersedeas* herein provided stays process for the execution of the judgment or decree brought under review by the writ of error or appeal. But this is the full extent of its effect. It does not prevent the defendant in error from bringing a new suit on another cause of action which arose out of the same general matter, and involved the same legal questions as were in the case which has been taken to the Supreme Court. *Spraul v. Louisiana*, 123 U. S. 516. After a motion to remand a cause to a State court has been granted, no stay of proceedings for the purpose of taking an appeal is necessary except as it is given by this section. *Johnston v. Donovan*, 30 F. R. 395.

"And in such cases where a writ of error may be a *supersedeas*, executions shall not issue until the expiration of ten days."—A writ of error operates as a *supersedeas* only from the time of the lodgment of the writ in the office of the clerk where the record to be re-examined remains. *Commissioners v. Gorman*, 19 Wall. 661; *Kitchen v. Randolph*, 93 U. S. 86. And the above provision of § 1007 does not apply to judgments in the highest court of a State. *Doyle v. Wisconsin*, 94 U. S. 50; *Foster v. Kansas*, 112 Id. 204. It was passed to remedy the inconvenience of immediate issue of execution (*Hovey v. McDonald*, 109 U. S. 159), and applies to proceedings in equity (Id.); but not to appeals from the special term to the general term of the Supreme Court of the District of Columbia (Id.); and the *supersedeas* takes effect only from the time the writ is lodged in the office of the clerk where the record remains. *Foster v. Kansas*, 112 U. S. 201. The execution of a warrant of commitment for the non-payment of a fine imposed for a criminal contempt, will be suspended where the defendant executes a bond "conditioned" to pay the fine if, after an appeal to the Supreme Court, the suspension of the sentence should be vacated. *Fischer v. Hayes*, 7 F. R. 96. Execution will not be stayed unless the writ of error is sued out in proper



time, notwithstanding a mistake was made whereby the party took an appeal in a common-law case instead of a writ of error, and subsequently, but after the expiration of the designated time, took out a writ. *Saltmarsh v. Tuthill*, 12 How. 387.

SECT. 1008. — *Whitsitt v. Union Depot Co.*, 122 U. S. 363. "Brought" in the third line is here substituted for "sued out" in the act of 1872, following § 22 of the judiciary act and the original act of March 3, 1803, which also included married women in the saving clause. 1 Com. D. 535. This section applies to judgments of State courts. *Cummings v. Jones*, 104 U. S. 419; *Scarborough v. Pargoud*, 108 Id. 567; *Polleys v. Improvement Co.*, 113 Id. 81. It does not apply to writs of error *coram nobis*. *Strode v. The Stafford Justices*, 1 Brock. 162. The general limit of time applies where a special act fixes no time for appeal. *United States v. Pacheco*, 20 How. 261. That this section has the same meaning as § 22 of the judiciary act of 1789. *McDonald v. Hovey*, 110 U. S. 627. An appeal is a matter of right (*Brown v. McConnell*, 124 U. S. 489), and where a party has taken the necessary steps to entitle him to appeal, a *mandamus* will lie to compel an allowance. *United States v. Gomez*, 3 Wall. 752. Any number of appeals may be taken within the two years. See *Stewart v. Masterson*, 124 U. S. 493. It is not necessary that any step should be taken toward perfecting an appeal during the term at which the judgment was entered. *United States v. Pacheco*, 20 How. 261. An allowance *nunc pro tunc* after the two years is of no effect. *Garrison v. Cass County*, 5 Wall. 823; *Credit Co. v. Railway Co.*, 128 U. S. 261. The security may be given after the two years (*The Dos Hermanos*, 10 Wheat. 306); or the court may disallow the appeal, although prayed for within the two years. *Id.* Filing a writ in the court to which it is addressed is bringing a writ of error. That it is tested or issued within the statute period makes no difference. *Brooks v. Norris*, 11 How. 204; *Scarborough v. Pargoud*, 108 U. S. 567; *Polleys v. Improvement Co.*, 113 U. S. 81. The time runs from the disposing of a petition for a new trial. *Brockett v. Brockett*, 2 How. 238. A motion for a new trial cannot be made after the end of the term (*Cambuston v. United States*, 95 U. S. 287); nor more than forty-two days after judgment. § 987. *Id.* In Louisiana, where the State code requires the judge to sign all final judgments, a judgment even of a United States circuit court is not rendered until the judgment is signed. *Del Valle v. Harrison*, 93 U. S. 233. If an opinion is filed containing directions for a decree, there is no decree until it has been filed; and if that is subsequently amended by substituting another, the last is the final decree. *United States v. Gomez*, 1 Wall. 690. The time runs from the formal entry of a decree, although such entry is after the date of the decision and entered *nunc pro tunc*. *Id.* Signing a citation after the expiration of the term to which an appeal taken with security is returnable, and after the commencement of the following term, is in effect the granting of a new appeal. *Brown v. McConnell*, 124 U. S. 489. An appeal is perfected, so far as the court from which it is taken is concerned, by approving the security and signing the citation. This may be done after the expiration of two years from the entry of the judgment, if the prayer for an appeal has been made within such time. *Brandies v. Cochrane*, 105 U. S. 262. The period of the Rebellion is excluded. *The Protector*, 9 Wall. 687. A special act was held not to extend the time or to allow an appeal in *United States v. Grant*, 110 U. S. 225. The disability referred to in the proviso must exist at the time the action accrues; and after it has begun to run, no subsequent disability will interrupt it. *McDonald v. Hovey*, 110 U. S. 619. An application for a citation for a writ of error, made by one who was a minor when the judgment was rendered, must be dealt with as if it were made within two years from entry of the judgment. It seems that persons who were not parties to the record cannot be heard on the application for a citation; and that any purchaser from them after judgment takes with notice of the right of an infant defendant to appeal therefrom within two years after he became of age. *Davie v. Heyward*, 33 F. R. 93.



**SECT. 1009.** — In prize cases wherever it appears that notice of appeal, or of intention to appeal to the Supreme Court, was filed with the clerk of the district court within thirty days next after the final decree therein, an appeal will be allowed to the Supreme Court whenever the purposes of justice require it. *The Nuestra Señora de Regla*, 17 Wall. 29.

**SECT. 1010.** — By U. S. S. Ct. Rule 23, "damages at a rate not exceeding ten per cent, in addition to interest, shall be awarded upon the amount of the judgment;" and the same rule applies "to decrees for the payment of money in cases in equity, unless otherwise ordered." "In cases in admiralty, interest shall not be allowed, unless specially directed by the court." Rule 23, § 4. Section 1010 applies to decrees in equity as well as actions at law. *Perkins v. Fourniquet*, 14 How. 328. Damages for delay are not allowed in admiralty cases. *The Douro*, 3 Wall. 564. But the Supreme Court can specially order interest. Rule 23, § 4, 108 U. S. 586. On affirmance by a divided court, no interest is allowed the appellee. *Hemmenway v. Fisher*, 20 How. 255. There is no increase of damages where money is stopped in the marshal's hands on monition issued by a third person. *Jennings v. The Perseverance*, 3 Dall. 336. See *West Wisconsin R. Co. v. Foley*, 94 U. S. 100, for a review of the law on this section. Damages are allowed only for the delay. *Cotton v. Wallace*, 3 Dall. 302. This section and Rule 23 give the only power of the United States Supreme Court to prevent frivolous appeals and writs of error. And the court will exercise the power without hesitation in all cases where the jurisdiction is invoked merely to gain time. *Amory v. Amory*, 91 U. S. 356; *Whitney v. Cook*, 99 Id. 607. It is doubtful if, under § 2, Rule 23, any damages can be awarded where there is no direct appeal from a money judgment. *United States v. New Orleans*, 8 F. R. 112. Under Rule 23, in relation to damages, where a writ of error is sued out merely for delay, more than ten per cent upon the amount of the judgment cannot be awarded, but the court may give less. *West Wisconsin R. Co. v. Foley*, *supra*. The full amount was given in *Insurance Co. v. Huchbergers*, 12 Wall. 164; *Hennessy v. Sheldon*, Id. 440; *Kilbourne v. State Savings Inst.*, 22 How. 503. It is solely for the Supreme Court to say whether any damages or interest are to be allowed in cases of affirmance. If upon an affirmance there is no allowance of interest or damages, it is equivalent to a denial of any interest or damages. *Boyce v. Grundy*, 9 Pet. 289. If every question involved in the case has been settled by prior adjudications, damages will be allowed. *Pennywit v. Eaton*, 15 Wall. 380. But not if a question raised was not settled until after the writ of error was sued out, but before the case was reached. *McKee v. Rains*, 10 Wall. 22. Interest on affirmance is allowed from the date of the judgment below until the same is paid at the same rate that similar judgments bear interest in the courts of the State where such judgment is rendered. Rule 23, § 1, 108 U. S. 586; *Brown v. Van Braam*, 3 Dall. 344; *Mitchell v. Harmony*, 13 How. 116; *Perkins v. Fourniquet*, 14 Id. 328; *Bank v. Wistar*, 3 Pet. 431; *Hemmenway v. Fisher*, 20 How. 255. The circuit court on a mandate cannot give interest unless the Supreme Court has awarded it. *Himely v. Rose*, 5 Cranch, 313; *The Santa Maria*, 10 Wheat. 442; *Boyce v. Grundy*, 9 Pet. 289. Where a collector of customs brings a writ of error to review a judgment recovered against him for moneys exacted by and to him on entries, the Supreme Court will, if it affirms the judgment, allow interest on it under Rule 23. In such a case the final judgment, "the amount whereof is payable" under § 989, is that rendered by the court below pursuant to the mandate of the Supreme Court. *Schell v. Cochran*, 107 U. S. 625. And see *Schell v. Dodge*, 107 U. S. 629; overruling *White v. Arthur*, 10 F. R. 91. The rule cited, or similar rules, have been applied in *Prentice v. Pickersgill*, 6 Wall. 511; *Kilbourne v. State Savings Inst.*, 22 How. 503; *Sutton v. Bancroft*, 23 Id. 320; *Jenkins v. Banning*, Id. 455; *Barrow v. Hill*, 13 Id. 54; *Hall v. Jordan*, 19 Wall. 271; *Insurance Co. v. Huchbergers*, 12 Id. 164; *Hennessy v. Sheldon*, Id. 440.



SECT. 1011. — 18 St. 316, ch. 80, § 1, changes "and" to "any" in the second line. When there is no demurrer to the declaration, or other exception to the sufficiency of the pleadings, no exception to the rulings of the court in the progress of the trial, in the admission or exclusion of evidence, or otherwise, no request for a ruling upon the legal sufficiency or effect of the whole evidence, or no motion in arrest of judgment, and the only matter presented by the bill of exceptions which this court is asked to review arises upon the exception to the general finding by the court for the plaintiff upon the evidence adduced at the trial, no question of law is presented which the Supreme Court can review. *Martinton v. Fairbanks*, 112 U. S. 670. A plea of another action pending is a plea in abatement, and cannot be reviewed. *Piquignot v. Penn. R. Co.*, 16 How. 104; *Stephens v. Monongahela Bank*, 111 U. S. 198. A judgment can be reviewed only for error in law apparent on the face of the record. *Hughes v. Investment Co.*, 28 F. R. 45.

SECT. 1012. — See notes, § 997 *et seq.* Rules, regulations, and restrictions respecting the time within which a writ of error may be brought, in what instances it may operate as a *supersedeas*, the citation to the adverse party, the security to be given, and the restrictions as to reversals, apply to appeals. *The San Pedro*, 2 Wheat. 132; *Thornton v. Bank*, 4 Am. L. T. 245. The Supreme Court has no power to receive an appeal in any other mode than that provided by law (*Villabolas v. United States*, 6 How. 81); nor to dispense with, change, or modify the provisions regulating the manner in which appeals shall be brought before it. *United States v. Curry*, 6 How. 106. On a joint decree all must join, unless there is a summons and severance. *Owings v. Kincannon*, 7 Pet. 399; *Mussina v. Cavazos*, 20 How. 280; *Masterson v. Herndon*, 10 Wall. 416; *Estis v. Trabue*, 128 U. S. 230. Where one of several appellants dies after the appeal is docketed and his representatives fail to appear after notice, if the cause of action survives, the appeal will proceed at the suit of the survivors. *Moses v. Wooster*, 115 U. S. 285. If all take an appeal, one may prosecute it, although the others abandon it. *Todd v. Daniel*, 16 Pet. 521. On decree on a bill against several holding distinct pieces of property under separate deeds, any party holding a distinct piece may appeal without joining the others. *Forgay v. Conrad*, 6 How. 201. A second appeal may be taken where the case is dismissed for informality. *Yeaton v. Lenox*, 8 Pet. 123; *Virginia v. West*, 19 How. 182; *United States v. Pacheco*, 20 Id. 261; *Edmonson v. Bloomshire*, 7 Wall. 306. An order permitting a party to perfect his appeal is not allowing a second appeal. *United States v. Curry*, 6 How. 106. An appeal is a matter of right and no petition is needed. *United States v. Curry*, 6 How. 106. It is not necessary that an appeal should be in open court, or in writing, or entered on the minutes of the court, or recorded. It may be made before a judge in vacation. *Hudgins v. Kemp*, 18 How. 530. But an appeal in open court, to be regular, should be entered on the minutes of the court. *Vansant v. Gaslight Co.*, 99 U. S. 213. An appeal is not "taken" until it is in some way presented to the court which made the decree appealed from. This is done by filing the papers. *Credit Co. v. Railway Co.*, 128 U. S. 261. A petition praying for an appeal does not remove the case unless accompanied by an allowance. *Barrel v. Trans. Co.*, 3 Wall. 424; *Pierce v. Cox*, 9 Id. 786. Whoever can sign a citation may allow an appeal (*Sage v. Railroad Co.*, 96 U. S. 712); as, *e. g.*, a district judge when sitting in the circuit court. *Railroad Co. v. Lockwood*, 17 Wall. 357; *Rodd v. Heartt*, 17 Id. 354. Acceptance of security, followed when necessary by the signing of a citation, is in legal effect the allowance of an appeal. *Sage v. Railroad Co.*, 96 U. S. 712. When an appeal is prayed, and an appeal bond filed is approved by the judge, the allowance of an appeal may be inferred. *Railroad Co. v. Bradleys*, 7 Wall. 575. The mere approval of the bond during the term is not sufficient to show that the appeal was allowed while the court was actually in session. *Vansant v. Gaslight Co.*, 99 U. S. 213. If no appeal lies, the circuit judge may refuse to allow it. *The Pueblo Case*, 4 Sawyer, 553. After an appeal has been allowed the circuit court can-



not set aside its order allowing the appeal. *McGarrahan v. New Idria Mining Co.*, 49 Cal. 331. An order allowing an appeal may upon the appellant's request be set aside at any time during the term at which it was entered, and the appeal vacated. *Goddard v. Ordway*, 101 U. S. 745. But when an appeal has been perfected and the case docketed, the lower court has no power over the appeal even during the term. *Keyser v. Farr*, 105 U. S. 265; *Draper v. Davis*, 102 Id. 370. If an appeal bond is filed the record may be amended *nunc pro tunc* to show that an appeal was taken and allowed. *Nicholson v. Chicago*, 5 Biss. 89. As to citation, see note, § 997. This provision applies to the time within which appeals may be brought. *The San Pedro*, 2 Wheat. 132; *Villabolas v. United States*, 6 How. 81; *Brandies v. Cochrane*, 105 U. S. 262; *Credit Co. v. Railway Co.*, 128 U. S. 261. The circuit court in an admiralty cause can issue no summary judgment against the sureties in an appeal bond on an appeal from the district court until after ten days, when an appeal may be a *supersedeas*, and the decree is sufficient to allow an appeal to the Supreme Court. *The New Orleans*, 17 Blatch. 216. Surviving appellants may prosecute an appeal from a decree in equity for damages and an injunction. *Moses v. Wooster*, 115 U. S. 285.

SECT. 1014.—By 20 St. 327, ch. 125, § 9, a United States marshal or deputy marshal may within his district arrest any person operating an illicit distillery, and take him before some judicial officer named in this section who may reside in the county of arrest, or, if none, in that nearest to the place of arrest, to be dealt with according to this and the two following sections. 18 St. 193, ch. 396, § 2, provides that § 33 of the judiciary act of 1789 shall apply to courts created by act of Congress in the District of Columbia.

This section is constitutional. *Ex parte Gist*, 26 Ala. 156. See also *United States v. Almeida*, 2 Wheeler's Cr. Cas. 576. Contempt of court is a crime against the United States within this section. *United States v. Jacobi*, 4 Am. L. T. (U. S. Cts.) 148. As to treason, see *United States v. Bollman*, 1 Cranch C. C. 373; 4 Cranch, 75. This section has no application to extradition proceedings. *Re Henrich*, 5 Blatch. 414.

"*Agreeably to the usual mode of process against offenders in such State.*"—By these words Congress intended to assimilate all the proceedings for holding accused persons to answer before a court of the United States to the proceedings had for similar purposes by the laws of the State where the proceedings should take place (*United States v. Rundlett*, 2 Curtis, 41; *United States v. Tureaud*, 20 F. R. 621); unless in contravention of express provisions of Federal statutes. *Turner v. United States*, 19 Ct. Cl. 629, 640. See also *United States v. Harden*, 10 F. R. 802. "Mode of process," as here used, is synonymous with mode of proceeding, and includes power to admit to bail. *United States v. Rundlett*, *supra*; *United States v. Martin*, 9 Sawyer, 90; 17 F. R. 150. "Process" means the warrant or writ by which the accused is brought to answer the charge. *McKinstry v. United States*, 34 F. R. 211. The authority here conferred is in its nature judicial. *Ex parte Gist*, 26 Ala. 156. A commissioner acting hereunder is simply a committing magistrate. *United States v. Martin*, 9 Sawyer, 90; 17 F. R. 150. He has the same power as State magistrates and no greater. *United States v. Horton*, 2 Dillon, 94; *Re Kaine*, 10 N. Y. Leg. Obs. 257. Accordingly in New York the commissioners have no authority to cause the accused to recognize to appear before them at a subsequent day. *United States v. Case*, 8 Blatch. 250. In Maine a record must be kept of warrants issued upon criminal complaints of persons arrested, imprisoned, let to bail, or discharged. *Frost v. Holland*, 75 Me. 108. See note, § 727.

In Alabama the testimony of witnesses at the preliminary examination must be reduced to writing. But if it is neglected the testimony given may be proved by any witness who heard and remembered it substantially. *Strong v. United States*, 34 F. R. 17. As to the procedure in Indiana, see *Van Buren v. United States*, 36 F. R. 81. A commissioner may order a recognizance to be given to appear before him in those States where a



State magistrate may do so. *United States v. Rundlett*, 2 Curtis, 41; *United States v. Walker*, 6 Pittsb. L. J. 37; *United States v. Evans*, 2 F. R. 147. Taking a bail bond under a Territorial act is therefore legal and valid. *Swan v. United States*, 9 Pac. Rep. (Wyoming) 931; *Nagle v. United States*, Id. 936; *Post v. United States*, Id.

A Federal judge has no exclusive jurisdiction in proceeding for the arrest and removal of offenders. *Bagnall v. Ableman*, 4 Wis. 163. The commissioner as committing magistrate may, if he finds probable cause, hold the accused for trial, and if not may discharge him; but in neither case is his action final or a bar to further proceedings. *Re Martin*, 5 Blatch. 303; *United States v. Shepard*, 1 Abb. U. S. 431. The circuit court on *habeas corpus* will examine into the evidence on which the commitment was grounded, and will do what the magistrate ought to have done. *Re Van Campen*, 2 Ben. 419; *United States v. Rogers*, 23 F. R. 658; *United States v. Brawner*, 7 Id. 86; *Contra, Re Byron*, 18 Id. 722; *United States v. Lantry*, 30 Id. 232.

Commissioners have no general powers in respect to depositions and affidavits. Their power is to hold to bail, &c., according to the course of practice in the several States, and as incident to that power they can take evidence (*United States v. Smith*, 17 F. R. 510); and to adjourn hearings to a different time and place (*United States v. Rundlett*, 2 Curtis, 41); but not to punish for contempt. *Ex parte Perkins*, 29 F. R. 900, 910. This section does not affect the powers conferred upon commissioners under the laws concerning extradition treaties. *Re Martin*, 5 Blatch. 303. Perjury committed before a district judge in a proceeding under this section is not punishable as perjury committed in courts of the United States. *United States v. Clark*, 1 Gall. 497.

A certified copy of the indictment is sufficient evidence to authorize the magistrate to commit the accused to be bailed for trial in the district where the indictment is pending. *Re Alexander*, 1 Lowell, 530; *United States v. Jacobi*, 4 Am. L. T. (U. S. Cts.) 148; *United States v. Haskins*, 3 Sawyer, 262; *United States v. Pope*, 24 Int. Rev. Rec. 29; *contra, Bagnall v. Ableman*, 4 Wis. 163. So is a confession of the accused. *United States v. Bloomgart*, 2 Ben. 356. But it is not an essential prerequisite that witnesses should be examined before the magistrate in the presence of the accused. *Re Alexander, supra*. It is not necessary that the district attorney should apply for a warrant. Any person may do so. *United States v. Skinner*, 2 Wheeler's Cr. Cas. 232. A district attorney has no authority to take a commissioner's warrant from the marshal in order to determine whether it should be executed or not (*United States v. Scroggins*, 3 Woods, 529); nor to dismiss a criminal charge while an examination of the accused is proceeding before a commissioner. *United States v. Schumann*, 2 Abb. U. S. 523.

The warrant of commitment must state probable cause (1 Burr's Trial, 11; *Ex parte Sprout*, 1 Cranch C. C. 424; *Ex parte Burford*, Id. 276; 3 Cranch, 448; *United States v. Lumsden*, 1 Bond, 5; *United States v. Shepard*, 1 Abb. U. S. 431; *Re Van Campen*, 2 Ben. 419); must be supported by the oath of some one having personal knowledge of the facts on which the charge is based (Rule of Court, 3 Woods, 502; *United States v. Burr*, 2 Wheel. Cr. Cas. 573; *United States v. Mackenzie*, 1 N. Y. Leg. Obs. 227; *United States v. Tureaud*, 20 F. R. 621; *Ex parte Sprout, supra*; *Ex parte Burford, supra*; *United States v. Shepard, supra*; *Bagnall v. Ableman*, 4 Wis. 163); and must be under seal. *Ex parte Sprout, supra*; *Ex parte Burford, supra*; *Ex parte Bennett*, 2 Cranch C. C. 612. And these prerequisites followed by an arrest and examination are necessary before the right to file a criminal information can be asserted. *United States v. Shepard, supra*. The commitment on a preliminary warrant for examination should not exceed twenty-four hours except for cause shown or on request of the prisoner. *United States v. Worms*, 4 Blatch. 332. Nor can the accused be held in custody or to bail for trial in a court whose sittings have by reason of rebellion, been interrupted and are indefinitely postponed. *United States v. Greiner*, 4 Phila. 396. A warrant is void if signed in lead pencil. *United States v.*



Thompson, 2 Cranch C. C. 409. The circuit court may on a writ of *habeas corpus* inquire into the cause of commitment by a commissioner, and in connection therewith issue a writ of *certiorari* to the commissioner to bring up the proceedings which took place before him. *Re Martin*, 5 Blatch. 303; *United States v. Berry*, 4 F. R. 779. The commissioner is an officer as to whom the writ of prohibition is never employed. *United States v. Berry*, *supra*.

A warrant of removal will be refused where the indictment is fatally deficient in essential averments so that it would be the duty of the court to whom it is presented by the grand jury to decline to take action upon it (*Re Clark*, 2 Ben. 540; *Re Buell*, 3 Dillon, 116); or sets forth an act which does not constitute an offence against the United States, or upon which no trial can be had in the district to which the removal is sought (*Re Doig*, 4 F. R. 193); or sets forth an impossible offence (*United States v. Pope*, 24 Int. Rev. Rec. 29); or, if issuing from a court which tries causes without a jury, charges an offence which is, under the Constitution, triable by a jury. *Re Dana*, 7 Ben. 1. Otherwise, on a review of proceedings by the circuit court on *habeas corpus*, it will be considered sufficient. *Re Clark*, *supra*. There should be a preliminary examination in the district where the offender is found, to establish his identity and his probable guilt, before a warrant of removal is issued by the judge. *Re Burkhardt*, 33 F. R. 25; *Re Bailey*, Woolw. 422. This being done, it is incumbent upon the judge to issue a warrant for the removal of the prisoner to the district where the trial is to be had. *Re Burkhardt*, *supra*. A judge of the district court may without a writ of *habeas corpus* reduce the bail if he think it excessive. *United States v. Brawner*, 7 F. R. 86; *Re Martin*, 5 Blatch. 303. The application for a warrant of removal may be heard with or without the aid of a writ of *habeas corpus*. *United States v. Brawner*, *supra*; *Re James*, 18 F. R. 853. And the accused has the right in either case to raise the question of jurisdiction, whereupon it becomes the duty of the judge to investigate the case, so far at least as to ascertain if the court to which the accused is asked to be removed is the one where the trial can be had; and if it is not, the warrant of removal will be refused. *United States v. Rogers*, 23 F. R. 658. The judge in his discretion may go into the whole case, if necessary to enable him to determine whether the accused is to be removed. *Re Wolf*, 27 F. R. 606. But the case should be one of peculiar urgency to warrant sustaining a plea to the jurisdiction. *United States v. White*, 25 F. R. 716.

An offender may be arrested and imprisoned or bailed in one district for trial in another as well after indictment as before. *United States v. Haskins*, 3 Sawyer, 262. And it is the practice of the district court for the northern district of Texas not to entertain an application for removal except after indictment found, and to require a copy of it to follow such application. *United States v. White*, *supra*. A removal is authorized only after arrest and commitment for want of bail. *United States v. Shepard*, 1 Abb. U. S. 431; *United States v. Jacobi*, 4 Am. L. T. (U. S. Cts.) 148; 14 Int. Rev. Rec. 45. And a removal may be made from a district within a State to a district within a Territory. *United States v. Haskins*, 3 Sawyer, 262. But the defendant may not be removed from one district into another in order that he may be imprisoned in the latter until he obeys an order made in a civil case pending in the United States court. *Re Graves*, 29 F. R. 60. The accused may not be removed if he is in State custody, and was so before the Federal court obtained jurisdiction. *Re James*, 18 F. R. 853; *United States v. Corrie*, 23 L. Rep. 145; *United States v. Burr*, 2 Burr's Trial, 452. If arrested in a district other than the one where the offence was committed, the accused is entitled to give bail, if the offence is bailable, for his appearance before the proper court. *Bagnall v. Ableman*, 4 Wis. 163. If there be a crime or offence, an arrest for trial may be made, to be followed by imprisonment if no bail is taken, or by bail even though the punishment on conviction be a fine alone. The arrest is made to secure a trial for the offence. *Re Jackson*, 14 Blatch. 245. It seems that if one imprisoned for contempt of a Federal



court escapes into another district he can be there arrested and returned. *Fanshawe v. Tracy*, 4 Biss. 490. Where the defendant is not within the district in which an indictment has been found against him, *quære* whether the court in that district can issue a warrant for his arrest wherever he may be found in the United States. *Re Alexander*, 1 Lowell, 530. A commitment is valid although the grand jury is in session, and an order of commitment does not lose its power on the commitment of a grand jury. *United States v. Burr*, 1 Burr's Trial, 79. If an indictment has been quashed the accused may be committed to await the finding of a new one. *United States v. Smith*, 2 Cranch C. C. 111; *United States v. Town-Maker*, Hempst. 299. And a person may be committed by one magistrate upon an affidavit made before another. *Ex parte Bollman*, 4 Cranch, 75.

This section applies only to proceedings before the civil, and it seems not to proceedings before military courts. *Kurtz v. Moffitt*, 115 U. S. 487, 500. Therefore a warrant for the arrest of one on trial before a naval court of inquiry will be refused. *United States v. Mackenzie*, 1 N. Y. Leg. Obs. 227. A United States marshal will be justified in making an arrest under a warrant issued by a commissioner who did not reside in the judicial district where the alleged offence was committed, describing the party arrested by a fictitious name, if the party arrested is, in fact, the person against whom the complaint was made. *Williams v. Tidball*, 8 Pac. Rep. (Arizona) 351. In the absence of any statute regulation concerning the compensation of commissioners of circuit courts the courts themselves may fix the rate. Where rates have not been fixed the amount may be ascertained by a reference to the local law of the State providing for similar services by local magistrates. 4 A. G. Op. 233. See further, as to compensation of commissioners, *McKinstry v. United States*, 34 F. R. 211; *Barber v. United States*, 35 Id. 886; and note, § 847. As to contempt, see *Re Ellerbe*, 4 McCrary, 449; 13 F. R. 530, see note, § 725; *United States v. Volz*, 14 Blatch. 15; *Re Rosdeitscher*, 33 F. R. 657; *United States v. Millburn*, 4 Cranch C. C. 478.

SECT. 1015. — See preceding note. The general terms of § 4 of the act of 1793 for taking bail in cases not capital seemed to supersede the restricted provision of § 33 of St. 1789, which was therefore omitted in the Revision. 1 Com. D. 537.

The power to let to bail is limited to the taking of security for the appearance of the accused, at the time and place set for the trial, and not for appearance from day to day (*United States v. Case*, 8 Blatch. 250); and to violations of the laws of the United States only. *United States v. Hand*, 6 McLean, 274. Money cannot be taken in lieu of bail and a prisoner may not be discharged after commitment for trial. *United States v. Faw*, 1 Cranch C. C. 486. A recognizance is sufficient if it sets out an offence punishable under the laws of the United States without stating particulars. *United States v. Dennis*, 1 Bond, 103. Where the indictment does not describe an indictable offence, the amount of bail is in the discretion of the magistrate. *United States v. Smith*, 4 Cranch C. C. 727. Separate bonds or recognizances must be given for separate offences. *United States v. Goldstein's Sureties*, 1 Dillon, 413. It is proper to bail a prisoner held for piracy if the confinement is injurious to his health. *United States v. Jones*, 3 Wash. C. C. 224. A person may be admitted to bail though he has forfeited his recognizance (*United States v. Feely*, 1 Brock. 255); or though his plea of not guilty has been stricken out during the term at which it was entered. *Bassett v. United States*, 9 Wall. 38. A continuance on account of the absence of material witnesses for the Government is no ground for demanding bail. Id. As to a bail bond taken by a clerk under direction of the court, see *United States v. Evans*, 2 F. R. 147. See 1 Burr's Trial, 18, 79, 104; *United States v. Volz*, 14 Blatch. 15; *Re Lee*, 6 Phila. 96. See note, § 1014.

SECT. 1016. — It is doubtful whether the court has the right to bail any person after an indictment against him for high treason. 1 Burr's Trial, 310; see also Id. 18, 104; *United States v. Hamilton*, 3 Dall. 17. See note, § 1014.



SECT. 1017.—All the cases for which writs of error to State courts were provided in the acts cited in the margin are here included, the particular case named in the act of 1866 being stated in the language of the act of 1867, which superseded a part, if not the whole, of § 25 of the judiciary act. 1 Com. D. 538.

SECT. 1018.—Without an entry of discharge or *exoneratur* there can be no defence to a *scire facias* upon a forfeiture of a bail bond. But the court may at its discretion on motion enter an *exoneratur*. *United States v. Stevens*, 16 F. R. 101. When bail is given the sureties may at any time thereafter seize their principal and deliver him up. They may do this in person or by agent, and to accomplish it may pursue the principal into another State, arrest him on Sunday, and may if necessary break and enter his house. *Taylor v. Taintor*, 16 Wall. 366.

SECT. 1020.—In *United States v. Barger*, 20 F. R. 500, the court removed the forfeiture of a recognizance, where the defendant, though not appearing for sentence on the day named therein, did appear subsequently at the same term. This proceeding was held to be within the spirit and reason of this section, though not strictly within the letter. Judgment on the recognizance may be set aside and the forfeiture remitted, upon the production of the accused for trial, although the Government may be prejudiced on account of the absence of a material witness, if there has been no collusion between the principal and his sureties. *United States v. Duncan*, 10 Pittsb. L. J. 41. Sureties were relieved where the defendant, being prosecuted for a misdemeanor, departed without leave during the trial, which resulted in his acquittal. *United States v. Santos*, 5 Blatch. 104. But not where the principal, when called for trial, was in custody under State process on a criminal charge. *United States v. Strickler*, 12 Blatch. 389.

"*And that public justice does not otherwise require.*"—The court will not relieve a forfeiture when it is convinced that the accused is guilty, if he fails to appear according to his recognizance, although he appears afterward, is tried, and escapes conviction because of the disagreement of the jury. *United States v. Mercer*, Deady, 502; *United States v. Stevens*, 16 F. R. 101.

SECT. 1021.—An indictment need not allege that it was found by twelve grand jurors. *United States v. Laws*, 2 Lowell, 115.

SECT. 1022.—This section in authorizing certain offences to be prosecuted either by indictment or by information, does not preclude the prosecution by information of other offences of such a grade as may be so prosecuted consistently with the Constitution and laws of the United States. *Ex parte Wilson*, 114 U. S. 417. It does not undertake to define which of those crimes and offences are infamous, and therefore not to be prosecuted by information, but leaves that to be regulated by the paramount authority of the Constitution. *Mackin v. United States*, 117 U. S. 348. See *Parkinson v. United States*, 121 U. S. 281.

SECT. 1024.—Under this section distinct offences (*Re Lange*, 13 Blatch. 548; *United States v. Mills*, 15 Int. Rev. Rec. 18; *United States v. Stetson*, 3 Wood. & M. 164; *United States v. Peterson*, 1 Id. 305; *United States v. Burns*, 5 McLean, 23), arising out of the same transaction (*United States v. Jacoby*, 12 Blatch. 491), though committed at different times (*United States v. Wentworth*, 11 F. R. 52), may be joined in one indictment. *United States v. Nye*, 4 F. R. 888; *United States v. Young*, 14 Int. Rev. Rec. 148; 4 Chi. Leg. News, 10. Therefore an indictment containing a count for revolt and another for exciting a revolt is good. *United States v. Peterson*, 1 Wood. & M. 305. So is one where one count alleges that the defendant counterfeited money and aided and assisted others in doing so, and another alleges that he caused and procured others to do so. *United States v. Burns*, 5 McLean, 23. But the crimes must be of the same class. *United States v. Bennett*, 17 Blatch. 357. Therefore burglary and larceny growing out of the same transaction may thus be joined in separate counts and separately punished. *Ex parte Peters*, 2 McCrary, 403; 12 F. R. 461. But a count for conspiracy cannot be joined with



a count for murder (*United States v. Scott*, 4 Biss. 29); nor a count for retailing liquor without payment of the special tax and a count for dealing in manufactured tobacco without payment of the special tax, the penalty for each being different. *United States v. Gaston*, 28 F. R. 848. They may be joined though one alleges a misdemeanor and the other a felony (*United States v. Spintz*, 18 F. R. 377), even though one is punishable with a severer penalty than the other, if the counts all relate to the same transaction and are so drawn to meet the evidence (*United States v. Dickinson*, 2 McLean, 325); but not if the felony is a capital offence. *United States v. Sharp*, Pet. C. C. 131. A count for an assault and battery may be joined with a count for a riot. *United States v. McFarlane*, 1 Cranch C. C. 163. Counts alleging the transmission of false papers to the pension office applying for bounty land may be united, but these cannot be joined with counts for the subornation of perjury. *United States v. Bickford*, 4 Blatch. 337. One accused of embezzling letters received at a post-office from various points within a few days may be tried therefor under a single indictment. *United States v. Brent*, 17 Int. Rev. Rec. 54; *United States v. O'Callahan*, 6 McLean, 596. Offences specified in Rev. Stats. § 3397, if arising out of the same transaction, may be joined in one indictment, though some are designated as felonies and others not. *United States v. Jacoby*, *supra*. The jury may find the defendant guilty of one of the charges joined and not of another, and may find a verdict as to one or more of the charges and be discharged from considering the remainder. *Ex parte Hibbs*, 26 F. R. 421. So sentence may be imposed under one count and further sentence suspended until the first has been satisfied. *United States v. Blaisdell*, 3 Ben. 132. When several indictments are consolidated into one a general verdict is proper, and will be sustained if any of the counts be good and charge an offence. *United States v. Stone*, 8 F. R. 232. See *United States v. Patterson*, 6 McLean, 466; *United States v. Seagrist*, 4 Blatch. 420; *State v. Callicutt*, 1 Lea, 714. And whether on a general verdict of guilty the defendant may be sentenced to more than the maximum punishment for one of the offences charged depends upon the circumstances of the case. *Ex parte Hibbs*, 26 F. R. 421. In an indictment joining several misdemeanors the prosecution is not bound to elect one transaction. *United States v. Devlin*, 6 Blatch. 71; *United States v. Peterson*, 1 Wood. & M. 305; *United States v. Dickinson*, 2 McLean, 325. Counts which allege offences of which but one person can be guilty cannot be joined with counts which allege that several persons committed an offence in its nature several. *United States v. Kazinski*, 2 Sprague, 7. And all the offences that might formerly by the rules of pleading have been joined must be under this section. *Id.* If there has been a conviction under an indictment containing several counts and cumulative sentence imposed, it will be upheld in a collateral action. *Ex parte Peters*, 4 Dillon, 169. See *United States v. Maguire*, 3 Cent. L. J. 273. A new trial will not be granted where the joinder of improper counts has benefited the accused. *United States v. Brent*, 17 Int. Rev. Rec. 54. The trial of two indictments together with or without an order of consolidation does not make them one indictment, charging a single offence and subjecting the accused to but one sentence. *Re Haynes*, 30 F. R. 767. This section and Rev. Stats. § 5480 compared, *Re Henry*, 123 U. S. 372. See further *United States v. Ancarola*, 1 F. R. 676; *United States v. Malone*, 20 Blatch. 137; 9 F. R. 897; *United States v. Martin*, 28 Id. 812. See note, § 5480.

SECT. 1025. — No mere irregularity or defect in the form of the proceedings which does not tend to the prejudice of the defendant should be ground for a new trial. *United States v. Molloy*, 31 F. R. 19. Such defects are — an irregularity in summoning a grand jury, unless there is an allegation of injury or prejudice (*United States v. Tuska*, 14 Blatch. 5); the absence of the names of some of the grand jury from the list of the taxpayers on the assessment roll of their respective counties (*United States v. Benson*, 12 Sawyer, 477; 31 F. R. 896); the trial of a case in the circuit court on a certified copy of an indictment sent up from the district court (*United States v. McKee*, 4 Dillon, 1); a clerical



error in the caption of an indictment (*United States v. Bornemann*, 35 F. R. 824); after a verdict an informal averment of fact, if the averment could be understood by a person of ordinary intelligence (*United States v. Noelke*, 17 Blatch. 554; 1 F. R. 426; *United States v. Rhodes*, 30 Id. 431); repugnant allegations as to time, if they can be understood (*United States v. Jackson*, 2 F. R. 502); an imperfect statement of the substance of a crime or a description of it (*United States v. Conant*, 9 Rep. 36; 9 Cent. L. J. 129); an averment that the defendant knowingly deposited a letter, without an averment that he knew it to be obscene (*United States v. Chase*, 27 F. R. 807); the omission of arraignment and plea. *United States v. Molloy*, *supra*. After verdict the objection of misjoinder of counts cannot be sustained in the absence of proof of injury. *United States v. Nye*, 4 F. R. 888. Matters of evidence need not be set out on an indictment for aiding in the commission of a crime. *United States v. Doherty*, 25 F. R. 28; *United States v. Simmons*, 96 U. S. 360. But a particular intent which, by statute, made an act a crime should be averred (*United States v. Jackson*, 2 F. R. 502); so should the allegation that an offence against the national election laws is cognizable by the Federal courts. *United States v. Morrissey*, 32 F. R. 147. An indictment should aver the crime so particularly that the defendant may intelligently prepare his defence and plead a judgment in bar of another prosecution. *United States v. Goggin*, 1 F. R. 49. An indictment alleging that a circular was mailed in violation of the statute must set forth the offence in the words of the statute, and an omission so to do is not cured by verdict. *United States v. Noelke*, 1 F. R. 426. In a prosecution for a refusal to answer the inquiry of a supervisor of elections who is verifying a registration list, the omission of the indictment to aver that the inquiry was made of the defendant at the place assigned by such list as his residence is matter of substance, and the defect is not curable by amendment. *United States v. Davis*, 6 F. R. 682. See *United States v. Jackson*, 25 F. R. 548; *United States v. Nelson*, 29 Id. 202, 210; *Babcock v. United States*, 34 Id. 873; *Beebe v. United States*, 11 N. W. Rep. (Dak.) 505.

SECT. 1028.—A certified copy of the record of a sentence of imprisonment is sufficient to authorize the detention of a prisoner without a warrant or *mittimus*. *Ex parte Wilson*, 114 U. S. 417.

SECT. 1030.—It seems that, previous to the enactment of this section, there was no implied power to do what is herein authorized. As the power is granted only to the court and district attorney, the statute may be regarded as restrictive and as excluding all other officers. *United States v. Harden*, 10 F. R. 802. It has no application to proceedings before commissioners. *United States v. Martin*, 9 Sawyer, 90; 17 F. R. 150. And it seems that the jailer may insist on written evidence of the order of the judge or district attorney to allow a prisoner to be taken from his custody. *Id.* A marshal having a prisoner in custody before a commissioner, is prohibited by this section from charging a fee when he is remanded, and should the commissioner needlessly issue warrants of commitment the prohibition of the statute will still apply. *Turner v. United States*, 19 Ct. Cl. 629. See note, § 788.

SECT. 1031.—*Brewer v. Jacobs*, 22 F. R. 217, 242.

SECT. 1032.—*United States v. Hare*, 1 Brun. Col. Cas. 449; 2 Wheeler's Crim. Cas. 283. The same practice prevails in Massachusetts under a similar statute. *Ellenwood v. Commonwealth*, 10 Met. 222; *Commonwealth v. McKenna*, 125 Mass. 397. Unless the defendant has had an opportunity to plead to the indictment, a judgment of conviction will be reversed. *Palmer v. United States*, 1 Wash. Terr. 5. But after a plea of not guilty, no further formality toward the prisoner as to the mode of his trial is required. *United States v. Gibert*, 2 Sumner, 19. The word "indicted" in this section is fairly to be construed to include an information and complaint. *United States v. Borger*, 19 Blatch. 249; 7 F. R. 193; *Re Smith*, 13 F. R. 25.



SECT. 1033. — *Indictment for treason.* — The copy of the indictment must be complete, including the caption. *United States v. Insurgents*, 2 Dall. 335. The list containing the names of the jurors and witnesses must give the township in which they severally reside; it is not enough to merely name the counties. Their occupations need not be stated. *Id.* The object in furnishing the list is to give an opportunity to investigate the characters and trace the conduct of the witnesses. *United States v. Stewart*, 2 Dall. 343.

*Indictment for other capital offences.* — In *United States v. Dow*, Taney, 34, it is said that the arraignment is the commencement of the trial, and there must be two entire days exclusive of the day of delivery of the copy and list and the day of arraignment. But in *United States v. Curtis*, 4 Mason, 232, and in *United States v. Neverson*, 1 Mackey, 152, it is said that the requirement is that the copy must be delivered two days before the cause is tried by jury, and not two days before arraignment. If the accused admits that he received a copy of the indictment two days before his trial, and the admission was not prejudicial to him, he waives the right to object after conviction that he did not receive it. *United States v. Cornell*, 2 Mason, 91, 103. The fact that a copy has not been supplied, or that it was defective, is waived by plea. *Id.*; *United States v. Curtis*, 4 Mason, 232. The accused in a case not capital cannot demand a copy of the indictment at the expense of the government. *United States v. Bickford*, 4 Blatch. 337; *contra*, *United States v. Williams*, 1 Cranch C. C. 178. In all cases in which there has been no preliminary examination, it is within the discretion of the court to order a list of witnesses sworn before the grand jury to be furnished to the accused. But not the minutes of the testimony given there. *United States v. Southmayd*, 6 Biss. 321. A delivery to the defendant, after the trial begins, of a list containing the name of a witness who will be called in behalf of the prosecution is not sufficient under this section to entitle the prosecution to use such witness on the trial, even though the court should adjourn the trial for three days in order that the defendant may not be surprised. *United States v. Neverson*, *supra*. See *United States v. Williams*, 1 Cranch C. C. 178.

SECT. 1034. — The accused may demand compulsory process to secure witnesses before he is indicted. *United States v. Burr*, 1 Burr's Trial, 177, 178.

SECT. 1035. — An indictment for murder is good after a verdict of manslaughter if it contains all the allegations essential to charge manslaughter. *United States v. Leonard*, 18 Blatch. 187; 2 F. R. 669.

SECT. 1036. — If one of two defendants charged with conspiracy together is acquitted, both are; but if a conspiracy is charged between them and others unknown, one may be convicted and the other acquitted. *United States v. Hamilton*, 8 Chi. Leg. News, 211.

SECT. 1037. — Remissions from one court to another are allowed in order to facilitate the public business, but they apply only to criminal cases in which the circuit and district courts have concurrent jurisdiction. *Campbell v. Kirkpatrick*, 5 McLean, 175. An indictment cannot, after a conviction in the district court, be remitted to the circuit court under this section. *United States v. Haynes*, 26 F. R. 857; *Re Haynes*, 30 Id. 767. But in *United States v. Haynes*, 29 F. R. 691, it was held that the case might be remitted from one court to another at any time from the presentment of the indictment until final judgment. An acquittal is a final judgment, but a conviction is not. When a case is remitted to another court, and the only point for consideration is a question of law, it may be decided there; but if a re-examination of the facts is required the cause can be heard by the judge of the court from which the case was remitted, or it can be remanded to that court. *Id.* The court which receives a case under this or the following section takes it up at the point where the court whence it came stopped. If it has been improperly remitted from one court to another, the latter court may remand it instead of entering a final judgment. *Id.* Where the district court after verdict remits an indictment to the circuit court, the latter court does not obtain jurisdiction, and an order in



arrest of judgment made by the latter court is void. *Re Haynes*, 30 F. R. 767. After a trial in the circuit court and a disagreement of the jury, and the case has been certified to the district court, the district judge, while sitting in the circuit court, may order the clerk thereof to correct the record so that it will show that the jury were discharged from the further consideration of the case after their inability to agree. *Kelly v. United States*, 27 F. R. 616. A trial may be had in the court to which a case has been remitted upon an exemplification of the record in the court from which it goes, including a certified copy of the indictment. *United States v. McKee*, 4 Dillon, 1. The district court may remit to the circuit court an indictment which the latter originally remitted to the former. And a demurrer filed in the district court may be rejoined to in the circuit court. *United States v. Murphy*, 3 Wall. 649. The court cannot of its own motion or on the application of the defendant remit an indictment to another court. *United States v. Bennett*, 16 Blatch. 338. This section must be strictly construed, and the word "indictment" does not include an information. *United States v. Tiernay*, 3 McCrary, 608; 16 F. R. 513.

SECT. 1038.—The district court will not remit an indictment except when it appears that the questions are of so grave a nature that it must judicially declare them both difficult and important. Nor would a district judge be justified in remitting a case because he had given a particular exposition to a statute concerning a crime in his charge to the grand jury, it not appearing that any other court had given a contrary exposition to such statute. *United States v. O'Sullivan*, 9 N. Y. Leg. Obs. 193. The circuit court has jurisdiction of a case remitted to it by order of the district court made after the defendant had pleaded therein. *United States v. Richardson*, 28 F. R. 61. This section prescribes no limit of time within which an opinion that a question is difficult and important may be formed. The order may be made after any proceedings in the case which do not amount to a bar of a future trial. *United States v. Morris*, 1 Curtis, 23, 33; *United States v. Haynes*, 29 F. R. 691; *Campbell v. Kirkpatrick*, 5 McLean, 177.

SECT. 1041.—It is discretionary with the court which imposes a fine as a penalty to order the accused to be imprisoned until the fine is paid. *Ex parte Jackson*, 96 U. S. 727. And in such a case a *capias pro* fine may be issued. *Ex parte Teuscher*, 23 Int. Rev. Rec. 202. A *capias pro* fine cannot be issued if the judgment provides for a *feri facias*. *Id.* If the judgment is silent concerning the mode in which it may be enforced, the district attorney may elect to issue a *feri facias* or a *capias pro* fine. *Id.*

SECT. 1042.—If one sentenced to pay a fine and costs, and to be imprisoned until they are paid, is pardoned on condition that such payment be made, he is not entitled to his discharge as a poor convict under this section until the term has been completed, and thirty days in addition for the non-payment of the fine and costs. *Re Ruhl*, 5 Sawyer, 186.

## CHAPTER XIX.

### LIMITATIONS.

SECT. 1043.—Upon an information to enforce a forfeiture under the internal revenue laws, the defendant may take advantage of the limitation under the general issue, without pleading specially. *United States v. Six Fermenting Tubs*, 1 Abb. U. S. 268.

SECT. 1044.—Amended by 19 St. 32, ch. 56, by changing "two years" to "three years;" by changing "is committed" to "shall have been committed:" and by adding thereafter:—

"But this act shall not have the effect to authorize the prosecution, trial or punishment for any offence, barred by the provisions of existing laws."



The limitation is applicable to common-law offences in the District of Columbia. *United States v. Watkins*, 3 Cranch C. C. 441; *United States v. Porter*, 2 Id. 60; *United States v. Slacum*, 1 Id. 485. See also *Murphy v. Ramsey*, 114 U. S. 43; *United States v. Irvine*, 98 U. S. 450. Sect. 1044 is as applicable to offences committed under statutes enacted since its adoption as to others. *Adams v. Woods*, 2 Cranch, 336; *United States v. Brown*, 2 Lowell, 267; *United States v. Ballard*, 3 McLean, 469; *Johnson v. United States*, Id. 89; *United States v. Mayo*, 1 Gall. 397; *United States v. White*, 5 Cranch C. C. 73. The statutory bar is not affected because an indictment on which a *nolle prosequi* was entered, was found within the prescribed time, the first and second indictments being entirely disconnected. *United States v. Ballard*, 3 McLean, 469. The government's lack of knowledge as to who committed the offence does not toll the statute. *United States v. White*, 5 Cranch C. C. 73. One who holds a genuine pension certificate, obtained through fraud, commits a distinct offence every time he presents it for payment; and if it has been presented within three years, the fact that it was obtained prior thereto does not prevent a prosecution. *United States v. Coggin*, 3 F. R. 492. The withholding of money due a pensioner is not a continuous offence, and a prosecution is barred if not begun within the prescribed time after demand was first made. *United States v. Irvine*, 98 U. S. 450; *United States v. Bennett*, 12 Blatch. 345. A conspiracy to defraud the government of duties on imported goods must be prosecuted within three years. *United States v. Hirsch*, 100 U. S. 33. The indictment may set out the facts which prevent the defendant from claiming the benefit of the statute. *United States v. Watkins*, 3 Cranch C. C. 441; *United States v. White*, 5 Id. 368. And proof may be given of such facts, though they are not pleaded. *United States v. White*, 5 Id. 116. Neither § 1044 nor § 1046 designate what offences must be prosecuted by indictment and what may be prosecuted by information. *Mackin v. United States*, 117 U. S. 348, 353.

An indictment for embezzling money from a postal money-order office must be found within three years. *United States v. Norton*, 91 U. S. 566. So must one for possessing and attempting to pass counterfeited United States notes. *United States v. Shorey*, 9 Int. Rev. Rec., 202. Where the law of the State in which an action is brought requires an action to be commenced by filing a petition, the service of a summons before that is done is not the commencement of an action. *United States v. Eddy*, 28 F. R. 226. An indictment for a conspiracy under Rev. Stats. § 5440, must be found within three years after the conspiracy is formed and an act is done in pursuance of it. *United States v. Owen*, 32 F. R. 534; *United States v. Fehrenback*, 2 Woods, 175; *United States v. Sanche*, 7 F. R. 718. The right of action secured to the United States by its laws is not affected by a State statute of limitations. *McGlinchy v. United States*, 4 Cliff. 312; *Perkins v. United States*, Id. 321. The bar of the statute may be taken advantage of under a plea of not guilty. *United States v. Brown*, 2 Lowell, 267; *United States v. Cook*, 17 Wall. 168; *Parsons v. Hunter*, 2 Sumner, 419; *United States v. White*, 5 Cranch C. C. 73; *United States v. Six Fermenting Tubs*, 1 Abb. U. S. 268. Or by demurrer. *United States v. Watkins*, 3 Cranch C. C. 441. But even when the record discloses that the offence was committed more than three years before the indictment was found, the defendant cannot claim the benefit of the statute by a demurrer. *United States v. Cook*, 17 Wall. 168.

SECT. 1045. — The revisers regarded the new limitation of five years provided by St. March 26, 1804, ch. 40, § 3 (2 St. 290), as to offences under the revenue laws, and by St. April 20, 1818, ch. 91 (3 St. 450) relating to the slave trade, as operating as an amendment to § 32 of St. 1790, ch. 9, and therefore treated the proviso of the original act as to fleeing from justice as being in force under all the three acts. So much of the act of 1804 as related to the recovery of penalties and forfeitures had been expressly repealed, and so much of the act of 1818 as related to the same subject was superseded by the gen-



eral act of 1839, which fixed the same limitation. 1 Com. D. 545; *Stimpson v. Pond*, 2 Curt. C. C. 502. "Fleeing from justice" here means leaving one's home, residence, or known abode within the district, or concealing one's self therein, with intent to avoid detection or punishment for some public offence against the United States. *United States v. O'Brian*, 3 Dillon, 381; *United States v. White*, 5 Cranch C. C. 38, 73. It does not apply to flight from the justice of a State. *Id.* Nor does it apply to an officer of a vessel, who, after committing a crime on the high seas, merely continues his voyage. *United States v. Brown*, 2 Lowell, 267. A fugitive from justice is not entitled to the limitations in § 1044, although he has, within three years, returned openly to the place where the offence was committed. *United States v. White*, 5 Cranch C. C. 116. A person may flee from justice although no process has been issued for his apprehension. *United States v. White*, 5 Cranch C. C. 38; *United States v. Smith*, 1 Brun. Col. Cases, 82.

SECT. 1046. — "Revenue laws" here mean such laws as are made for the direct and avowed purpose of creating and securing revenue or public funds for the service of the government, not including laws whose collateral and indirect operation may possibly conduce to the public or fiscal wealth. *United States v. Mayo*, 1 Gall. 397; *United States v. Norton*, 91 U. S. 566, 569. An act which imposes a penalty for not depositing the ship's register with the consul on her arrival at a foreign port, is not a revenue law. *Parsons v. Hunter*, 2 Sumner, 419. Nor is the statute which established the postal money-order system. *United States v. Norton*, *supra*. Laws imposing internal revenue taxes are within this section. *United States v. Wright*, 3 Pittsb. 192. A conspiracy to defraud the government of duties on imported goods is not a crime arising under the revenue laws. But fraud in invoicing goods at the custom house and falsely classifying them is. *United States v. Hirsch*, 100 U. S. 33. Sect. 1046 furnishes the limitation as to all criminal proceedings under the internal revenue acts, and it probably fixes also the limitation as to all proceedings for the recovery of fines, penalties, and forfeitures under such acts; if otherwise, then § 1047 does, and in either case the limitation is five years. 14 A. G. Op. 81. St. July 5, 1884, ch. 225 (23 St. 122; see *Mackin v. United States*, 117 U. S. 354) provides, repealing all laws in conflict therewith: —

"That no person shall be prosecuted, tried, or punished for any of the various offences arising under the internal revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offence, in all cases where the penalty prescribed may be imprisonment in the penitentiary, and within two years in all other cases: *Provided*, That the time during which the person committing the offence is absent from the district wherein the same is committed shall not be taken as any part of the time limited by law for the commencement of such proceedings; *Provided further* that the provisions of this act shall not apply to offences committed prior to its passage: *And provided further* that where a complaint shall be instituted before a Commissioner of the United States within the period above limited, the time shall be extended until the discharge of the Grand Jury at its next session within the district: *And provided further* that this act shall not apply to offences committed by officers of the United States."

SECT. 1047. — The revisers observe that St. 1790 described two classes of criminal prosecutions in providing that no person shall be prosecuted, &c. "for any offence not capital, *nor* for any fine or forfeiture under any penal statute, unless," &c., and that it was to the second of these classes that St. 1839, ch. 36, applied a new limitation. 1 Com. D. 546; *Stimpson v. Pond*, 2 Curt. C. C. 502.

The limitation prescribed by § 1047 applies to suits or prosecutions *in personam* or *in rem* (*Hatch v. The Boston*, 3 F. R. 807, 810); to actions of debt as well as to informations and indictments (*Adams v. Woods*, 2 Cranch, 336); but not to indictments for offences punishable by imprisonment. *United States v. Brown*, 2 Lowell, 267. It applies to suits in favor of the United States; and the fact that there has been a fraudulent concealment of the cause of action does not prevent the running of the statute. *United*



*States v. Maillard*, 4 Ben. 459. It applies also to an action to recover the penalty for failing to comply with the law requiring that the register of a ship shall be deposited with the consul on her arrival in a foreign port. *Parsons v. Hunter*, 2 Sumner, 419. It "relates to penalties and forfeitures incurred by infractions of the law, and applies as well to suits as to other forms of prosecution therefor; but a civil action upon a bond grows out of contract, whether it be in favor of the United States or of a private person. A penal sum named in a bond is not a penalty within the statute." *Raymond v. United States*, 14 Blatch. 51.

"Penalty," as used in this section, signifies a fixed pecuniary mulct imposed for the infraction of a law. *Re Landsberg*, 11 Int. Rev. Rec. 150. If the statute creating an offence provides that it shall be a misdemeanor and be punished by fine or imprisonment or both in the discretion of the court, it makes it a crime, rather than a mere penal offence or forfeiture. *Re Landsberg*, 11 Int. Rev. Rec. 150. See *McGlinchy v. United States*, 4 Cliff. 312; *Perkins v. United States*, Id. 321. Sects. 21, 22 of St. June 22, 1874, ch. 391 (18 St. 190), provides:—

"SEC. 21. That whenever any goods, wares, and merchandise shall have been entered and passed free of duty, and whenever duties upon any imported goods, wares, and merchandise shall have been liquidated and paid, and such goods, wares, and merchandise shall have been delivered to the owner, importer, agent, or consignee, such entry and passage free of duty and such settlement of duties shall, after the expiration of one year from the time of entry, in the absence of fraud and in the absence of protest by the owner, importer, agent, or consignee, be final and conclusive upon all parties.

"SEC. 22. That no suit or action to recover any pecuniary penalty or forfeiture of property accruing under the customs revenue laws of the United States shall be instituted unless such suit or action shall be commenced within three years after the time when such penalty or forfeiture shall have accrued: *Provided*, That the time of the absence from the United States of the person subject to such penalty or forfeiture, or of any concealment or absence of the property, shall not be reckoned within this period of limitation."

"All parties," in § 21, includes the United States. *United States v. Phelps*, 17 Blatch. 316. That section does not apply to claims under an express provision of statute, like that of June 30, 1864, ch. 171, § 20, that money paid on goods imported on a certain day shall be refunded. 15 A. G. Op. 121. The year runs from the presentation to the collector of the "entry" by the importer, and not from the first liquidation of the duty. *United States v. Frazer*, 10 Ben. 347. The "protest" referred to in § 21 is a protest against the "prior settlement of duties," declared final after the expiration of the year. *Beard v. Porter*, 124 U. S. 437. As to the government's right to reliquidate the duties, this statute is in the nature of a statute of limitations; but if the reliquidation be lawfully made within the year the statute does not operate as a limitation upon the suit to collect the duties assessed, and such suit may be brought at any time afterwards. *United States v. Leng*, 18 F. R. 15.

SECT. 1048. — The act of 1864, which related to "the present rebellion," is here reproduced, the revisers suggesting that one of its objects may have been to prevent an improper limitation of civil actions by local State legislation as well as of actions arising under Federal statutes which provide a limitation, and that possibly actions for the recovery of real estate not begun at the time of the Revision are thereby saved. 1 Com. D. 547. In *Hanger v. Abbott*, 6 Wall. 532, it was held that the time during which the courts in the Confederate States were closed to the citizens of loyal States was, in suits since brought, to be deducted from the time of limitation prescribed by those States respectively, independently of the above act of 1864, and although the statutes may themselves contain no such exception. In *The Protector*, Id. 687, the same rule was applied to the acts of Congress of 1798 and 1803, fixing the time within which appeals shall be taken from the inferior Federal courts to the Supreme Court. In *Stewart v. Kahn*, 11 Wall. 493; *United States v. Wiley*, Id. 508, and *Mayfield v. Richards*, 115 Id. 137, it was held that the act



of 1864 was not only prospective in its operation ; that all the time, before as well as after its passage, during which a plaintiff could not prosecute his suit by reason of the Rebellion, was to be deducted from any State limitation ; that the act applied to cases in State courts as well as Federal courts, and was constitutional as thus construed. In *Winn's Succession*, 33 La. An. 1392, it was held, denying *Stewart v. Kahn, supra*, and *Aby v. Brigham*, 28 La. An. 840, that this act was not applicable to proceedings in State courts.

This section does not apply to a defendant who was within reach of process from courts which were open. *Britton v. Butler*, 11 Blatch. 350. Nor did it suspend legal remedies and acts of limitation as between citizens of the Confederate States, in places where the State courts were open. *Lockhart v. Horn*, 1 Woods, 628. The suspension of the statute of limitations provided for by this section ceased a reasonable time after peace was restored, though no court was in session for some time thereafter. *United States v. Muhlenbrink*, 1 Woods, 569. This section is not of itself a statute of limitations, and a provision of a State constitution which provides for a different suspension of the statute of limitations is not in conflict with it. *Graydon v. Sweet*, 1 Woods, 418.

## CHAPTER XX.

### THE COURT OF CLAIMS—ORGANIZATION AND SESSIONS.

SECT. 1049. — See note, § 554.

SECT. 1051. — Rooms elsewhere have since been provided. 21 St. 55, Res. 20 ; see notice in 14 Ct. Cl. 1, also history of the court in 17 Ct. Cl. 3.

SECT. 1052. — By 18 St. 252 any three shall constitute a quorum if the concurrence of three is necessary to the decision.

SECT. 1053. — See note, § 677.

## CHAPTER XXI.

### JURISDICTION POWERS AND PROCEDURE.

"As at first organized the Court of Claims was merely an auditing board, authorized to pass upon claims submitted to it and report to the Secretary of the Treasury. He submitted to Congress such confirmed claims as he approved, with an estimate for their insertion in the proper appropriation bill ; such as he disapproved demanded no further action. It was by reason of that feature of the law that this court refused to exercise the appellate jurisdiction over awards of that court which the act of Congress attempted to confer, because the court was of opinion that the so-called Court of Claims was not, in the constitutional sense, a court which could render valid judgments, and because there could be no appeal from the Supreme Court to the Secretary of the Treasury. *Gordon v. United States*, 2 Wall. 561. An act of Congress removing this objectionable feature having passed the year after that decision, the appellate power of this court has been exercised ever since." *Langford v. United States*, 101 U. S. 344 ; 12 Ct. Cl. 338. The history of the court by Richardson, C. J., will be found in 17 Ct. Cl. 1 ; 7 South L. Rev. N. S. 781, and in the text books on Practice in the United States courts. See *Ford v. United States*, 19 Ct. Cl. 598 *et seq.*, and Report of Gilchrist, C. J., in Dev. 11. War claims are considered in 13 Am. L. Reg. N. S. 265, 337, 401 ; 14 Id. 65. The court was not organized to try claims for mere nominal damages. *Grant v. United States*, 7 Wall. 331 ; 7 Ct. Cl. 53 ; 1 Id. 61. "The Court of Claims was established to give legal redress to the citizen as against the



government where he would have had legal redress as against another citizen." *Nott, J.*, in *Brown v. United States*, 6 Ct. Cl. 198. This case has a valuable statement upon the origin of the court, page 191. See also 1 Kent's Com. (13th ed.) 297 n. As to how far the common law rules of evidence prevail, see *Moore v. United States*, 91 U. S. 270. As to taking judicial notice of State laws, see *Sykes v. United States*, 8 Ct. Cl. 330. *Mahan v. United States*, 14 Wall. 109; 6 Ct. Cl. 331. The jurisdiction of the court has been somewhat enlarged and some changes have been made in the law by 24 St. 505. The following notes can be safely examined only by referring to 24 St. 505, which is given below in full.

By 18 St. 74, the provision that land-grant railroads are not to be paid for transportation of property, troops, &c., of the United States, is not to prevent such railroad from bringing suit in the Court of Claims under laws in full force before the act. And by 18 St. 453, ch. 133, the court is to determine the legal principles upon which to fix the settlement of rates for transportation on land-grant roads. *Atchison R. Co. v. United States*, 15 Ct. Cl. 126; *Northern Pacific R. Co. v. United States*, Id. 443; 16 A. G. Op. 607. By 18 St. 192, ch. 393, § 2, the court shall not consider claims for damages for the discontinuance of certain contracts, &c., for collecting moneys belonging to the United States, &c. By 18 St. 481, ch. 149, provision is made for deducting any debt due the United States for any judgment recovered against the United States by such debtor. *Bonnafon v. United States*, 14 Ct. Cl. 484. By 20 St. 207, the presiding judge is to certify the necessity of printing. By 20 St. 171, ch. 319, provision is made for the determination of claims upon the unappropriated balance of "the Chinese indemnity fund" under the control of the State department. *Hubbell v. United States*, 15 Ct. Cl. 546. By 20 St. 324, ch. 115, the court is to adjudge the claims of the New Mexico volunteers for losses of horses and equipments, upon petition filed within one year after passage of the act. *Valdez v. United States*, 16 Ct. Cl. 550. Statutes for soldiers' benefit suppose faithful service; hence a deserter cannot recover for the horse captured by the enemy under 9 St. 414, though the claim is within the statute. *Tapia v. United States*, 16 Ct. Cl. 561. By 20 St. 515, ch. 77, § 2, no claim shall be allowed if wilfully and fraudulently made for more than is due, or false evidence is presented in support thereof. By 21 St. 284, ch. 243; 22 St. 469, provision is made for the settlement of all outstanding claims against the District of Columbia. *Laughlin v. District of Columbia*, 116 U. S. 485; *Fendall v. United States*, 16 Ct. Cl. 106. By 21 St. 504, ch. 139, and 22 St. 585, jurisdiction is conferred on the court to hear certain claims of the Choctaw and Cherokee Indians. *Choctaw Nation v. United States*, 119 U. S. 1. By 23 St. 242, no person in the employ of the government is to receive pay as referee. By St. March 3, 1883, ch. 116, 22 St. 485 (Bowman Act) either House of Congress, or any committee of either, may refer claims involving the determination of facts to the court for decision and report. § 1. So also of claims in any executive department involving controverted questions of fact and law. § 2. *Jackson v. United States*, 19 Ct. Cl. 504; *Hodge v. United States*, 20 Id. 352. When a claim is presented to a department for payment, it is pending therein. A final decision on the merits by an officer precludes his successor from transmitting it to the court, but parties in interest are entitled to be heard. *Jayne v. United States*, 21 Ct. Cl. 311. The transfer of a claim does not carry with it an increase of power over the matter in controversy. If the department be without jurisdiction, the court cannot determine the case upon its merits. *The State of Illinois v. United States*, 20 Ct. Cl. 342. To enable the court to take cognizance of a claim transmitted to it by the head of a department under this act it must appear that such claim was one which that department had authority to settle or adjust, as had previously been held in relation to claims transferred under Rev. Sts. § 1063. *Pitman v. United States*, 20 Ct. Cl. 254; *Pope v. United States*, 21 Id. 50; *Dennis v. United States*, 20 Id. 119; *McClure v. United States*,



19 Id. 18. Claims for injury by the army or navy to property, or their occupation of real estate during the Rebellion, and claims barred by any Federal law, are excluded. § 3. Neglect to assert a claim within six years after it accrued bars it. *Dunbar v. United States*, 19 Ct. Cl. 493, 674; 22 Id. 109. A claim that might have been presented to the Southern Claims Commission and was not, as well as those presented and paid, is barred. *Burwell v. United States*, 22 Ct. Cl. 92. But a claim adversely reported to Congress by this Commission is not thereby barred by this act or by 16 St. 524. *Dodd v. United States*, 21 Ct. Cl. 117. "Barred" does not mean merely any law of limitation but "any law" which has the effect of barring the claim. *Ford v. United States*, 19 Ct. Cl. 524; *Battelle v. United States*, 21 Id. 250; *Dunbar v. United States*, 22 Id. 109; *Marshall v. United States*, 21 Id. 307. In Congressional cases the court has no jurisdiction of claims for the proceeds of abandoned and captured property. *Nelson v. United States*, 22 Ct. Cl. 159; *Myers v. United States*, 22 Id. 80; *Vance v. United States*, 21 Id. 488; *Burke v. United States*, Id. 317; *Mitchell v. United States*, Id. 466; *Beasley v. United States*, Id. 225; *McDonald v. United States*, Id. 319; *McLenore v. United States*, Id. 327; *Blair v. United States*, Id. 253. The claimant for supplies, &c., furnished for the suppression of rebellion must prove his loyalty; the Attorney-General is to appear for the United States and interested parties may testify. Reports of the Court of Claims may be continued for action. §§ 4-7. An executor in Louisiana in possession after the heirs are entitled to the property need not prove loyalty. *Randolph v. United States*, 21 Ct. Cl. 282. See *Newman v. United States*, Id. 205. The instances in which the court is prohibited from exercising jurisdiction of cases transmitted under the Bowman Act are fully set forth in *Heslebower v. United States*, 21 Ct. Cl. 239; *Neal v. United States*, Id. 240. Where the petition contains counts for liquidated and others for unliquidated damages, the court has jurisdiction by virtue of the former, and the case will not be dismissed for want of jurisdiction because of the latter. *Dennis v. United States*, 20 Ct. Cl. 119. The Bowman Act does not repeal Rev. Stats. § 1059. The two were enacted for different objects and they confer different jurisdictions. *Webb v. United States*, 20 Ct. Cl. 487. "The jurisdiction of this act is much like that of the organic act of Feb. 24, 1855, whereby the court was to report the facts and the law to Congress, without entering judgment, and under that act the court always took cognizance of treaty cases and reported the facts and law thereon." *Chickasaw Nation v. United States*, 22 Ct. Cl. 248. The causes which gave rise to, the purposes of, and modes of procedure under this act, are further set forth in *Ford v. United States*, 19 Ct. Cl. 593 *et seq.*; *McClure v. United States*, Id. 18, 173; *Jackson v. United States*, Id. 504; *Choteau v. United States*, 20 Id. 252; *Prannen v. United States*, Id. 219; *Carroll v. United States*, Id. 426; *Dobyns v. United States*, 19 Id. 494. As to how far the rules under the Rev. Stats. apply, see *Smith v. United States*, Id. 690; *The W. B. Chester v. United States*, Id. 681. See notes, § 1063, and Tucker Act, *infra*, §§ 13, 14. By 22 St. 635, Res. 5, is referred to the court the claim of members of the New York Stock Exchange for moneys illegally collected as shown by *Bailey v. Clark*, 21 Wall. 284. See *Van Schaik v. United States*, 21 Ct. Cl. 7. By 23 St. 257, the court is to hear certain questions as to expenses in collecting revenue from customs prior to July 1, 1881, &c. By 23 St. 283, the court is given jurisdiction over the French Spoliation Claims. *Gray v. United States*, 21 Ct. Cl. 340; *Holbrook v. United States*, Id. 434; *Cushing v. United States*, 22 Id. 1; *Hooper v. United States*, Id. 408.

Several private acts and decisions thereon have been cited, although many of them have been omitted because of no general application. Some will be referred to hereinafter. See *Tillson v. United States*, 100 U. S. 43; *Ex parte Atocha*, 17 Wall. 439; 6 Ct. Cl. 69. The following is the act of March 3, 1887, ch. 359; 24 St. 505 (The Tucker Act), referred to above, with decisions, &c., added:—



“The Court of Claims shall have jurisdiction to hear and determine the following matters :

“First. All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: *Provided, however,* That nothing in this section shall be construed as giving to either of the courts herein mentioned, jurisdiction to hear and determine claims growing out of the late civil war, and commonly known as ‘war claims,’ or to hear and determine other claims, which have heretofore been rejected, or reported on adversely by any court, Department, or commission authorized to hear and determine the same. [See *Dunbar v. United States*, 22 Ct. Cl. 115; *Chappell v. United States*, 34 F. R. 673. ‘Heretofore rejected or reported on adversely.’ See *Baker v. United States*, Id. 353; *Perrin v. United States*, Id. 354; *Bliss v. United States*, Id. 781. ‘Claim’ is a broad term. It includes a claim by a purchaser or his assignee of timber land under 20 St. 89, to have a patent issue for the same. *Jones v. United State*, 35 F. R. 561; *Montgomery v. United States*, 36 Id. 4. *Sioux City R. Co. v. United States*, Id. 610; *United States v. Knox*, 128 U. S. 230.]

“Second. All set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court: *Provided,* That no suit against the Government of the United States, shall be allowed under this act unless the same shall have been brought within six years after the right accrued for which the claim is made.

“SEC. 2. That the district courts of the United States shall have concurrent jurisdiction with the Court of Claims as to all matters named in the preceding section where the amount of the claim does not exceed one thousand dollars, and the circuit courts of the United States shall have such concurrent jurisdiction in all cases where the amount of such claim exceeds one thousand dollars and does not exceed ten thousand dollars. All causes brought and tried under the provisions of this act shall be tried by the court without a jury. [*Leavitt v. United States*, 34 F. R. 623; *Jones v. United States*, 35 Id. 561; *Sioux City R. Co. v. United States*, *supra*.]

“SEC. 3. That whenever any person shall present his petition to the Court of Claims alleging that he is or has been indebted to the United States as an officer or agent thereof, or by virtue of any contract therewith, or that he is the guarantor, or surety, or personal representative of any officer, or agent, or contractor so indebted, or that he, or the person for whom he is such surety, guarantor, or personal representative has held any office or agency under the United States, or entered into any contract therewith, under which it may be or has been claimed that an indebtedness to the United States has arisen and exists, and that he or the person he represents has applied to the proper Department of the Government requesting that the account of such office, agency, or indebtedness may be adjusted and settled, and that three years have elapsed from the date of such application and said account still remains unsettled and unadjusted, and that no suit upon the same has been brought by the United States, said court shall, due notice first being given to the head of said Department and to the Attorney-General of the United States, proceed to hear the parties and to ascertain the amount, if any, due the United States on said account. The Attorney-General shall represent the United States at the hearing of said cause. The court may postpone the same from time to time whenever justice shall require. The judgment of said court or of the Supreme Court of the United States, to which an appeal shall lie, as in other cases, as to the amount due, shall be binding and conclusive upon the parties. The payment of such amount so found due by the court shall discharge such obligation. An action shall accrue to the United States against such principal, or surety, or representative to recover the amount so found due, which may be brought at any time within three years after the final judgment of said court. Unless suit shall be brought within said time, such claim and the claim on the original indebtedness shall be forever barred.

“SEC. 4. That the jurisdiction of the respective courts of the United States proceeding under this act, including the right of exception and appeal, shall be governed by the law now in force, in so far as the same is applicable and not inconsistent with the provisions of this act; and the course of procedure shall be in accordance with the established rules of said respective courts, and of such additions and modifications thereof as said courts may adopt.

“SEC. 5. That the plaintiff in any suit brought under the provisions of the second section of this act shall file a petition, duly verified with the clerk of the respective court having jurisdiction of the case, and in the district where the plaintiff resides. Such petition shall set forth the full name and residence of the plaintiff, the nature of his claim, and a succinct statement of the facts upon which the claim is based, the money or any other thing claimed, or the damages sought to be recovered and praying the court for a judgment or decree upon the facts and law. [*Chappell v. United States*, 34 F. R. 675.]

“SEC. 6. That the plaintiff shall cause a copy of his petition filed under the preceding section to be



served upon the district attorney of the United States in the district wherein suit is brought, and shall mail a copy of the same, by registered letter, to the Attorney-General of the United States, and shall thereupon cause to be filed with the clerk of the court wherein suit is instituted an affidavit of such service and the mailing of such letter. It shall be the duty of the district attorney upon whom service of petition is made as aforesaid to appear and defend the interests of the Government in the suit, and within sixty days after the service of petition upon him, unless the time should be extended by order of the court made in the case to file a plea, answer, or demurrer on the part of the Government, and to file a notice of any counter-claim, set-off, claim for damages, or other demand or defence whatsoever of the Government in the premises: *Provided*, That should the district attorney neglect or refuse to file the plea, answer, demurrer, or defence, as required, the plaintiff may proceed with the case under such rules as the court may adopt in the premises; but the plaintiff shall not have judgment or decree for his claim, or any part thereof, unless he shall establish the same by proof satisfactory to the court.

“SEC. 7. That it shall be the duty of the court to cause a written opinion to be filed in the cause, setting forth the specific findings by the court of the facts therein and the conclusions of the court upon all questions of law involved in the case, and to render judgment thereon. If the suit be in equity or admiralty, the court shall proceed with the same according to the rules of such courts.

“SEC. 8. That in the trial of any suit brought under any of the provisions of this act, no person shall be excluded as a witness because he is a party to or interested in said suit; and any plaintiff or party in interest may be examined as a witness on the part of the Government.

“Sec. 1079 of the Revised Statutes is hereby repealed. The provisions of sect. 1080 of the Revised Statutes shall apply to cases under this act.

“SEC. 9. That the plaintiff, or the United States, in any suit brought under the provisions of this act shall have the same rights of appeal or writ of error as are now reserved in the statutes of the United States in that behalf made, and upon the conditions and limitations therein contained. The modes of procedure in claiming and perfecting an appeal or writ of error shall conform in all respects, and as near as may be, to the statutes and rules of court governing appeals and writs of error in like causes. [See *United States v. Young*, 94 U. S. 258.]

“SEC. 10. That when the findings of fact and the law applicable thereto have been filed in any case as provided in sect. 6 of this act, and the judgment or decree is adverse to the Government, it shall be the duty of the district attorney to transmit to the Attorney-General of the United States certified copies of all the papers filed in the cause, with a transcript of the testimony taken, the written findings of the court, and his written opinion as to the same; whereupon the Attorney-General shall determine and direct whether an appeal or writ of error shall be taken or not; and when so directed the district attorney shall cause an appeal or writ of error to be perfected in accordance with the terms of the statutes and rules of practice governing the same: *Provided*, That no appeal or writ of error shall be allowed after six months from the judgment or decree in such suit. From the date of such final judgment or decree, interest shall be computed thereon, at the rate of four per centum per annum, until the time when an appropriation is made for the payment of the judgment or decree.

“SEC. 11. That the Attorney-General shall report to Congress, and at the beginning of each session of Congress, the suits under this act in which a final judgment or decree has been rendered giving the date of each, and a statement of the costs taxed in each case.

“SEC. 12. That when any claim or matter may be pending in any of the Executive Departments which involves controverted questions of fact or law, the head of such Department, with the consent of the claimant, may transmit the same, with the vouchers, papers, proofs, and documents pertaining thereto, to said Court of Claims, and the same shall be there proceeded in under such rules as the court may adopt. When the facts and conclusions of law shall have been found, the court shall report its findings to the Department by which it was transmitted. [This section is nearly identical with § 2 of the *Bowman Act*. *Chickasaw Nation v. United States*, 22 Ct. Cl. 247, 248.]

“SEC. 13. That in every case which shall come before the Court of Claims, or is now pending therein, under the provisions of an act entitled ‘An act to afford assistance and relief to Congress and the Executive Departments in the investigation of claims and demands against the Government,’ approved March 3, 1883, if it shall appear to the satisfaction of the court, upon the facts established, that it has jurisdiction to render judgment or decree thereon under existing laws or under the provisions of this act, it shall proceed to do so, giving to either party such further opportunity for hearing as in its judgment justice shall require, and report its proceedings therein to either House of Congress or to the Department by which the same was referred to said court.

“SEC. 14. That whenever any bill, except for a pension, shall be pending in either House of Congress providing for the payment of a claim against the United States, legal or equitable, or for a grant, gift, or bounty to any person, the House in which such bill is pending may refer the same to the Court of Claims, who shall proceed with the same in accordance with the provisions of the act approved March 3, 1883,



entitled an 'Act to afford assistance and relief to Congress and the Executive Departments in the investigation of claims and demands against the Government,' and report to such House the facts in the case and the amount, where the same can be liquidated, including any facts bearing upon the question whether there has been delay or laches in presenting such claim or applying for such grant, gift, or bounty, and any facts bearing upon the question whether the bar of any statute of limitation should be removed or which shall be claimed to excuse the claimant for not having resorted to any established legal remedy.

"SEC. 15. If the Government of the United States shall put in issue the right of the plaintiff to recover the court may, in its discretion, allow costs to the prevailing party from the time of joining such issue. Such costs, however, shall include only what is actually incurred for witnesses, and for summoning the same, and fees paid to the clerk of the court.

"SEC. 16. That all laws and parts of laws inconsistent with this act are hereby repealed."

SECT. 1059.—*First.* The court cannot entertain an action against a State, or one in which a State is impleaded as defendant, and is a necessary party. *Milwaukee v. United States*, 1 Ct. Cl. 187. Demands against the government founded on torts are excluded. *Gibbons v. United States*, 8 Wall. 274, 275; 2 Ct. Cl. 105; 2 Id. 421; *Milwaukee Co. v. United States*, 1 Id. 187; *Morgan v. United States*, 14 Wall. 531; *Pitman v. United States*, 20 Ct. Cl. 255. And the limitation to cases of contract, express or implied, refers to the distinction between actions of contract and tort, "which is inherent in the essential nature of judicial remedies under all systems, and especially under the system of the common law." *Langford v. United States*, 101 U. S. 345; 12 Ct. Cl. 338. No suit can be brought on equitable considerations. *Bonner v. United States*, 9 Wall. 156; 7 Ct. Cl. 133; 1 Id. 125; see the Tucker Act, § 1, cl. 1. And a special act providing that if the court is satisfied that just and equitable grounds exist for credits, it shall make a decree, confers no equity, but the ordinary jurisdiction of a court of law. *McClure v. United States*, 116 U. S. 145; 21 Ct. Cl. 494; 17 Id. 12; *Tillson v. United States*, 100 U. S. 43. A rule of the court requiring parties to present their claims to an executive department before suit is void. *Clyde v. United States*, 13 Wall. 38; 5 Ct. Cl. 134. As to objections to jurisdiction see *Sweeny v. United States*, Id. 285; see note, § 1063. For a case where it was held that the question as to the unconstitutionality of an act, &c., were rendered immaterial by the plaintiff's suing in the Court of Claims, see *Great Falls Co. v. Attorney-General*, 124 U. S. 581; 25 F. R. 521; 112 U. S. 645; 16 Ct. Cl. 160. For enlarged jurisdiction, see the Tucker Act, *supra*, § 1, cl. 1.

"*All claims founded upon any law of Congress.*"—A claim is within this clause which has been presented to and allowed by the proper officer; the claimant having pursued the statutory remedy to the end, being satisfied with the decision given and insisting upon payment promised by the government. *Kaufman v. United States*, 96 U. S. 567; 13 Ct. Cl. 562; 11 Id. 659. The rules of construction, and the meaning of "to adjudge the claim according to the principles of equity and justice," in case of the reference of claims to the court by special act, are treated in *Braden v. United States*, 16 Ct. Cl. 389. See *United States v. Irwin*, 127 U. S. 125. In the case of special acts the authority of the court is generally restricted thereby. *Ex parte Atocha*, 17 Wall. 439; 8 Ct. Cl. 427; 6 Id. 69. The court may hear and determine a cause in which the State is a party in a suit against the United States (*United States v. Louisiana*, 123 U. S. 32; 22 Ct. Cl. 85); also a suit to recover of the United States taxes and penalties like those in §§ 3220, 3228, payment having been refused and the claim having been in due time presented on appeal to and allowed by the Commissioner of Internal Revenue (*United States v. Savings Bank*, 104 U. S. 728; 16 Ct. Cl. 335); also a suit for drawback under the act of Aug. 5, 1861, ch. 45, § 4, payment having been refused. *Campbell v. United States*, 107 U. S. 407; 12 Ct. Cl. 470; see *Portland Co. v. United States*, 5 Id. 441. Where real property was sold for direct taxes under 12 St. 292, 304, ch. 45, § 36, and ch. 98, p. 422, and the net surplus was deposited in the Treasury, it was held that before applying for such surplus the owner had



no enforceable claim, and that the Statute of Limitations began to run only from the date of application. *United States v. Cooper*, 120 U. S. 124; 21 Ct. Cl. 510; *United States v. Taylor*, 104 U. S. 216; 14 Ct. Cl. 339. Cases under the revenue laws are not within the jurisdiction of the court. *Nichols v. United States*, 7 Wall. 129; 1 Ct. Cl. 70; *Schlesinger v. United States*, 1 Id. 116; see *Boehm v. United States*, 21 Id. 290; *Turner v. United States*, 9 Id. 367, and see also cases under contract, *infra*. But there is a distinction in case of an action to recover an overpayment of unascertained duties on imports. *Broulatour v. United States*, 7 Ct. Cl. 555. There is no appeal to the Court of Claims or any other court from the action of the Secretary of the Treasury, when it is not a judicial power, but one of mercy. *Dorsheimer v. United States*, 7 Wall. 166; 2 Ct. Cl. 103. A claim for property accidentally destroyed by burning, &c., by the naval forces of the United States is not within the jurisdiction of the court. *Perlin v. United States*, 12 Wall. 315; 7 Ct. Cl. 223. 21 St. 650, providing that certain persons be released from liability upon the bond of an internal revenue collector, &c., does not authorize a suit to recover money paid upon an execution against the bondsmen. *Parker v. United States*, 22 Ct. Cl. 100. With some few exceptions, an appropriation by a law of Congress of a definite sum of money for the relief of a specified class of claimants comes within this subject. *Blount v. United States*, 21 Ct. Cl. 279. See *United States v. Jordan*, 113 U. S. 418; 19 Ct. Cl. 108; *Nashville Ry. Co. v. United States*, 113 U. S. 261; 19 Ct. Cl. 476; *Chesapeake Ry. Co. v. United States*, Id. 300; *Wray v. United States*, Id. 154; *George v. United States*, 18 Ct. Cl. 432; *Huffman v. United States*, 17 Id. 55; *Hukill v. United States*, 18 Ct. Cl. 180; 16 Id. 562. Where an officer is directed by statute to examine claims and report to Congress to await legislative action, no action can be maintained on the report; but where Congress validates claims, appropriates money and directs the Secretary of the Treasury to examine and pay them, a suit may be sustained on the original claim. *Huffman v. United States*, *supra*. A statute which confers exclusive authority upon the head of a department over certain questions or claims deprives the court of jurisdiction therein. *Davidson v. United States*, 21 Id. 298; *Daily v. United States*, 17 Id. 144; *Marshall v. United States*, 21 Id. 307; *Chesapeake Ry. Co. v. United States*, 20 Id. 49. See further on this subject *Alire v. United States*, 1 Id. 233; 7 Id. 27. A suit may be maintained upon an allowance made by a Commissioner of Internal Revenue to a judgment creditor, under § 3220, where the collector does not object and sets up no claim himself. *Nixon v. United States*, 18 Ct. Cl. 448. Otherwise where the Commissioner has exceeded his jurisdiction in making an allowance. *Seat v. United States*, 18 Ct. Cl. 458. Where the only contract showing liability to pay for property is an act of Congress directing a designated officer to pay the owners the sum appropriated, and such officer hears the parties and pays the whole sum to those he decides to be owners, the court has no jurisdiction of an action by a rejected party. *Bofinger v. United States*, 18 Ct. Cl. 148, 165. It has jurisdiction of an action to recover the amount of an award, payment being refused, under a statute giving an informer a share of a penalty. *Ramsay v. United States*, 21 Ct. Cl. 443; 14 Id. 367; 120 U. S. 214. See also *Bradley v. United States*, 12 Ct. Cl. 578, 591. When the law declares that certain specified acts must be done to entitle the claimant to a gratuity out of the Treasury to which, aside from that law, he would have no right, every satisfactory condition must be complied with before he can claim the gratuity. *Davis v. United States*, 17 Ct. Cl. 292. The rejection of a claim in whole or in part by the accounting officers leaves the party free to pursue his remedy in the Court of Claims, although he may have accepted the portion allowed. *Longwill v. United States*, 17 Ct. Cl. 288; *Davis v. United States*, 10 Id. 285. If a claim is founded on a law of Congress, the court will take jurisdiction, unless the power to pass upon it is lodged in some other tribunal or officer. *Thomas v. United States*, 16 Ct. Cl. 522. See *Irby v. United States*, 18 Ct. Cl. 259. It has



jurisdiction of a claim of one formerly an officer in the navy of the republic of Texas for pay allowed him by 11 St. 248 (*Moore v. United States*, 4 Ct. Cl. 139); also of the claim of an owner of Texas bonds which the United States assumed responsibility for, although lost or stolen before they were endorsed, and has paid through mistake (*Morrell v. United States*, 7 Id. 421); also of an action against the government upon a decree rendered in a suit under the abandoned or captured property act, where the Secretary of the Treasury has not paid the full sum found by the decree to be due the claimant. *Brown v. United States*, 6 Id. 171. Also of the claim of a navy officer for his expenses when travelling under orders. *United States v. McDonald*, 128 U. S. 471. If a tax be invalid, or has been abated, and the government uses money of the party which it withholds in payment of the tax, an action for money had and received may be maintained. *Johnston v. United States*, 17 Ct. Cl. 157. It is not clear that claims for salaries "ought not to be regarded as claims founded upon a law of the United States." But see claims founded on contract, *infra*. *Milford v. Commonwealth*, 144 Mass. 65.

"*Any Regulation of an Executive Department.*" — These words mean a rule made by the head of the department for its action, under an act of Congress conferring power so to do. A mere order of the President or of a Secretary is not a regulation. *Harney v. United States*, 3 Ct. Cl. 38; *Maddux v. United States*, 20 Id. 199. Settlers on public lands dispossessed by the Executive may be compensated for "improvements." Id. See *Campbell v. United States*, 12 Ct. Cl. 476.

"*Upon any contract, expressed or implied, with the government of the United States.*" — Questions of salary are questions of contract. *Patton v. United States*, 7 Ct. Cl. 371; *Collins v. United States*, 15 Id. 35; *Dainese v. United States*, Id. 64; *French v. United States*, 16 Id. 419; *United States v. Mitchell*, 109 U. S. 146; 18 Ct. Cl. 281; *Adams v. United States*, 20 Id. 115; *Milford v. Commonwealth*, *supra*; *United States v. Langston*, 118 U. S. 389. Where the money of an innocent person goes into the national treasury through the fraud of its agent, it may be recovered. *United States v. State Bank*, 96 U. S. 30; 13 Ct. Cl. 523; 10 Id. 519. If the government has contracted for a quantity of wood, more or less, and notice has subsequently been given that the whole amount will be needed, a refusal to accept it constitutes a breach, and the fact that the contractor subsequently makes it impossible for him to perform is immaterial. *Williams v. United States*, 15 Id. 461. The court cannot entertain jurisdiction, under the act of 1863, as to captured and abandoned property, where the party gave aid and comfort to the Rebellion and was not pardoned until two years after its suppression, though the general limitation is six years. *Haycraft v. United States*, 22 Wall. 81; 10 Ct. Cl. 95; 8 Id. 483. Unless the government has ratified a contract of an officer in excess of his authority or received the benefits of it, it is not liable. The ratification of some of a series of unauthorized acts is not to be construed to be an approval of any not specified. *De Celis v. United States*, 13 Ct. Cl. 117; *Pitcher v. United States*, 1 Id. 7. A contract is not complete within § 3744, where the claimant signed the proposals and the officer the acceptances, neither retaining possession of all the original parts, and the drawings and specifications which were to be parts of the contract were not being written or agreed upon. *South Boston Iron Co. v. United States*, 18 Ct. Cl. 165; 21 Id. 503; 118 U. S. 37; *Harvey v. United States*, 8 Ct. Cl. 501; 12 Id. 341; 13 Id. 322; 18 Id. 470; 20 Id. 529; 105 U. S. 243; 113 Id. 243. A contract otherwise within that section is not ineffectual because not filed as it prescribes. *Power v. United States*, 18 Ct. Cl. 263. No public officer has power to contract for the alienation of government property without express authority from Congress. *Flores v. United States*, 18 Ct. Cl. 352. Under 13 St. 396, a commanding officer could only order a quartermaster to obtain supplies in an emergency expeditiously and without advertising by written order. One contracting was bound to ascertain if such order had been made. *Cobb v. United States*, 18 Ct. Cl. 514, overruling *Thompson v. United*



States, 9 Id. 187. Sect. 3744, requiring all contracts by certain departments to be in writing, and signed, applies to such contracts as the above. *Id.*, overruling *Cobb v. United States*, 7 Id. 470. An oral agreement to accept corn instead of oats, which the contractor agreed in writing to furnish, is void under § 3744. But if a subordinate officer, unauthorized to waive the requirements, accepts corn instead of oats, the government is liable for the fair value thereof. *Mitchell v. United States*, 19 Ct. Cl. 39. Where a contract of employment provides that the compensation be fixed thereafter, no action lies until that is done. *Titus v. United States*, 16 Ct. Cl. 276. Jurisdiction of an action for the use of a patented article, by virtue of a contract, is not lost because the government pleads that the patent is void for want of novelty. *Morse Arms Manuf. Co. v. United States*, 16 Ct. Cl. 296. The Pacific Railroad Act (12 St. 489, ch. 120, § 6) provided that grants therein were upon condition that the company shall transport mails at fair and reasonable rates, not to exceed those paid by private parties for the same service. This was held not to be a contract for all prospective services at the same rates paid by private parties. *Union Pacific R. Co. v. United States*, 16 Ct. Cl. 569. A contract for the purchase of horses is not broken by the adoption of a new rule for their inspection. *Spicer v. United States*, 1 Ct. Cl. 316.

The court has jurisdiction of a claim for money deposited with a revenue officer authorized to apply it to demands against the depositor, the compromise being rejected and the money being applied to assessments for taxes and penalties against the plaintiff and paid into the Treasury (*Brighton v. United States*, 12 Ct. Cl. 330); of an action by an informer for the portion of a forfeiture allowed by the revenue laws (14 St. 546, § 1), (*Shelton v. United States*, 8 Id. 487); although if an officer thereto authorized has distributed the fines and penalties to which informers were entitled, his action is final (*Kellogg v. United States*, 15 Id. 372); of a contract for postal-car facilities conditioned and to become operative upon appropriations by Congress, it being valid if it does not exceed the appropriation though exhausted. *New York R. Co. v. United States*, 21 Ct. Cl. 468; *Dougherty v. United States*, 18 Id. 503; *Illinois R. Co. v. United States*, Id. 118; *Chicago Ry. Co. v. United States*, 104 U. S. 680, 685, 687; 15 Ct. Cl. 232. As to failure of Congress not constituting a breach of contract, see *Mohine Water Power Co. v. United States*, 20 Ct. Cl. 331. It has jurisdiction of contracts under the Pacific Railroad Act (12 St. 493; 13 Id. 356) with the companies which accepted them, § 6 of the first act not affecting portions of the road not subsidized, and as to such portions, 20 St. 56 not authorizing the government to withhold compensation due (*Central Pacific R. Co. v. United States*, 21 Id. 180, 507; 118 U. S. 235); of a contract not in accordance with § 3744, supplies having been delivered to and accepted by the government (*Dougherty v. United States*, 18 Ct. Cl. 496); of a proper voucher by an Indian agent for services rendered by his order within his power and duty, it being *prima facie* evidence of indebtedness (*McCann v. United States*, Id. 445); of services of mail contractors in 1859–61 in the States named in 19 St. 362 and for whom an appropriation was there made although it has been covered into the Treasury (*George v. United States*, Id. 432; *Hukill v. United States*, 16 Id. 562; *Huffman v. United States*, 17 Id. 55); of a lease by a subordinate, following the express directions of his superior, authorized to so command, though the latter has not expressly approved the act, if use and occupation are not objected to by him (*Green v. United States*, 18 Id. 93); of a contract of an executive officer, within the scope of his authority (*McCullum v. United States*, 17 Ct. Cl. 92; *Garfield v. United States*, 811 Id. 322, 601; 93 U. S. 242); of an action for damages from the refusal of the government to accept property purchased by it (*Gibbons v. United States*, 8 Wall. 269; 7 Ct. Cl. 105; 2 Id. 421); of a charter-party providing that the government might take a vessel at her appraised value, she being afterwards seized by a military officer (*Bogert v. United States*, 2 Id. 159; 3 Id. 18); of a reward offered by the government when accepted though the appropriation is exhausted. *Briggs v. United States*, 15 Id. 48.

The court has *not* jurisdiction of an action for damages from a breach of contract by the



illegal imprisonment of the claimant by the government or some one supposed to have acted under its authority (*Spicer v. United States*, 1 Id. 316); of an oral contract for work on a vessel, made by or on behalf of, the Navy Department, being void under § 3744 (*Steele v. United States*, 19 Id. 181; 20 Id. 526; 113 U. S. 128); of a contract for public work under § 3709, if no exigency existed in fact, or was not determined to exist by the officer in charge of such work, or could not be judicially inferred, the supervising architect of the Treasury not being able to bind the government (*Schneider v. United States*, 19 Ct. Cl. 547); of an act of the provisional legislature of a State attempting to secede, guaranteeing the bonds of a railroad company (*Schweitzer v. United States*, 21 Ct. Cl. 303); of an unconscionable contract, the contractor being limited to the recovery of the value of the article sold (*Hume v. United States*, Id. 328); of the debts of the District of Columbia, unless otherwise provided for by Congress (*Bundy v. United States*, Id. 429); of a contract by the Surgeon-General for compensation in excess of that prescribed by the Army Regulations, even if disregarded for a series of years, with the concurrence of Secretaries of War (*Arthur v. United States*, 16 Id. 422); of a parol contract by officers empowered by a legal regulation of the head of an executive department to contract for the government in writing, the authority to an officer of one class not authorizing an officer of a different class to contract, although employed about the same business (*Camp v. United States*, 113 U. S. 648; 20 Ct. Cl. 531; 15 Id. 469); of a contract by an officer not thereto authorized, although Congress, by special act, has made provision for the payment of claims of the same class, otherwise not recoverable; the fact that no appeal has been taken by the government in the case of claims of a particular class not being a reason for holding the government liable upon another claim of the same class (*United States v. McDougall*, 121 U. S. 89; see *Belt v. United States*, 15 Ct. Cl. 92); of a suit against the government under a contract to deliver captured or abandoned property for one fourth its proceeds (*Camp v. United States*, *supra*); of a suit against the government for the return of the fee required by the trade-mark statute to be paid for the right thereby given, after the statute was held void. *Woodman v. United States*, 15 Ct. Cl. 541.

The following cases relate chiefly to "implied contracts":—If it is the duty of an officer to pay on demand to a tax-payer the surplus of a sale, an implied contract arises, and it may be recovered. *Taylor v. United States*, 14 Ct. Cl. 339; 17 Id. 427; 104 U. S. 216. The court has jurisdiction of a suit by a patentee for the royalty agreed to be paid for the use of his invention by an authorized officer of the government. *Burns v. United States*, 4 Ct. Cl. 113; 7 Id. 219; 12 Wall. 246. After a patentee submitted his patent to the department, and the Secretary of War adopted it, the government proceeded to manufacture it. It was presumed to have done so under an implied license and for a reasonable royalty. *McKeever v. United States*, 14 Ct. Cl. 396; 18 Id. 757. If a surveyor has followed the unauthorized instructions of a surveyor-general, and made a survey contrary to the orders of the latter's superior, he cannot recover for his labor; but if, in obedience to the instructions of such superior, he obliterates his survey, he may recover on a *quantum meruit*. *White v. United States*, 15 Ct. Cl. 305. The government is liable for such proportion of a general average adjustment as it ought in equity and justice to bear. *Brown v. United States*, 15 Ct. Cl. 392. Where a manufacturer of matches furnished his own die for stamps under 13 St. 223, § 161, it was held that his right to the commission rested upon contract, and might be enforced. *Daily v. United States*, 7 Ct. Cl. 383. It is implied from the fact that the government manufactured a patented military device without market value, on the solicitation of the patentee, that it should pay for the right to use the invention. *Palmer v. United States*, 19 Ct. Cl. 669; 128 U. S. 262. If the commissioners made an illegal assessment of taxes under 12 St. 292, 422, the person who paid more than his proportion may recover under § 3689. *Seabrook v. United States*, 21 Ct. Cl. 39. But the collection of the whole tax was not rendered void,



because two tracts were sold when enough to pay the amount due was realized from one. *Lawton v. United States*, 21 Ct. Cl. 44. Money illegally exacted by a government officer under circumstances which make payment necessary to avoid the discontinuance of the business in which the payee is engaged may be recovered. *Swift Co. v. United States*, 111 U. S. 22; 105 Id. 691; 19 Ct. Cl. 712; 18 Id. 42; 17 Id. 442; 14 Id. 481. And it is immaterial whether such transaction is for cash or there is a running account. *New York Co. v. United States*, 20 Ct. Cl. 174. If a sale of real estate to a third party for the non-payment of a tax brought a surplus, paid into the Treasury, the owner or his legal representatives may sue therefor as upon an implied contract, after demand upon the proper officer. *Taylor v. United States*, *supra*. And the surplus bid by the United States at the purchase of the land may be recovered. *Lawton v. United States*, 18 Ct. Cl. 595; 19 Id. 709; 110 U. S. 146. But the statute does not mean to give the owner both the land and the surplus. *Rhett v. United States*, 20 Ct. Cl. 338.

To constitute an implied contract, there must have been some consideration moving to the United States; or they must have received money charged with a duty to pay it over; or the claimant must have had a lawful right to it when received, as in the case of money paid by mistake. Such a contract does not arise with respect to moneys paid into the United States Treasury as the proceeds of property sold under 12 St. 589. *Knote v. United States*, 95 U. S. 149; 13 Ct. Cl. 517; 10 Id. 397. Where an officer convicted by a military commission of defrauding the government was sentenced to pay a fine, and after payment was released, and thereafter consented that the money paid might pass into the Treasury, it was held that there was no implied contract that the money would be refunded, because the fine was imposed by a tribunal without jurisdiction or paid under duress. *Carver v. United States*, 111 U. S. 609; 19 Ct. Cl. 714; 16 Id. 361. If an officer authorized to seize property of the Confederate Government seized private property, in an insurrectionary State, there is no implied contract that the proceeds shall be returned to the owner. *Gooch v. United States*, 15 Ct. Cl. 281. A binding contract for carrying the mails for the time stated is not created by an official order stating the compensation for such service "from July 1, 1877, to June 30, 1881 (unless otherwise ordered)." *Eastern R. R. Co. v. United States*, 20 Ct. Cl. 23. Beneficial voluntary service does not raise an implied contract unless there has been inducement, agreement, or ratification. *Boston v. District of Columbia*, 19 Ct. Cl. 31. Where the government has purchased property, the contract of sale negatives the existence of a contract of lease between the time of purchase and the execution of the conveyance. *Carpenter v. United States*, 6 Ct. Cl. 156; 9 Id. 18; 17 Wall. 489. There is no obligation to indemnify a party for a loss caused by his own act. Remote damages cannot be recovered. *Illinois Central R. Co. v. United States*, 16 Ct. Cl. 312. A person having through a clerk unlawfully obtained from the office of an assistant treasurer of the government money belonging to it, replaced it by paying to the clerk funds he had fraudulently obtained from a bank, the clerk having no knowledge of this fact. *Held*, that the bank could not recover from the government. *State Bank v. United States*, 114 U. S. 401; 20 Ct. Cl. 537; 17 Id. 329. If the acts of a government agent employed to devise a revenue tax-stamp constitute a license to manufacture and use the device, any presumption of an implied contract to pay a royalty is negatived. And an assignee of such an agent who acquires the patent for a pre-existing consideration, while the government is making such use of it, takes subject to the license, and is estopped by his subsequent silence. *Solomons v. United States*, 21 Ct. Cl. 479; 22 Id. 335. The government is not liable under a marshal's deed for property sold under the Confiscation Act for anything beyond the estate of the person proceeded against, though such deed assumes to convey an estate in fee-simple. *Waples v. United States*, 16 Ct. Cl. 126; 19 Id. 711; 110 U. S. 630. Where the plaintiff assigned to the government as collateral a judgment against a third



party for a sum in excess of his own indebtedness, such third party having a claim against the government for more than the judgment, it was held that the accounting officers were not bound to collect the whole amount and pay the balance to the claimant. *Taggart v. United States*, 17 Ct. Cl. 322. A certificate for arrears of pensions does not create a debt against the government which survives to the pensioner's administrator. *Donnelly v. United States*, 17 Ct. Cl. 105.

The court has no jurisdiction of an action to review the determination of the Secretary of the Interior in striking a pensioner's name from the roll. *Harrison v. United States*, 20 Ct. Cl. 122. If the report of an officer of the government appointed to investigate a claim constituted an implied contract to pay the claimants the sum found due, it did not have that effect when such officer was required to make report to Congress. *Ludington v. United States*, 15 Ct. Cl. 453. One who accepts an office and discharges the duties when there is no law for his compensation, or for the expenses thereof, cannot recover either. *Knapp v. United States*, Dev. 132. No implied contract arises between the government and a citizen because the latter, in response to proposals, submitted a stamp similar in design to that invented independently by another, which latter the government adopted. *Fletcher v. United States*, 11 Ct. Cl. 748. The use of a patented machine by an officer of the government without authority of the patentee, does not give the court jurisdiction of an action to recover the profits, though they were for the benefit of the government. *Pitcher v. United States*, 1 Ct. Cl. 7. Neither has it jurisdiction of an action for infringement of a patent. *Id.*

The court has jurisdiction of a claim under the revenue laws, based upon an implied promise to repay money erroneously collected, though there may be another mode of recovery (*Schlesinger v. United States*, 1 Ct. Cl. 16); but see *De Celis v. United States*, 13 Ct. Cl. 117; *Doherty v. United States*, 6 Id. 90; *Nichols v. United States*, 7 Wall. 122, and other cases, *supra*; of an action for salvage services rendered the government (*Bryan v. United States*, 6 Ct. Cl. 128; *McGowan v. United States*, 20 Id. 147); of a claim for money paid under the void judgment of a military commission (*Devlin v. United States*, 12 Ct. Cl. 266); of a claim where an authorized officer of the government, in an emergency, has taken private property into its use (*United States v. Russell*, 13 Wall. 623; 5 Ct. Cl. 121; *Grant v. United States*, 1 Id. 41; see *Hollister v. Benedict Manuf. Co.* 113 U. S. 59, 67); of a claim where a contractor who was ordered to render service turned it over to another contractor, who performed it and brought suit, although the government supposed it was done by the contractor to whom the order was first given (*Wilder v. United States*, 16 Ct. Cl. 528); of a claim for rent where the owner consents to the occupation by agreement or implication, and no adverse claim is set up by the occupant (*Mills v. United States*, 19 Ct. Cl. 79); of a claim on a draft issued by the Treasury Department, and improperly paid there to a third person without authority from, or the indorsement of, the payee (*Buffalo Bayou R. Co. v. United States*, 16 Ct. Cl. 238); of a claim where it being impossible to determine whether work done by a claimant was required by his contract, it was presumed that it was so required (*Crocker v. United States*, 21 Ct. Cl. 255); of a claim where an officer of State militia, by order of a United States officer, under military necessity and for government uses, took private property, the government paying the expenses, and being held liable also for the property (*Kettler v. United States*, 21 Ct. Cl. 175); of a claim for the act of the cashier and a director of plaintiff in placing plaintiff's money in the treasury of the government to conceal the embezzlement of a government employee, the money being retained by the Treasury officers (*Newton Bank v. United States*, 16 Ct. Cl. 54); of a claim for payment of an illegal tax upon realty, made for the purpose of obtaining possession, including interest on such tax exacted for a period anterior to a legal assessment (*Simons v. United States*, 19 Ct. Cl. 601); of a claim for rent of property occupied by the govern-



ment for military purposes, surrendered in 1865 and re-occupied by it in 1867, rent being paid for a year (*Board of Officers v. United States*, 20 Ct. Cl. 18); of a claim for the proceeds of property illegally seized by government officers and paid into the Treasury (*Thayer v. United States*, 20 Ct. Cl. 137); of a claim by the owner where an officer *de facto* incurred expense in reasonable measures to preserve public property in his charge (*Holton v. United States*, 15 Ct. Cl. 276); of a claim against the government for appropriating and using private property (*Hersch v. United States*, 15 Ct. Cl. 385); of a claim where private property is taken by government officers by virtue of a statute, for public use, although regular proceedings for its condemnation were not taken (*United States v. Great Falls Manuf. Co.*, 112 U. S. 645; 16 Ct. Cl. 160); of a claim for occupancy by the government of land which is private property (*Johnson v. United States*, 4 Ct. Cl. 248); of a claim where one has delivered property in pursuance of an express contract, which is void (*Heathfield v. United States*, 8 Ct. Cl. 213); of a claim for money of an innocent person paid into the Treasury by a fraud perpetrated by the agent of the government (*United States v. State Bank*, 96 U. S. 30; see 114 U. S. 401; 20 Ct. Cl. 537; 17 Id. 329); of a claim where property leased by the government is damaged by the want of a reasonable care while in its possession (*United States v. Bostwick*, 94 U. S. 53; 13 Ct. Cl. 67; 9 Id. 479); of a claim for holding money belonging to a bank on account of a tax on national banks, the same being invalid or having been remitted (*Johnston v. United States*, 17 Ct. Cl. 157); of a claim for money paid under protest for internal revenue taxes, and extorted without color of right. *Boehm v. United States*, 20 Ct. Cl. 241.

The court has *not* jurisdiction of a suit for the act of a government officer in seizing buildings of a citizen for the use of an Indian agency, under a claim that they are the property of the government (*Langford v. United States*, 101 U. S. 341; 12 Ct. Cl. 338); of an action by one who has paid an officer of the government money for the purpose of influencing his official action to recover such money after it has been seized and found its way into the Treasury (*Clark v. United States*, 12 Ct. Cl. 597; 102 U. S. 322; 99 Id. 493); of an action to recover fees by witnesses who attend before congressional committees, in the absence of a statute allowing them (*Lilley v. United States*, 14 Ct. Cl. 539); of an action for rent where the government occupies property to which it asserts title (*Kinhead v. United States*, 18 Ct. Cl. 504); of an action for voluntary military services rendered by a civilian, unless there has been a direct user which imports an acceptance (*Carroll v. United States*, 20 Ct. Cl. 426); of an action against the government for the unauthorized acts of its officers, being torts (*Gibbons v. United States*, 8 Wall. 269; 2 Ct. Cl. 421); of a claim against the government for a marine tort. (*Dennis v. United States*, 2 Ct. Cl. 210); of an action by a contractor for extra work, with knowledge that he must look to Congress for compensation (*Merchants' Co. v. United States*, 15 Ct. Cl. 270); of a claim for services to the government without its knowledge or request, no benefit accruing to it (*Utica Ry. Co. v. United States*, 22 Ct. Cl. 265); so where an officer of the government is properly assigned to the work of devising something to be used in the public service, the government meeting the expenses and paying the officer his usual salary, the government is not liable for royalty on the invention, though it was made by the officer previous to the time he was assigned to the work, if the labor and expense of perfecting were borne by the former. *Solomons v. United States*, 22 Ct. Cl. 335. The court has not jurisdiction of a claim for rent for the use of real property seized by military officers in the insurrectionary States during the war, though such use continued after peace. *Dykes v. United States*, 16 Ct. Cl. 289.

"*All claims which may be referred to it by either House of Congress.*"—A claim against the District of Columbia cannot be referred by one House of Congress. *Strachan v. District of Columbia*, 20 Ct. Cl. 484. The jurisdiction of the court over cases referred to it by one House is subject to provisions of general statutes of limitation regulating that jurisdiction. *Ford v. United States*, 116 U. S. 213; 19 Ct. Cl. 519, 596. See *Webb v.*



United States, 20 Ct. Cl. 487. There is a difference between the transmission of a claim under § 1060 and reference under this section. The Bowman Act is not inconsistent herewith; the jurisdictions are different, and this section is not repealed by that act. *Id.* Reference hereunder gives the privilege of suing the government, but does not create a new cause of action. *Id.* The court cannot allow a claim for the refunding of internal revenue taxes rejected by the Commissioner, and the reference by one House of Congress does not give jurisdiction. *Boehm v. United States*, 21 Ct. Cl. 290. See *Vigo's Case*, 21 Wall. 650. Where a claim has been referred to a special tribunal and dismissed, and then taken to the court and dismissed for want of jurisdiction, a joint resolution of Congress referring it back to the court does not allow it to consider the claim upon the merits regardless of the dismissal by the special tribunal. *Meade v. United States*, 9 Wall. 691, 2 Ct. Cl. 224. All claims referred are subject to the restrictions of the resolution. *Ex parte Atocha*, 17 Wall. 439; 9 Ct. Cl. 38; 8 *Id.* 427; *De Groot v. United States*, 5 Wall. 419; 7 Ct. Cl. 2; 1 *Id.* 97; *Roberts v. United States*, 92 U. S. 41; 11 Ct. Cl. 98; 6 *Id.* 84; *Harvey v. United States*, 12 *Id.* 141; 13 *Id.* 322. There is nothing in the Tucker Act as to the reference of claims, but other language is used. There is also a proviso excepting "war" and rejected claims. See *supra*.

*Second.* — By 18 St. 481, ch. 149, the amount of a debt due the United States is to be withheld by the Secretary of the Treasury in paying judgments or claims against the United States; if the claimant assents to a set-off, a discharge is to be given to him; if not, an additional amount is to be held to cover costs, &c., and the Secretary is to bring suit. If the judgment is against the United States, or the amount recovered is less than that withheld, the balance is to be paid to the plaintiff with six per cent interest. *United States v. Jones*, 119 U. S. 480; *United States v. Griswold*, 12 Sawyer, 398; 30 F. R. 606. *Bonnafon v. United States*, 14 Ct. Cl. 484.

"*All set-offs, counter-claims,*" &c. — After due allowance of a claim and payment of a part to the assignees of the claimant, upon his receipt in full, the government, when sued for the balance, cannot set up as a counter-claim the amount so paid on the ground that the assignment was irregularly executed. *McKnight v. United States*, 98 U. S. 179; 13 Ct. Cl. 292. The claimant being indebted as surety on an official bond given to the United States, the amount not paid was properly kept by the Treasury as a set-off to abide the settlement of the principal's account. *Id.* Unless the government pleads its set-off or counter-claim, or moves for a new trial, it cannot, after judgment against it, set up and deduct the amount it claims. *United States v. O'Grady*, 22 Wall. 641; 8 Ct. Cl. 451. A claim of the government against an insolvent for the proceeds of securities illegally converted to his use may be set off against a demand by his general assignee in insolvency on account of property of the debtor sold to it. *Allen v. United States*, 17 Wall. 207; 5 Ct. Cl. 339. If an action is brought on a judgment against the government by the owner of cotton, the tax imposed thereon by 13 St. 16, though not assessed may be set off. *Bonnafon v. United States*, 14 Ct. Cl. 484. The Supreme Court having ruled (*Allen v. United States*, *supra*) that this clause authorizes the court to hear and determine demands of the government of every kind against the claimant, or those whom he represents, whether liquidated or unliquidated, and to set off the amount found due the United States, it is competent for the government to take an assignment from A., against whom it has recovered judgment, of a judgment against B., and set it off in a suit brought by B. upon an award of Congress, notwithstanding B. assigned his award to M., the party claimant, provided the set-off was acquired before notice of the assignment. *Macauley v. United States*, 11 Ct. Cl. 693. Where through the mistake of an officer, the government failed to collect the tax on property released to the owner free from taxes, it was held in a suit by the owner for the proceeds of property withheld by the officer in the same transaction, that the government could set off the tax on the property released, but not on that retained.



*Roman v. United States*, 11 Ct. Cl. 761. In a suit by an army officer for his pay, the income-tax cannot be set off. *Jones v. United States*, 4 Ct. Cl. 197. This and §§ 1060, 1061, are not in conflict with the Seventh Amendment to the Constitution. *McElrath v. United States*, 102 U. S. 426; 12 Ct. Cl. 201, 312. Where an officer of the Navy, upon a settlement of his accounts, announced that he would not be concluded thereby, and sued for the balance alleged to be due, it was held that the government was not bound by the settlement, and could obtain judgment for moneys improperly paid him in pursuance thereof. *Id.* The government, not being liable for injury, &c., to private property through military operations, cannot offset the cost of rebuilding railroad bridges destroyed by either of the armies in the civil war, their rebuilding being a military necessity, without contract with the owner or request from him. *United States v. Pacific Railroad*, 120 U. S. 227; reversing 20 Ct. Cl. 200. If payments have been made in good faith, with knowledge of all the facts, on a contract providing for greater compensation than the government officer was authorized to allow, they cannot be allowed as a counter-claim in an action upon the claim in which they were made. *Arthur v. United States*, 16 Ct. Cl. 422. If an officer occupies two separate and distinct positions, and Congress has directed that he be released from liability on account of a balance due in one capacity, no deduction can be made from a sum due him in another capacity on account of such balance. *Hall v. United States*, 17 Ct. Cl. 39. If a special law has released contractors from all liability and directed the discontinuance of an action, there is nothing for the government to set up as a counter-claim in another court. *Henegan v. United States*, 17 Ct. Cl. 273. If the court has no jurisdiction of an action against the District of Columbia, it has no jurisdiction of a set-off against the claimant, arising out of another cause of action. *Looney v. District of Columbia*, 18 Ct. Cl. 8; 19 *Id.* 230; 113 U. S. 258. Where old material has been unlawfully turned over to one who had made a contract to render services for the government, void under § 3744, a counter-claim for its full value may be maintained. *Steele v. United States*, 19 Ct. Cl. 181; 113 U. S. 128. Money paid on a fraudulent voucher may be recovered as a counter-claim. *Charles v. United States*, 19 Ct. Cl. 316. An army officer illegally placed on the retired list, and holding his position in good faith, cannot be required to return money received as compensation; otherwise, where one simply claims to be an officer, and renders the government no service. *Miller v. United States*, 19 Ct. Cl. 338. See *Montgomery v. United States*, *Id.* 370; *McBlair v. United States*, *Id.* 528. If a special statute for the relief of certain claimants directs a designated deduction, another set-off cannot be allowed. *Ely v. United States*, 19 Ct. Cl. 658. Where a claim is prosecuted by a firm of three, the government cannot set off a judgment against two of them. *Boehm v. United States*, 20 Ct. Cl. 142. Ordinarily, a tax may be set up as a counter-claim, but not where the assets of an insolvent bank are in the hands of the comptroller, and the government must share with other creditors. *Jackson v. United States*, 20 Ct. Cl. 298. If the failure to perform contract work resulted from doing extra work ordered by the defendants, each party contributing to the delay, a counter-claim for damages from the failure cannot be set up. *Crocker v. United States*, 21 Ct. Cl. 255. If the claim is dismissed for want of jurisdiction, the counter-claim goes with it. *Boehm v. United States*, 21 Ct. Cl. 290. In an action by an officer for a pay-account balance, an alleged overpayment may be set up as a counter-claim. *United States v. Burchard*, 125 U. S. 176; 19 Ct. Cl. 137. Where citizens of a State neglected to pay their proportion of a general tax, *held* that the unpaid balance could not be set off against a debt due by the government to the State. *Louisiana v. United States*, 22 Ct. Cl. 284. A debtor to the United States cannot evade liability to a judgment by consigning his property to a factor and obtaining advances. *United States v. Villalonga*, 23 Wall. 35; 8 Ct. Cl. 452; 10 *Id.* 428. Authorizing the Attorney-General to defend the District like the United States, and "with the same power to interpose counter-claims," is as if it



contained the language of this and § 1061. *Neitzey v. District of Columbia*, 17 Ct. Cl. 111; *Brown v. District of Columbia*, Id. 420; *Looney v. District of Columbia*, 19 Id. 230; 18 Id. 8; 113 U. S. 258; *Betts v. District of Columbia*, 20 Ct. Cl. 445. See *Tucker Act*, §§ 1, 2.

*Third.*—There is no section in the *Tucker Act* exactly corresponding to this. The rules regulating appeals from the Court of Claims are not dispensed with by this section. *United States v. Clark*, 94 U. S. 75; 11 Ct. Cl. 698. It is both prospective and retroactive. *Glenn v. United States*, 4 Ct. Cl. 510. It is not intended to afford relief “against losses suffered by the officer through forgeries committed by his employees or others, for which he would in law be entitled to recover against both the forger and the depository who paid the forged checks.” *Hall v. United States*, 9 Ct. Cl. 270, 274. This act is not limited to officers of the army and navy; it extends to disbursing officers of the executive departments. *Hobbs v. United States*, 17 Ct. Cl. 189. See *Malone v. United States*, 5 Id. 486. That the United States is not bound by a settlement of accounts by accounting officers, see *McElrath v. United States*, 102 U. S. 426.

“We think it is a principle of general application, that so long as a party who has a cause of action delays to enforce it in a legal tribunal, so long will any legal defence to that action be protected from the bar of the lapse of time, provided it is not a cross-demand in the nature of an independent cause of action.” *United States v. Clark*, 96 U. S. 43; 11 Ct. Cl. 698. But an independent action for relief after the money lost has been paid to the government, must be brought within six years. *United States v. Smith*, 105 U. S. 620; 14 Ct. Cl. 114. See notes, § 1062.

*Fourth.* By 18 St. 318, ch. 80, the jurisdiction “shall not extend to any claim against the United States growing out of the destruction or appropriation of, or damage to, property by the Army or Navy engaged in suppression of the Rebellion.” Claimants under St. 1863 are not deprived of its benefits because of aid and comfort *not* voluntarily given. *United States v. Padelford*, 9 Wall. 531; 4 Ct. Cl. 316. But aid and comfort are voluntarily given when one voluntarily becomes surety on the official bond of a personal friend. *United States v. Padelford*, *supra*. To constitute a capture there must have been an actual seizure in obedience to orders. *United States v. Padelford*, *supra*, pp. 539–543. To maintain an action under the above statute the property must have been captured, seized, or sold and the proceeds paid into the Treasury. *Spencer v. United States*, 91 U. S. 577; 11 Ct. Cl. 181; 8 Id. 288. For the right of a subject of Great Britain to bring suit for the proceeds of captured and abandoned cotton, see *United States v. O’Keefe*, 11 Wall. 178; 5 Ct. Cl. 674. Under the acts of 1863 and 1864 a claim for the proceeds of captured property sold without judicial condemnation between July 17, 1862, and March 12, 1863, may be recovered, if accounted for and credited to the fund. *United States v. Pugh*, 99 U. S. 265; 14 Ct. Cl. 591, and cases cited. The statutes of 1863 and 1864 are *in pari materia*. *Moore v. United States*, 10 Ct. Cl. 375. There is no right to recover for property captured before July 17, 1862. Id. A loyal citizen may recover Treasury notes advanced by him during the Rebellion to satisfy another’s mortgage and seized and turned over to the Treasury. *Mezeix v. United States*, 6 Ct. Cl. 232. The confiscation act of 1862 was not repealed by that of 1863. Hence where property was seized on land by naval forces, before the enactment of the latter, and was afterwards held under its provisions, the proceeds might be recovered, a court of admiralty being without jurisdiction. *United States v. Winchester*, 99 U. S. 372; 14 Ct. Cl. 13. The act of 1868 (15 St. 243), ch. 276, § 3, which declares the intent and meaning of the statute of March 12, 1863, is treated in *Lamar v. McCulloch*, 115 U. S. 163. A person who did give aid and comfort to the Rebellion and who was pardoned after two years from its suppression, cannot then obtain the benefit of the act of 1863. *Haycraft v. United States*, 22 Wall. 81; 8 Ct. Cl. 483. The petition must be so drawn as to make out a case.



*Pugh v. United States*, 13 Wall. 633; 5 Ct. Cl. 113. A party need not prove, in addition to his own loyalty, that of the persons from whom he bought the property taken and sold. *United States v. Anderson*, 9 Wall. 56; 4 Ct. Cl. 467. The burden of proof is on the claimant. *United States v. Ross*, 92 U. S. 281; 10 Ct. Cl. 424; *Spencer v. United States*, *supra*. As to the right of recovery when the facts proved tend generally to show that the property was sold and the proceeds paid into the Treasury, see *United States v. Crusell*, 14 Wall. 1; 4 Ct. Cl. 533. See also *Intermingled Cotton Cases*, 92 U. S. 651; *Jenkins v. United States*, 8 Ct. Cl. 464; *Silvey v. United States*, 4 Id. 490; 7 Id. 278, 305; *Johnson v. United States*, 14 Id. 276; *Sharp v. United States*, 12 Id. 638; *Cones v. United States*, 8 Id. 329, 421. An officer's expenditure of the proceeds, approved by the Treasury officers, is equivalent to receipt of the money in the Treasury. *Fluker v. United States*, 14 Ct. Cl. 252; *Hudnall v. United States*, 3 Id. 291. The fourth clause of this section does not repeal the jurisdictional limit in 12 St. 820, nor attach to cases under that act the statute of limitations. *Wade v. United States*, 21 Ct. Cl. 141. To make the government liable, the proceeds must reach the Treasury in some form. *Irvine v. United States*, 18 Ct. Cl. 615. Where confiscation proceedings were unauthorized, money which went into the Treasury may be recovered though paid out, such payment being unauthorized. *Duncan v. United States*, 18 Ct. Cl. 230. As cases under this section and 18 St. 318, *supra*, now less frequently arise, we cite, without abstracts of the opinions, the following cases, most of which were decided soon after the war: *United States v. Villalonga*, 23 Wall. 35; 8 Ct. Cl. 452; *Slawson v. United States*, 16 Wall. 310; 6 Ct. Cl. 370; 4 Id. 87; *United States v. Kimbal*, 13 Wall. 636; 5 Ct. Cl. 252; *Bishop v. United States*, 4 Id. 448; *Lindsley v. United States*, Id. 359; *Filor v. United States*, 9 Wall. 45; 3 Ct. Cl. 25; *Ludington v. United States*, 15 Id. 453; *Patterson v. United States*, 6 Id. 40; *Raines v. United States*, 11 Id. 648; *Dykes v. United States*, 16 Id. 289; *United States v. Russell*, 13 Wall. 623; 5 Ct. Cl. 121; *Brown v. United States*, 6 Id. 171; *Pennsylvania Co. v. United States*, 7 Id. 401; *Bogert v. United States*, 2 Id. 159; 3 Id. 18; *Waters v. United States*, 4 Id. 389; *Radovich v. United States*, 5 Id. 541; *Provine v. United States*, Id. 455; *Clark v. United States*, 1 Id. 145; *Green v. United States*, 18 Id. 93; *Kettler v. United States*, 21 Id. 175.

SECT. 1060. — "There is an important difference between the *transmission* by the Secretary of the Senate or the Clerk of the House of bills and petitions upon which no action is taken, and *referring* claims by a formal resolution of the Senate or House of Representatives, and that difference is provided for in the respective §§ 1059 and 1060, and is recognized in § 1069." *Webb v. United States*, 20 Ct. Cl. 493.

SECT. 1061. — This section does not violate the Seventh Amendment of the Constitution. *McElrath v. United States*, 102 U. S. 440; 12 Ct. Cl. 312. The right to resort to a cross-action against the claimant is as comprehensive as the similar rights given to the Crown by the *Petitions of Right Act*, 1860 (23 and 24 Vict., 17, ch. 34). *Roman v. United States*, 11 Ct. Cl. 762. See *Delancey v. The Queen*, 6 L. R. Exch. R., p. 286. Where the defendants have overpaid a contractor and neglect to give the data thereof, the petition and counter-claim will both be dismissed. *Shrewsbury v. United States*, 13 Ct. Cl. 183. See *Boughton v. United States*, Id. 284. If the Treasury recognizes the void assignment of a claim against the government and pay the amount due thereon, it cannot be recovered. *McKnight v. United States*, 13 Ct. Cl. 312, 313; 98 U. S. 179. See note, § 1059, cl. 2; *Smith v. United States*, 14 Ct. Cl. 189. 21 St. 284, ch. 243, § 3, authorizing the Attorney-General to defend the District like the United States, and "with the same power to interpose counter-claims" is as if it reiterated the provisions as to counter-claims of this and § 1059. *Neitzey v. United States*, 17 Ct. Cl. 124, 125. The evidence must be definite. *Shrewsbury v. United States*, 13 Id. 183, 189. "This statute is broad enough to authorize the Court of Claims, in suits against the United States, to hear and determine demands of the government of every kind against the claimant, or those whom the claim-



ant represents, whether liquidated or unliquidated, and to set off against the claim in suit the amount found in favor of the United States upon such hearing and determination." *Allen v. United States*, 17 Wall. 207, 210.

SECT. 1062. — See notes, §§ 1059, cl. 3, 1069.

"*Without fault or negligence on the part of such officer.*" — These words mean such care and diligence as a prudent man would exercise in the discharge of a high public trust, or in a matter of private interest under similar circumstances. Each case is to be decided upon its own circumstances. *Malone v. United States*, 5 Ct. Cl. 486; *Glenn v. United States*, 4 Id. 501; *Howell v. United States*, 7 Id. 512; *Hall v. United States*, 9 Id. 270; *Holman v. United States*, 11 Id. 642; *Clark v. United States*, Id. 698; *Curtis v. Banker*, 136 Mass. 359. See *Christian v. United States*, 7 Ct. Cl. 431; *Whittelsey v. United States*, 5 Id. 452; *Prime v. United States*, 3 Id. 209; *Murphy v. United States*, Id. 212; *Hobbs v. United States*, 17 Id. 189; *Scott v. United States*, 18 Id. 1; *Hoyle v. United States*, 21 Id. 300. For a private act broader than the language of this and § 1059, see *Reynolds v. United States*, 15 Ct. Cl. 314. "*Decree.*" The use of this word does not make the suit one of equity. *McClure v. United States*, 116 U. S. 150, 151; 17 Ct. Cl. 12.

SECT. 1063. — By 18 St. 75, ch. 285, § 2, the Secretary of the Treasury is to report to Congress claims allowed by the Quartermaster General, Commissary General, and Third Auditor of the Treasury under 13 St. 381; 14 St. 397. The reference by a department without jurisdiction to pay does not give the court jurisdiction. *Hart v. United States*, 118 U. S. 62; 16 Ct. Cl. 459; 15 Id. 414; 12 Id. 319; *Chesapeake R. Co. v. United States*, 20 Ct. Cl. 49. If, after transmission, the claimant does not voluntarily appear and file his petition, the court will, on motion, require him. The court cannot decline jurisdiction if the case comes within the statute; and if two claimants seek to recover for the use of the same property, one cannot resist *in limine* by a plea to the jurisdiction that the title to land is involved. *Bright v. United States*, 6 Ct. Cl. 118; 8 Id. 326. A claim for rent under this section is sufficiently described as that of A. M., if the equitable owner, although the legal title is in his trustee. *Mills v. United States*, 19 Ct. Cl. 79. *Ex parte* affidavits, though usually rejected, will be received if taken by an officer of the government required to make an investigation. *Chickasaw Nation v. United States*, 19 Ct. Cl. 136. The requirement that all vouchers, papers, proofs, &c., shall be sent up with the claim does not affect the rules of evidence or make such papers evidence. *Brannen v. United States*, 20 Ct. Cl. 219. A case involving the right of a claimant to a military bounty land warrant, which has been rejected by the department, is apparently within this clause. *United States v. Alire*, 6 Wall. 573; 1 Ct. Cl. 233. The limitation prescribed by § 1069 cannot be pleaded where a claim has been transmitted under this section. The design of the statute is to secure an adjudication upon the merits. *Winnisimmet Co. v. United States*, 12 Ct. Cl. 319; *Lippitt v. United States*, 100 U. S. 663; 14 Ct. Cl. 148. Neither 13 St. 380 nor 14 St. 57 deprive the Treasury accounting officers of power to settle claims for rent of property held by, and used under, contract during the civil war. If such a claim is presented to the department within six years after the cause of action accrued, and the department has jurisdiction, it may be referred to the court at any time thereafter. *Green v. United States*, 18 Ct. Cl. 93; *McClure v. United States*, 19 Id. 18. "The Revised Statutes and the Bowman Act complete a system for the investigation and settlement of all classes of claims, while the system would be inadequate and imperfect under either one without the other." *Webb v. United States*, 20 Ct. Cl. 496. A technical objection to the transmission of a claim will not be entertained. *Mills v. United States*, 19 Ct. Cl. 97. The jurisdiction of the court under the revenue laws is stated in *Campbell v. United States*, 12 Ct. Cl. 470; 107 U. S. 407. It has been held that the claim may be transmitted "after the accounting officers have certified a balance in favor of the claimant. *Delaware River Case*, 5 Ct. Cl. 55; *Winnisimmet Case*, 12 Id. 319. It never could have been intended by Congress that in such



cases the United States were to assume the burden of proof to establish the errors of their accounting officers, instead of requiring claimants to prove their whole case." *McKnight v. United States*, 13 Ct. Cl. 309. See case of *George Chorpenning*, 15 A. G. Op. 19; 94 U. S. 397; 12 Ct. Cl. 710; 11 Id. 625; 13 A. G. Op. 164. See note, § 1069, and see § 5498; *The Bowman Act, supra*; *The Tucker Act, supra*, § 12.

SECT. 1064. — A rule of the court requiring parties before suing therein to present their claims to an executive department is void. *Clyde v. United States*, 13 Wall. 38; 5 Ct. Cl. 134. Claimants must prove their claims although they have been allowed by the accounting officers. *McKnight v. United States*, 13 Ct. Cl. 292; 98 U. S. 179. If one only of two claimants appears, he cannot take judgment by default though the government does not defend. He must show a *prima facie* right to recover, but need not disprove the right of the other claimant. *Bright v. United States*, 8 Ct. Cl. 326. The court will take jurisdiction of an agreed case which the head of a department certifies to be correct and sufficient. *Broulatour v. United States*, 7 Ct. Cl. 555. As to questions of law, see *Amoskeag Co. v. United States*, 6 Id. 99; 17 Wall. 592.

SECT. 1065. — If a judgment creditor of the government chooses to allow a set-off under 18 St. 481, ch. 149, he cannot thereafter sue on his judgment for the balance so set off. If the government has sought to use an independent demand against the claimant by way of set-off, it cannot afterward use it to reduce a judgment in his favor; but if it did not set up such demand, it may avail itself of it as provided in the act referred to. *Bonnafon v. United States*, 14 Ct. Cl. 484. See notes also §§ 825, 1063, 1069.

SECT. 1066. — "The language is comprehensive and explicit. If the cause of action grows out of a treaty stipulation, the court cannot entertain it. If it is *dependent* on any such stipulation, the same result follows." *Great Western Ins. Co. v. United States*, 112 U. S. 197; 19 Ct. Cl. 206; *Alling v. United States*, 114 U. S. 562; 17 Ct. Cl. 311; *Ex parte Atocha*, 17 Wall. 439; 6 Ct. Cl. 69; *Langford v. United States*, 12 Id. 338; 101 U. S. 341; *Kinhead v. United States*, 18 Ct. Cl. 505. A claim against the United States under 22 St. 98, ch. 195, is not one within the meaning of the word "treaty" in this section. *United States v. Weld*, 127 U. S. 51. The court has jurisdiction of a claim for the salary of a consul. *Dainese v. United States*, 15 Ct. Cl. 64. As to whether this section is repealed by the Tucker Act, *quære*, see *United States v. Weld, supra*, p. 57. The restriction is upon cases defined in §§ 1059 and 1063, in which final judgment is entered, and does not apply to the jurisdiction since given by the Bowman Act. *Chickasaw Nation v. United States*, 22 Ct. Cl. 247. As to the bearing of the Tucker Act on this section, see *Id.* pp. 247, 248.

SECT. 1068. — The subjects of Great Britain may sue (*United States v. O'Keefe*, 11 Wall. 178; 5 Ct. Cl. 674; *Carlisle v. United States*, 16 Wall. 147; 6 Ct. Cl. 398); and those of Belgium (*De Give v. United States*, 7 Id. 517); and of France (*Rothschild v. United States*, 6 Id. 204; *Dauphin v. United States*, *Id.* 221); and of Italy (*Frihera v. United States*, 9 Id. 254); and of Prussia (*Brown v. United States*, 5 Id. 571); and of Spain (*Molina v. United States*, 6 Id. 269); and of Switzerland. *Lobsiger v. United States*, 5 Id. 687. A foreign government does not deny the right of an American to sue it by requiring him to give security for costs. *Brown v. United States*, 5 Ct. Cl. 571. An alien who was naturalized before this section was enacted is entitled to prosecute an action begun before he was naturalized. *Bulwinkle v. United States*, 4 Ct. Cl. 395; *Mentz v. United States*, *Id.* 471. And he may prosecute an action begun before this statute was enacted, if he was not an alien when the plea of alienage was put in. *Scharfer v. United States*, 4 Ct. Cl. 529; *Wagner v. United States*, 5 Id. 637.

SECT. 1069. — Claims referred by the head of a department under § 1063 are not affected, if presented for settlement at the proper department within six years after they accrued. *United States v. Lippitt*, 100 U. S. 663; 14 Ct. Cl. 148; *Winnissimmet Co.*



*v. United States*, 12 Id. 319. Suits begun upon claims before this section was enacted were not affected. *Parlin v. United States*, 1 Ct. Cl. 174. Another statute governs suits for the value of captured or abandoned property. *Tibbetts v. United States*, 1 Ct. Cl. 169. An action for money received by the government must be brought within six years after its reception. *Clark v. United States*, 99 U. S. 493; 12 Ct. Cl. 597; *Lawson v. United States*, 14 Id. 332; 101 U. S. 164. This section does not apply to suits to establish a defence under §§ 1059-1062. *United States v. Clark*, 96 U. S. 37; 94 Id. 73; 11 Ct. Cl. 698. If a disbursing officer asks to have money lost allowed in a suit on his bond, the statute does not run until he is held liable by a refusal of the proper officers to give him credit therefor. *Id.* The limitation applies where a disbursing officer robbed of public funds subsequently paid by him filed his petition for relief after six years. *United States v. Smith*, 105 U. S. 620; 14 Ct. Cl. 114; distinguishing *United States v. Clark*, *supra*. Inability to sue by reason of aid the claimant gave the Rebellion does not prevent the running of the statute. *Kendall v. United States*, 107 U. S. 123; 14 Ct. Cl. 122, 374. If one is entitled to a drawback on the surplus from sale of property for taxes under the act of 1861, the statute does not begin to run until demand upon the Secretary of the Treasury therefor. *United States v. Taylor*, 104 U. S. 216; 14 Ct. Cl. 339; *United States v. Cooper*, 120 U. S. 124; 21 Ct. Cl. 510. See *Lawton v. United States*, 18 Id. 595; 110 U. S. 146; *Simons v. United States*, 19 Ct. Cl. 601. This section applies to a special act authorizing jurisdiction of a claim under the abandoned and captured property act, but being silent as to the time within which suit must be brought. The court has no jurisdiction of a claim which accrued more than six years before the petition was filed. The relation of trustee and *cestui que trust* does not exist between the government and the claimant of a fund in the Treasury. *Rice v. United States*, 21 Ct. Cl. 413; 122 U. S. 611. If a debtor admits a certain sum due and denies a larger, the payment of the former cannot be changed by the creditor into a payment on account of the latter so as to prevent the running of the statute. *United States v. Wilder*, 13 Wall. 254; 5 Ct. Cl. 462. The statute begins to run on a claim for services when performed. *Id.*; *Titus v. United States*, 16 Ct. Cl. 276. A claim for property sold must be sued upon within six years after delivery, not from the time when the department refused to allow payment. *Battelle v. United States*, 7 Ct. Cl. 297. An officer whose accounts are settled annually is entitled to the balance due at the end of each fiscal year. *Ellsworth v. United States*, 14 Ct. Cl. 382; 101 U. S. 170; *Bachelor v. United States*, 8 Ct. Cl. 235. The statute cannot be ignored because of equities. *Cross v. United States*, 4 Ct. Cl. 271. It began to run on claims which accrued during the Rebellion in favor of a resident of an insurrectionary State, when the Rebellion was suppressed. *Sierra v. United States*, 9 Ct. Cl. 224; *Kendall v. United States*, *supra*. The claimant's death does not interrupt the statute if the claim accrued during his life. *Sierra v. United States*, *supra*. But if the claimant died before the claim accrued, the statute did not begin to run until the appointment of an administrator. *Fulenweider v. United States*, 9 Ct. Cl. 403. An amendment may be allowed to the petition more than six years after the statute began to run. *Griffin v. United States*, 13 Ct. Cl. 257. If the amendment only increases the *ad damnum*, the limitation does not apply. *Devlin v. United States*, 12 Ct. Cl. 266. The court will take notice of the face of the petition as to the time of filing. *Kendall v. United States*, *supra*. This section differs from ordinary statutes of limitations because it bars the demand instead of applying a prescription to the right of action. *Id.* An action by a State for money received by the government from the sale of swamp lands granted by the act of 1850 is not barred until six years after the amount thereof is ascertained. The court is without jurisdiction of so much of a claim to the proceeds of swamp lands as was credited to the State claiming them on the Treasury books more than six years before suit brought. *United States v. Louisiana*, 127 U. S. 182; 123 Id. 32; 22 Ct. Cl. 85, 284. If the claimant is not under



disability his claim must be sued upon or presented to the proper department within six years after a right of action accrued. No officer can waive the statute, and the court must take notice that the claim is barred, if that appears. *Finn v. United States*, 123 U. S. 227. See *United States v. McDougall*, 121 Id. 89; 21 Ct. Cl. 511. This section applies to claims referred by either house of Congress. *Ford v. United States*, 116 U. S. 213; 21 Ct. Cl. 496; 19 Id. 519, 596. An action is not barred upon a Treasury draft in payment of an account, though not maintainable upon the original cause of action. *Buffalo R. Co. v. United States*, 16 Ct. Cl. 238. See *McKnight v. United States*, 98 U. S. 179; 13 Ct. Cl. 292. If a contract is rescinded and another takes its place, the statute begins to run as to claims accrued under the former when rescinded. *Chandler v. United States*, 17 Ct. Cl. 1. The plaintiff's ignorance of his ability to establish a cause does not prevent the statute from running. *Green v. United States*, 17 Ct. Cl. 174. The statute does not begin against a disbursing officer within §§ 1059 and 1062 until the government officers have stated an account holding him responsible. If there are successive accounts it begins to run from the last. *Hobbs v. United States*, 17 Ct. Cl. 189. In such case there must be an authoritative demand for payment, or a refusal by the accounting officers to credit him with the amount of his loss, to set the statute running. *Scott v. United States*, 18 Ct. Cl. 1. If the statute has begun to run, no subsequently occurring disability interferes with it. *Whitney v. United States*, 18 Ct. Cl. 19. If a claim has been presented to the proper department within six years, it may be referred to the court at any time after the six years have expired. *Green v. United States*, 18 Ct. Cl. 93; *McClure v. United States*, 19 Id. 18. Acknowledgments and promises by executive officers without legislative authority do not prevent the running of the statute. *Leonard v. United States*, 18 Ct. Cl. 382. Pensions unpaid for a series of years are not running accounts so as to make this section inapplicable. Claims which accrued before the claimant's insanity are barred if not presented within six years. *Id.* If an act appropriating money to pay a barred claim allows the claimant to sue under it, it takes the claim out of the statute. *Wray v. United States*, 19 Ct. Cl. 154. The statute does not begin to run on a claim for extra work under a building contract contemplating the same until the contract is performed. *United States v. Gibbons*, 109 U. S. 200; 15 Ct. Cl. 174. If the petition demands compensation for all services under the contract, the statute will not continue to run against items claimed by amendments to it. *Cape Ann Granite Co. v. United States*, 20 Ct. Cl. 1. If a claim is payable on demand, it accrues when demand is made. *Harrison v. United States*, 20 Ct. Cl. 175. The fact that the claim sued upon, which accrued twenty years before, was presented at the department for payment, will not prevent its being barred. *Ihrle v. United States*, 21 Ct. Cl. 216. If the right of action is contingent, the statute does not begin to run until the happening of the contingency. *Louisiana v. United States*, *supra*. Any item in the account of a court commissioner for fees is barred if rendered more than six years before proceedings. 18 St. 333 does not postpone the running of this section until the account is approved. *Patterson v. United States*, 21 Ct. Cl. 322.

SECT. 1070. — The court may not delegate its powers, but may refer cases involving complicated accounts and facts to a special commissioner to state the accounts, marshal the assets, and adjust the losses. *Intermingled Cotton Cases*, 92 U. S. 651. See 2 Ct. Cl. 529. If the claimant's neglect to furnish items makes a reference necessary, he must bear the expense. *Jones v. United States*, 4 Ct. Cl. 197. Where several seek to recover the proceeds of property from a common fund, a reference is proper. *Persons v. United States*, 10 Ct. Cl. 502; *Crowell v. United States*, 6 Id. 23. Exceptions should be taken if a party is not satisfied with the commissioner's findings. *Bright v. United States*, 12 Ct. Cl. 646. Notice should be given the parties of a reference. *Jones v. United States*, *supra*.

SECT. 1072. — A corporation, organized under the laws of a State while in rebellion, for purposes not hostile to the government, may sue under the captured and abandoned prop-



erty act. *United States v. Insurance Cos.*, 22 Wall. 99; 8 Ct. Cl. 449. A *feme covert* who in equity, by the law of domicile, may hold property with or without a trustee, acquired from her husband or otherwise, may sue. *Meriwether v. United States*, 13 Ct. Cl. 259. She may sue in her own name if the laws of domicile permit, where her husband refuses to be a party. *Stanton v. United States*, 4 Ct. Cl. 456. If minors have a guardian in the State of their domicile who is tutrix under the laws of the State where their property is, suit should be brought in the former capacity. *Id.* A principal may sue in his own name though the contract is in that of his agent. *Ramsdell v. United States*, 2 Ct. Cl. 508. Claims cannot be assigned so as to authorize the assignee to sue in his own name. *United States v. Gillis*, 95 U. S. 407; 12 Ct. Cl. 704. An assignee for creditors may sue in the name of his assignor. *Morgan v. United States*, 14 Ct. Cl. 319. In order that the assignor may sue for the use of the assignee the former must verify the petition, or file a warrant of attorney, or prove the assignment. *Silverhill v. United States*, 5 Ct. Cl. 610. But if the assignor dies *pendente lite*, verification by his executrix is sufficient. *Pullen v. United States*, 7 Ct. Cl. 507. A suit in the name of the assignor by an assignee for his own use cannot proceed to judgment without proof of the transfer of the *chose in action*. *Crowell v. United States*, 6 Ct. Cl. 23. Where the assignor and assignee join as co-claimants, the former verifying the petition alleging that the suit is for the assignee, the assignment need not be proven. *Tebbetts v. United States*, 5 Ct. Cl. 607.

One holding a part interest in a claim, to be paid when the warrant is issued, cannot have suit to his use. *Raines v. United States*, 11 Ct. Cl. 648. If the claim of a loyal contractor has been severed from that of his disloyal co-contractor, the former may sue. *United States v. Burns*, 12 Wall. 246; 4 Ct. Cl. 113. The disloyalty of one partner defeats an action by the other. *Schreiner v. United States*, 6 Ct. Cl. 359. A claimant jointly interested must show the extent of his interest. *Headman v. United States*, 5 Ct. Cl. 640. Separate interests cannot be united in one petition. *Wilson v. United States*, 1 Ct. Cl. 318; *Parish v. United States*, *Id.* 345; 8 Wall. 489. Parties who purchased property as individuals, and delivered it to a carrier as joint property, may proceed as joint owners. *Rutherford v. United States*, 8 Ct. Cl. 481. The holder of a draft is not affected by the disability of one who endorsed and passed it before the civil war. *Peirce v. United States*, 1 Ct. Cl. 195. The assignor may repudiate a void assignment and sue in his own name. *Belt v. United States*, 15 Ct. Cl. 92. If the legal title to real property has been "divested out" of the owner, and vested in a trustee authorized to collect past and future rents, the trustee may sue. *Mills v. United States*, 19 Ct. Cl. 79. An action for surplus money from the sale of realty for the non-payment of taxes, where the sale took place during the testator's life, must be brought by the executors; they are the "legal representatives" within the act of 1861. Such money in the Treasury is personalty. *Chaplin v. United States*, 19 Ct. Cl. 424; *Graham v. United States*, 21 *Id.* 47. Where the wife owned realty so sold in South Carolina, an action for the surplus accrued to her husband on her death. *Chisholm v. United States*, 19 Ct. Cl. 435. The executor of the will of a resident of South Carolina, whose property was sold for taxes due the government, is the one to sue for the surplus under a clause in the will directing that if such money should be recovered it should be invested by his son as trustee for his daughter. *Kidder v. United States*, 19 Ct. Cl. 561. The legal owner of realty when sold for taxes is the equitable owner of the surplus, and an executor in possession at the time of sale cannot prosecute a claim for it under 12 St. 304, 422. *Fripp v. United States*, 19 Ct. Cl. 667. A corporation not aiding the Rebellion is not disqualified from suing because its officers, as individuals, rendered aid. *Board of Officers v. United States*, 20 Ct. Cl. 18. But if the enemy controlled a corporation located and operated within its lines, and employed it in carrying on war, it is disqualified. *Chesapeake & Ohio R. Co. v. United States*, 20 Ct. Cl. 49. The word "owner," in 12 St. 292, providing that the surplus of tax sales



shall be paid to the "owner," was intended to include every kind of estate or equity which should rightly entitle a person to the whole or a portion of the surplus. *Rodgers v. United States*, 21 Ct. Cl. 132. A person in the actual possession of property when sold for taxes, under color of title, may sue for the surplus; but if such possession is not shown, the claimant must prove either a complete title in himself or an assessment to him or to those under whom he held, and that he or they paid the tax for a period covered by the Statute of Limitations. *Wilson v. United States*, 21 Ct. Cl. 135. One who owned property when sold for taxes without vacating, no demand being made, is not debarred from recovering the surplus, nothing appearing to show an estoppel. *Paynter v. United States*, 21 Ct. Cl. 221. A contractor who carried the mail in Virginia after she seceded, and before West Virginia was organized, may recover for services under 19 St. 344, 362. *Wilmoth v. United States*, 20 Ct. Cl. 113. Every person having an estate in land sold for taxes is a necessary party to an action for the surplus. *Cuthbert v. United States*, 20 Ct. Cl. 172. A seaman's administrator may sue for his decedent's share of the Japanese indemnity fund under 22 St. 421. *Thompson v. United States*, 20 Ct. Cl. 276. The purchaser of imported goods in bond on July 1, 1883, may maintain an action for the refund under 22 St. 488, ch. 121, § 10, regardless of when or by whom the duty had been paid. *Abbot v. United States*, 20 Ct. Cl. 280. If land sold for taxes after the death of the owner is charged with an unpaid legacy, the legatee may sue for the surplus in the Treasury. *Elliott v. United States*, 20 Ct. Cl. 328.

The provision requiring a denial of any transfer of the claim does not relate to a transfer of the property out of which the claim arose. *Bates v. United States*, 4 Ct. Cl. 569. The case must be set out precisely and clearly. The averments will be construed most strongly against the petitioner. *Merchants' Exchange Co. v. United States*, 1 Ct. Cl. 332; *Guttman v. United States*, 6 Id. 111; 18 Wall. 84. The facts which authorize a recovery must be stated. *Morgan v. United States*, 14 Ct. Cl. 442; *Monk v. United States*, 12 Id. 293. But not the evidence by which they are to be proven. *Noble v. United States*, Dev. 135. If the claim rests upon a statute, it should be referred to. Id. Persons in the Rebellion were not required, after proclamation of pardon, to set forth their loyalty. *Armstrong v. United States*, 13 Wall. 154; 6 Ct. Cl. 226; *Pargoud v. United States*, 13 Wall. 156; 4 Ct. Cl. 337, 349; *White v. United States*, 19 Id. 436. The petition of an alien must show that he has not rendered voluntary aid to the Rebellion. *Hill v. United States*, 8 Ct. Cl. 470. Unless the petition shows a disability, it is insufficient if it shows that the claim accrued more than six years before filing. *Kendall v. United States*, 14 Ct. Cl. 122, 374; 107 U. S. 123.

If the money sued for was illegally exacted, the petition should allege payment under protest. *Schlesinger v. United States*, 1 Ct. Cl. 16; *Nicoll v. United States*, Id. 70; 7 Wall. 122. See also 96 U. S. 567; 107 Id. 407. The relief desired must be stated. *Patterson v. United States*, 6 Ct. Cl. 40. The petition and facts must so nearly correspond that the latter shall not introduce a demand not pleaded. *Baird v. United States*, 8 Ct. Cl. 13; 5 Id. 348. If the claim is one ordinarily settled by a department, the petition must recite application for its adjustment. *Calkins v. United States*, 1 Ct. Cl. 382. An executor need not allege the testator's loyalty; it is sufficient to allege and prove his own. *White v. United States*, 19 Ct. Cl. 436. The rule that assignments of claims are void makes the clause requiring the assignor's loyalty to be alleged, inoperative. Id. If a congressional committee transmits to the court a bill for a claimant's relief, his petition must be confined to setting forth substantially the same cause of action. *Choteau v. United States*, 20 Ct. Cl. 250. In an administrator's action under § 4 of the Bowman act, transmitted by Congress, the loyalty required to be proved is that of the administrator having possession of the supplies or stores, or from whom they were taken. *Newman v. United States*, 21 Ct. Cl. 205. The petition of an officer under 18 St.



333 need not allege that his claim for fees has been presented to the accounting officers. *Ravesies v. United States*, 21 Ct. Cl. 243; *Bryan v. United States*, Id. 249.

New parties cannot be substituted by amendment when not in privity with the original ones. The succession of one corporation to the franchises and property of another creates no privity as to claims not assigned. *Chesapeake & Ohio R. Co. v. United States*, 19 Ct. Cl. 300. A change of parties can only be allowed where no new cause is introduced, and the effect is to substitute one representative for another. *Belloque v. United States*, 8 Ct. Cl. 493. Unnecessary parties may be dropped. *Molina v. United States*, 6 Ct. Cl. 269; *Benton v. United States*, 5 Id. 692; *Roddin v. United States*, 6 Id. 308. The assignor may be substituted for the assignee. *Coté v. United States*, 3 Ct. Cl. 64. And *vice versa* where the assignor becomes bankrupt. *Person v. United States*, 8 Ct. Cl. 543. One under disability may be made a party on removal thereof. *Stanton v. United States*, 4 Ct. Cl. 456. The vendee of the assignee may be substituted, although the claimant had assigned to another prior to bankruptcy. *Burke v. United States*, 13 Ct. Cl. 231. See *United States v. Gillis*, 95 U. S. 407.

If errors have not misled the other party, and may be corrected without injustice, an amendment will be allowed. But amendments introducing a new party not in privity; or a new cause of action; or seeking to enforce a penalty; or misleading the other side; or giving one party an unfair advantage, will be denied. *Thomas v. United States*, 15 Ct. Cl. 335. An amendment showing that the suit is brought in a representative capacity, and that the decedent owned the property claimed, will be allowed. Id. If the petition is indefinite and uncertain, and alleges conclusions of law instead of averments of fact, the defendant should move that it be conformed to the rules of court. *Burt v. United States*, 19 Ct. Cl. 120. A defective petition may be amended. *Jones v. United States* 1 Ct. Cl. 383. But not without leave. *Shaw v. United States*, 9 Ct. Cl. 301. If a case is remanded for further proof, and the order specifies the amendment allowed, further leave need not be applied for. Id. An amendment may be allowed showing that the action is being partly carried on for another than the petitioner. Id. A petition by joint owners may be so amended as to ask for separate judgments. *Mott v. United States*, 3 Ct. Cl. 218. For a case where the claimant was not held to strict technical rules of pleading, see *United States v. Behan*, 110 U. S. 338, 347; 18 Ct. Cl. 687.

A petition which is not verified may be corrected. *Griffin v. United States*, 13 Ct. Cl. 257. The government waives a verification by filing a general traverse to an unverified petition. Id.

Leave will be given the government to plead specially to the allegations of loyalty after issue joined. *Peirce v. United States*, 1 Ct. Cl. 195. A plea is bad for duplicity which sets up a recovery in a previous action, and objects that the cause of action now sued upon accrued prior to the trial of such action and might have been tried therein. *Shrewsbury v. United States*, 9 Ct. Cl. 263. An objection to the right of the petitioner's action should be raised by demurrer or plea; if it is to the jurisdiction only, it should be by plea. *Pennsylvania Co. v. United States*, 7 Ct. Cl. 401. A traverse makes it necessary for the petitioner to prove all material allegations. *Calkins v. United States*, 1 Ct. Cl. 382. Matters in the petition, not denied in the traverse, are presumed to be true. *Hill v. United States*, 8 Ct. Cl. 470. *United States v. Insurance Cos.*, 22 Wall. 99; 8 Ct. Cl. 449. Special rules of pleading do not bind the court; but allegations and proof must so correspond as to enable the defendant to plead *res judicata*. *Little v. United States*, 19 Ct. Cl. 323.

Where property intermingled and stored was sold, and the proceeds were paid into the Treasury as a common fund, held that the rights of the several claimants might be determined in one action. *Intermingled Cotton Cases*, 92 U. S. 651; *Woodruff v. United States*, 4 Ct. Cl. 486. A suit for the net proceeds of captured property cannot be consolidated with one for work and services in saving and transporting it under a contract pro-



viding that the compensation should be one-fourth of the proceeds. *Woodruff v. United States*, 5 Ct. Cl. 645. Suits by different persons for the proceeds of the same property will be consolidated. *Turner v. United States*, 2 Ct. Cl. 390; *Mezeix v. United States*, 6 Id. 232. Where the claim is referred by Congress, one who claims as assignee cannot intervene unless the act making the reference permits. *Atocha v. United States*, 6 Ct. Cl. 90. A partner cannot intervene where the firm claims the same property. *Belloque v. United States*, 8 Ct. Cl. 493. If services are rendered under the contract sued upon subsequent to the commencement of suit and are brought into the case by consent, the whole matter will be disposed of as if a single cause of action. *Cape Ann Granite Co. v. United States*, 20 Ct. Cl. 1. For a special statute making verification a jurisdictional verification, see *Cherokee Indians v. Cherokee Nation*, 19 Ct. Cl. 35. See Tucker Act, §§ 5, 6; notes § 1059, Fourth. Many of the above cases arose under the Captured and Abandoned Property Act.

SECT. 1073. — See notes § 1072, Tucker Act, §§ 5, 6.

SECT. 1074. — This section does not impose more stringent conditions than did the act of 1863. The aid or comfort contemplated by both is such as imposes forfeiture of property, outlawry from the courts, deprivation of rights of loyal men, and the stigma of at least incipient treason. The acts must have been purposely committed to aid and promote the Rebellion, or from other improper motives. *Grossmeyer v. United States*, 4 Ct. Cl. 1, 12; 9 Wall. 72. Any acts voluntarily committed, tending to assist, &c., the Rebellion, bar recovery. To recover it must appear that such acts were abstained from during the entire war. *Bond v. United States*, 2 Ct. Cl. 529; *Bates v. United States*, 4 Id. 569, 578. One who voluntarily, through friendship, signed the bonds of rebel officers, gave aid or comfort to the Rebellion. *United States v. Padelford*, 9 Wall. 531; 4 Ct. Cl. 316. Under the act of 1863, providing that any person claiming the ownership of property should recover on proof of never having given aid or comfort to the Rebellion, where the property was taken after the decedent's death and from his administrator, the latter was held to be the owner within the meaning of the law. *Carroll v. United States*, 13 Wall. 151; 5 Ct. Cl. 620. A trustee must prove the loyalty of the beneficiaries, not his own. *Stoddart v. United States*, 6 Ct. Cl. 340. One who professed to be loyal, and served in defence of Richmond, standing guard over Union prisoners under a general order, is within this clause. *Kuper v. United States*, 3 Ct. Cl. 74. Aid or comfort was given by an alien domiciled in the United States who manufactured saltpetre in an insurrectionary State and sold it to the Confederates, knowing it was to be used in the manufacture of gunpowder for the war. *Carlisle v. United States*, 16 Wall. 147; 6 Ct. Cl. 398. One who purchased property in good faith may recover the proceeds on proof of loyalty, though that of his vendor is not proven. *United States v. Anderson*, 9 Wall. 56; 4 Ct. Cl. 467. See notes, § 1072.

If the claimant took the oath of amnesty and was within the terms of the President's pardon, proof of loyalty need not be made. *United States v. Padelford*, *supra*; *United States v. Klein*, 13 Wall. 128; 4 Ct. Cl. 559. *Armstrong v. United States*, 13 Wall. 154; 5 Ct. Cl. 623. *Pargoud v. United States*, 13 Wall. 156; *Carlisle v. United States*, *supra*. The proclamation of pardon is taken notice of by all courts. *Armstrong v. United States*, *supra*. An alien domiciled within the United States during the Rebellion was included in the proclamation. *Carlisle v. United States*, *supra*. Compliance with a conditional pardon must be proven. *Haym v. United States*, 7 Ct. Cl. 443; *Waring v. United States*, Id. 501. The death of the owner of the property claimed prior to the proclamation does not relieve his representative from proving the decedent's loyalty. *Meldrim v. United States*, 7 Ct. Cl. 595.

The nature of proof required by prior statutes is not materially changed by this. *United States v. Padelford*, *supra*. An alien need only prove that he was neutral. *Rothschields v. United States*, 6 Ct. Cl. 204, 218. Slight evidence will establish the loyalty of a colored



citizen resident in the South during the war. *Thomas v. United States*, 3 Ct. Cl. 52; *Dereef v. United States*, Id. 163. An alien is not prevented from recovering by proof of interest in a blockade adventure, it not appearing that an attempt to accomplish the purpose was made. *Hill v. United States*, 8 Ct. Cl. 470.

SECT. 1076. — This does not include the power to call for acknowledgments or promises to take a claim out of the statute of limitations. The replies which may be made cannot admit away or waive any defence, nor give a cause of action not possessed. *Leonard v. United States*, 18 Ct. Cl. 382. A return by the head of a department that the furnishing information or papers would, in his opinion, be injurious to the public interest, is a sufficient answer to the rule. 13 A. G. Op. 539.

SECT. 1079. — This section is repealed by § 8 of the Tucker Act. For cases thereon before the repeal, see *Hubbell v. United States*, 4 Ct. Cl. 37; *Waters v. United States*, Id. 389; *Hebrew Congregation v. United States*, 6 Id. 241; *Wood v. United States*, 10 Id. 395; *Macauley v. United States*, 11 Id. 575; *Kellogg Bridge Co. v. United States*, 15 Id. 111; *Merchants Ex. Co. v. United States*, Id. 270; *Henegan v. United States*, 17 Id. 155; *Kulb v. United States*, 18 Id. 40; *Bofinger v. United States*, Id. 148; *Lawrence v. United States*, 8 Id. 256; *Hoyle v. United States*, 21 Id. 300; *United States v. Clark*, 96 U. S. 37; 94 Id. 73; 11 Ct. Cl. 698; *United States v. Anderson*, *supra*; *Bradley v. United States*, 104 U. S. 442; 12 Ct. Cl. 578; *McClure v. United States*, 116 U. S. 150; 17 Ct. Cl. 12. See *Cornett v. Williams*, 20 Wall. 226. For the legislative history of this and the next section, see *Atchison R. R. Co. v. United States*, 15 Ct. Cl. 1. See also § 858, note.

SECT. 1080. — The right cannot be extended to the examination of any but the claimant. He is responsible only for his own non-attendance, and the case can be enjoined only because of his refusal to testify. *Macauley v. United States*, *supra*; *Atchison R. Co. v. United States*, *supra*. This section authorizes a general examination, and also the consideration of the results of such examination, regardless of common-law rules or evidence, should the government offer them. These powers are distinct, and may be used for different purposes. Id. A corporation claimant may be required to produce its officers for examination as under a bill of discovery. Id. The court will exercise the powers of an equity court to prevent abuse of examination. Id. See Tucker Act, § 8.

SECT. 1082. — The court issues writs to every part of the country. It is not a court "in the District of Columbia," but a court of the United States for the United States, and for no particular State or district. *Jones v. United States*, 1 Ct. Cl. 398; *Sykes v. United States*, 8 Id. 330.

SECT. 1083. — This section governs as to rules of evidence applicable to all cases reported under the Bowman Act. *Ex parte* affidavits filed with a committee of Congress and transmitted with the claim are inadmissible. *Smith v. United States*, 19 Ct. Cl. 690.

SECT. 1086. — If the defendant has secured a new trial the court will find the facts concerning fraud established by its evidence, though the original judgment has been paid and the claimant does not appear. *Peychaud v. United States*, 16 Ct. Cl. 601. The form of judgment in such case prescribed. Id. See *United States v. Moore*, 3 MacArthur, 233.

SECT. 1087. — It having been held that the rule prescribed by § 9 of the cited act of 1855 for determining when a new trial may be granted to an unsuccessful claimant, was still in force, although the confirmation by Congress, with which it was there connected, was done away, it is stated in the form of an affirmative power, according to the method of § 17 of the judiciary act, giving power to grant new trials. 1 Com. D. 559. The court may grant a new trial after an appeal, if it has the record. *Roberts v. United State*, 92 U. S. 41; 15 Wall. 384; 6 Ct. Cl. 84. If the court is without jurisdiction an order dismissing a case for *non pros.* will not be set aside. *Garcia v. United States*, 14 Ct. Cl. 121. New trials will not be granted unless good cause at common law or in chancery is shown.



Mistakes and inadvertence of counsel in bringing all the evidence in the record to the court's attention is not good cause. Motions analogous to motions to set aside a verdict because contrary to the weight of evidence will not be allowed as matter of right. *Calhoun v. United States*, 14 Ct. Cl. 193. A motion to open a judgment will be denied if not made with diligence, as after three years. *Figh v. United States*, 3 Ct. Cl. 97. The fact that the amount involved in a cause precludes an appeal is no reason for a new trial. *Deeson v. United States*, 6 Ct. Cl. 227. Unless the court is confident of a different result on a second trial, it will not be granted, though the claimant was insane at the first trial and has been restored to health. *Bramhall v. United States*, 6 Ct. Cl. 238. A new trial will not be granted because a party failed to communicate to his attorney essential evidence. *Armstrong v. United States*, 6 Ct. Cl. 226. If due diligence would have discovered the evidence before the first trial a new trial will not be granted because of the party's ability to produce it. *Garrison v. United States*, 2 Ct. Cl. 382; 7 Wall. 688. A rehearing on a point presented and considered in the argument and disposition of the case will not be granted unless desired by one of the judges who rendered judgment. *Fendall v. United States*, 12 Ct. Cl. 305. If the claimant's affidavit on a motion shows that the witnesses on whom he relies are in the government employ, he may be excused for not presenting their affidavits. *Murphy v. United States*, 15 Ct. Cl. 217. To obtain a new trial for newly discovered evidence, the moving party must show that it has come to his knowledge since the trial; that it was not owing to want of diligence that it did not come sooner; that it is so material as to probably produce a different verdict if a new trial should be granted; that it is not cumulative; that it is not merely such as impeaches the character or credit of a witness. *Silvey v. United States*, 7 Ct. Cl. 308; *Payan v. United States*, 15 Id. 56. An expectation that a more elaborate discussion may produce a different result is not ground for a new trial; neither is the omission of the court to find a fact which, if found, would not control the case. *Rhine v. United States*, 15 Ct. Cl. 59. If a motion is substantially in accordance with the rules stated in *Silvey v. United States*, *supra*, it will be granted. *Johnson v. United States*, 15 Ct. Cl. 62. If it appears that newly discovered evidence may change the basis of the judgment and entitle the party to a review on the law, a new trial may be granted. *Murphy v. United States*, *supra*. If a motion because of newly-discovered evidence appeals to the court's sense of justice, and shows the existence of strong *prima facie* reasons for doubting the correctness of a finding, a rehearing will be granted on that point. *Murphy v. United States*, *supra*. If a case has been dismissed for want of prosecution it will not be reinstated unless the petition states a cause of action. *Whitney v. United States*, 18 Ct. Cl. 19; *Flores v. United States*, Id. 352; *Wade v. United States*, 21 Id. 141. It must appear that the party has something new to offer. *Roche v. District of Columbia*, 18 Ct. Cl. 289; *Power v. United States*, Id. 493.

SECT. 1088. — The words "final disposition" mean the final determination on appeal if taken, or if none, then its final determination in the Court of Claims. *Ex parte Russell*, 13 Wall. 664. A new trial may be granted, if moved for within two years, though the judgment of the court has been affirmed and the mandate of affirmance filed. *Ex parte United States*, 16 Wall. 699. A motion for a new trial may be made while an appeal is pending in the Supreme Court. That court will not dismiss an appeal because of such motion. But otherwise, if the motion is granted and a new trial ordered. *United States v. Ayres*, 9 Wall. 608; 5 Ct. Cl. 712; *United States v. Young*, 94 U. S. 258; 9 Ct. Cl. 431; 12 Id. 129. It is for the Court of Claims to determine whether or not the motion for a new trial was made in time. *United States v. Crusell*, 12 Wall. 175; 7 Ct. Cl. 204; 4 Id. 533. And its decision is not subject to review if it has jurisdiction to act. *Young v. United States*, 95 U. S. 641; 13 Ct. Cl. 518. It is not necessary that the motion should be disposed of within two years. *Belloq v. United States*, 13 Ct. Cl. 195. After an



appeal the court cannot grant a new trial upon the common-law rights of suitors. *Ford v. United States*, 18 Ct. Cl. 62.

A new case must be made involving fraud or other wrong upon the government. The right is analogous to a bill of review in chancery to set aside a former decree, or a bill impeaching a decree for fraud. *Ex parte Russell*, *supra*. Neither the lack of diligence nor the *laches* of the officers of government is sufficient ground for a new trial. *Child v. United States*, 6 Ct. Cl. 44. The decision in *Silvey v. United States*, 7 Ct. Cl. 305, is overruled as to the measure of diligence required by the government, and the dissenting opinion in that case is declared to be the law in *Ford v. United States*, 18 Ct. Cl. 70. A new trial will be granted if it appears *prima facie* that a wrong has been done the government. *Douglas v. United States*, 11 Ct. Cl. 655; *Ayers v. United States*, 5 Id. 712; 9 Wall. 608; *Tait v. United States*, 5 Ct. Cl. 638. The statute does not require formal evidence to support a motion. *Ex parte* testimony ordinarily admitted on the hearing of such motions is sufficient. *Ayers v. United States*, *supra*. It is fraud, wrong, or injustice for a claimant who participated in the Rebellion to conceal the fact from the court while proving loyalty. *Tait v. United States*, *supra*. An error of law which may be corrected on appeal is not ground for a new trial. *Ealer v. United States*, 5 Ct. Cl. 708. A second motion on the same grounds as the former will not be allowed. *Child v. United States*, *supra*. "May," as here used, means "shall." It does not give the court a discretion, but a power, and it must be exercised whenever a *prima facie* case is shown. No conditions can be attached to the right. *Henry v. United States*, 15 Ct. Cl. 162. A new trial cannot be granted after appeal unless wrong and injustice have been done. When a motion is made for a new trial for newly discovered evidence, it is enough to show injustice, and that the newly discovered evidence was not known to the Attorney-General and his assistants. *Ford v. United States*, *supra*. But if evidence is not offered because deemed immaterial, a new trial will not be granted on the ground that it is newly discovered; neither will it be allowed, to interpose a technical defence against a just claim. *Id.* If an unsatisfied judgment, pleadable as a set-off, exists, and the fact was not known to the defendant's attorney at the trial, it is cause for a new trial. *Childs v. District of Columbia*, 19 Ct. Cl. 332.

21 St. 284, ch. 243, §§ 1, 4, extends this section to cases in which the District of Columbia is defendant. *Childs v. District of Columbia*, 19 Ct. Cl. 332. The government's motion for a new trial, the object being to have the court determine whether the Comptroller of the Currency should pay taxes due it out of the assets of an insolvent national bank, will be denied where the court has ruled that the assets should be in the hands of the receiver. *Jackson v. United States*, 21 Ct. Cl. 203.

SECT. 1089. — For provision as to deduction of debt due the United States, see 18 St. 481, *supra*, at beginning of chapter. By 19 St. 344, the cost of printing is to be taxed to the losing party, and to be collected, except when judgment is against United States, by the clerk, and paid into the Treasury. *Railroad Co. v. Collector*, 96 U. S. 594. Appropriation acts provide that no judgment shall be paid until the right of appeal has expired. 21 St. 252. An appeal from a judgment before the right has expired is not vacated by the appropriation by Congress of the amount to pay the judgment. *United States v. Jones*, 119 U. S. 477. An appropriation to pay private claims means those neglected by the executive departments or without their jurisdiction. The appropriation is for debts not to be paid out of the specific appropriations. *Sweeney v. United States*, 5 Ct. Cl. 285, 290; 8 Id. 134; 17 Wall. 75. See also note, § 707.

SECT. 1090. — The defendant is not deprived of his right to interest on a judgment appealed from because he himself appealed as to a part of the judgment against him. *Hobbs v. United States*, 19 Ct. Cl. 220. See *White v. Arthur*, 20 Blatch. 246; 10 F. R. 83.

SECT. 1091. — A claim for loss and damage from the failure of the government to



perform its contract was referred to the court by special act, "to investigate the same, and to ascertain, determine, and adjudge the amount equitably due, if any, for such loss and damage." There being no stipulation for interest, none was allowed. *Tillson v. United States*, 100 U. S. 43; 11 Ct. Cl. 758; 15 Id. 618; *Harvey v. United States*, 113 U. S. 244; 105 Id. 671; 20 Ct. Cl. 529; 18 Id. 470; 17 Id. 443; 13 Id. 322; 12 Id. 141; 8 Id. 501. Another act referred a claim for supplies to the court, to be governed by the rules and regulations theretofore adopted by the government in like cases. Held, that as the case was like those in which interest was allowed by the act of 1790, the claimant might recover interest. *United States v. McKee*, 91 U. S. 442; 10 Ct. Cl. 208, 231. As to a factor who files a claim against the proceeds of captured or abandoned property, which exceeds the amount of his claim, recovering interest to the time of judgment, see *Villalonga v. United States*, 8 Ct. Cl. 452; 10 Id. 22, 428; 23 Wall. 35. Interest on a judgment begins to run when a certified copy is presented for payment, and ceases when the mandate of affirmance is issued or ordered to be issued. *Hobbs v. United States*, 19 Ct. Cl. 220. The subject of interest as damages is controlled by this section, though the action is brought under a special statute. *Ely v. United States*, 19 Ct. Cl. 658.

SECT. 1092. — The amount of a judgment cannot be corrected after satisfaction, even though there was an arithmetical error in the court's opinion. *Russell v. United States*, 15 Ct. Cl. 168. The implication from the language of this section is that a claim is not discharged until both judgment and interest are paid. *Hobbs v. United States*, 19 Ct. Cl. 220. See *United States v. Frerichs*, 124 U. S. 320; 21 Ct. Cl. 16.

SECT. 1093. — This section, considered with § 1092, relates only to judgments upon the merits, and does not change the rule of the common law, nor does it do more than attach to final judgments the conclusiveness which the common law ascribes to them. Hence sustaining a demurrer to a petition which failed to allege a necessary fact does not bar an action founded upon a petition which alleges such fact. *Spicer v. United States*, 5 Ct. Cl. 34. Judgment for the government for the breach of a covenant to furnish specified freight for transportation does not bar an action for the consideration agreed to be paid for the freight actually transported. *Shrewsbury v. United States*, 9 Ct. Cl. 263. A judgment in a cause argued and submitted is conclusive, notwithstanding the Supreme Court subsequently reversed a similar judgment. *Osborn v. United States*, 9 Ct. Cl. 153. An action for rent due in instalments is maintainable as often as the respective sums become due. *Cross v. United States*, 14 Wall. 479; 8 Ct. Cl. 1; 5 Id. 88. A judgment dismissing a case for want of jurisdiction is not a bar. A judgment of the Court of Claims appealed from is not a final judgment. *Green v. United States*, 18 Ct. Cl. 93. If the claimant has consented to a judgment against him on a general demurrer, he cannot subsequently sue on the same cause. *Porter v. United States*, 20 Ct. Cl. 307. If a claimant has had judgment rendered against him because his claim was barred by the statute of limitations, this section bars a suit on the same cause. *Battelle v. United States*, 21 Ct. Cl. 250. This section operates on the Bowman Act, "and bars in this court any demand against the government in which a final judgment has been rendered." *McClure v. United States*, 19 Ct. Cl. 23; *State of Illinois v. United States*, 20 Id. 348.



## TITLE XIV.

## THE ARMY.

## CHAPTER I.

## ORGANIZATION.

SECT. 1094. — See notes §§ 214, 1342, 1996. "Post" stricken out in 25th line by 19 St. 240, ch. 69, § 1. The Army is now limited to 25,000 enlisted men, exclusive of those in the signal service, which has a force of enlisted men not exceeding 500, but including Indian scouts and hospital stewards. 19 St. 97; 21 St. 30; 22 St. 117, 456; 23 St. 107, 357. As to the band, see note, § 1111. 19 St. 131, ch. 263, repeals the provision of July 24, 1876, ch. 226 (19 St. 97), limiting the number of Indian scouts to 300, and continues in force Rev. Stats. §§ 1094, 1112, authorizing the employment of 1000 of them; provided, that a proportionate number of non-commissioned officers may be appointed; and allows forty cents per day for the use and risk of the scout's own horses and horse-equipments. As to the Adjutant-General's Department, see note § 1194. As to the proviso at the end of this section, see next note. All persons comprehended by this section are subject to the rules and articles in § 1342. 16 A. G. Op. 14; 15 Id. 408. But a civilian employed as a quartermaster's clerk is not subject to the jurisdiction of a court-martial; nor are superintendents of national cemeteries. 16 A. G. Op. 13. The word "armies" in the acts of Congress does not include the marine corps. *Re Bailey*, 2 Sawyer, 200. See note, § 1342, art. 60. The Secretary of War is a civil officer, and not in the military service. *United States v. Burns*, 12 Wall. 246; 4 Ct. Cl. 113. Whether an Army chaplain is in the military service has been held a question for the jury. *Mutual Ins. Co. v. Wise*; 34 Md. 582. St. June 18, 1878, ch. 263, § 15, provides that the Army shall not be used to execute the laws, except as expressly authorized by the Constitution or acts of Congress. See §§ 787, 5298, 5300; 21 St. 31, § 5. Prior to this act, a marshal had implied authority, under § 27 of St. Sept. 24, 1789, ch. 20, to summon the army as a *posse comitatus* to aid in the execution of process. 16 A. G. Op. 162; 6 Id. 471. A soldier retains his residence as a citizen, in the State from which he entered the Army, but may change his domicil while in the service, as by removing his family. *Ames v. Duryea*, 6 Lans. (N. Y.) 155.

St. July 29, 1886 (24 St. 167), ch. 810, provides —

"That the Secretary of War be, and he is hereby, authorized and directed to cause to be enlisted and mustered into the service of the United States, for clerical service and messenger duty at the headquarters of the Army and at the several division, department, and district headquarters, at headquarters general service, at recruiting depots, and at West Point, New York, in the Army, a corps of men not to exceed 170, who shall be subject to the Articles of War and Army Regulations the same as enlisted men on duty in the line, but shall not be subject to be assigned to any other than clerical and messenger duty, as hereinbefore specified; nor shall this number be computed as a part of the number at which the Army is now limited by law.

"SEC. 2. That of the men so enlisted 125 shall be 'general-service clerks,' who shall be classified and paid as follows: Class one shall consist of 90 clerks, at \$1000 per annum; class two shall consist of 25 clerks, at \$1100 per annum; class three shall consist of ten clerks, at \$1200 per annum; and



the remaining 45 of such men shall be 'general-service messengers,' who shall be paid at the rate of \$60 per month; and all of such men shall be mustered for pay monthly the same as enlisted men, and shall receive no other compensation, pay, or allowance, except when on duty, when necessity requires, they shall each be allowed for subsistence one ration in kind to be issued by the Commissary Department.

"SEC. 3. That the provisions of law relating to the retirement of enlisted men shall be construed to include 'general service clerks' and 'general service messengers' and, for the purposes of retirement, they will rank as follows: General service clerks of class three with first sergeants of the line. General service clerks of class two with sergeants of the line. General service clerks of class one with corporals of the line. General service messengers with privates of the line."

SECT. 1095. — By 22 St. 118, ch. 254, the General, when retired, is to be retired without reduction in his current pay and allowances. 23 St. 434, ch. 346, authorizes the President, with the advice and consent of the Senate, to appoint on the retired list of the Army one General or General-in-chief, from among those who have served as such, with the same rank and full pay, and increases accordingly the total number allowed by law to compose said retired list. St. June 1, 1888, ch. 338 (25 St. 165), provides —

"That the grade of Lieutenant-General of the Army is hereby discontinued and is merged in the grade of General of the Army of the United States, which grade shall continue during the lifetime of the present Lieutenant-General of the Army, after which such grade shall also cease; and the President of the United States is hereby authorized to appoint, with the advice and consent of the Senate, a General of the Army of the United States. SEC. 2. That the pay and allowances of the General be the same as heretofore allowed for that grade."

By St. June 23, 1879 (21 St. 30), ch. 35, § 2,

"The Secretary of War is authorized and directed to cause all the regulations of the Army and general orders now in force to be codified and published to the Army, and to defray the expenses thereof out of the contingent fund of the Army."

Legislative ratification is implied when Congress permits the orders of an executive department to be formulated as regulations, published, and carried into effect. *Maddux v. United States*, 20 Ct. Cl. 193; *Morrison v. United States*, 13 Id. 6.

St. June 18, 1878 (20 St. 149), ch. 263, § 2, provides —

"SEC. 2. That in every Official Army Register hereafter issued, the lineal rank of all officers of the line of the Army shall be given separately for the different arms of the service; and if the officer be promoted from the ranks, or shall have served in the volunteer army, either as an enlisted man or officer, his service as a private and non-commissioned officer shall be given, and in addition thereto the record of his service as volunteer."

St. June 23, 1879 (21 St. 30), ch. 35, § 8, repealing § 6 of 20 St. 145, ch. 263, contains the proviso, —

"That when the economy of the service requires, the Secretary of War shall direct the establishment of military headquarters at points where suitable buildings are owned by the government."

SECT. 1096. — The rank hereby given entitles its holder to the same precedence as like rank gives to a line or staff officer when serving upon military boards, courts of inquiry, courts-martial, and the like. 16 A. G. Op. 551.

SECT. 1097. — "Shall" inserted after "who" by 19 St. 241, ch. 69, § 1.

SECT. 1100. — The revisers assumed that the President's power to add four corporals to the battery organization, conferred by the act of 1866, was not taken away by § 10 of St. 1870, although, read literally, such would be its effect. 1 Com. D. 586.

SECT. 1102. — Amended by striking out the five words following "majors" in second line, and by adding "seventh, eighth," after "the" in the seventh line. 19 St. 241, ch. 69, § 1. By 19 St. 97, ch. 226, cavalry regiments may be recruited to 100 men in each company, and kept as near as practicable to that number. 19 St. 204, ch. 301, authorized the President to increase the number of enlisted men to 100 for each company of cavalry



employed in Indian hostilities until the cessation of such hostilities, adding not more than 2500 at any one time to the Army above the limit of 25,000.

SECT. 1103. — See preceding note.

SECT. 1104. — The act of 1866 provided for four colored infantry regiments. The act of 1869 directed the Secretary of War to consolidate infantry regiments, in the process of reducing the number to 25. At the time of the Revision these four regiments had been consolidated into two, and the veteran reserve into nothing. 1 Com. D. 588.

SECT. 1110. — Amended by striking out "Post" in the first line, by 19 St. 242, ch. 69, § 1.

SECT. 1111. — See note, § 1278. By 18 St. 402, ch. 131, §§ 9, 10, this band consists of one teacher of music, who is its leader, and may be a civilian, and of 40 enlisted musicians; the leader to receive \$90 per month, one ration, and the allowance of fuel of a second lieutenant; of the enlisted musicians, ten receive \$34, and the others \$40, per month, and all these have the benefits as to pay arising from re-enlistments and length of service, applicable to other enlisted men of the Army. By 19 St. 382, ch. 109, there were only 24 enlisted musicians for the fiscal year ending June 30, 1878.

SECT. 1112. — See notes, §§ 1094, 1144. An Indian tribe which offers to co-operate with the United States troops, cannot be armed and subsisted under existing laws. 16 A. G. Op. 451.

SECT. 1113. — Post-traders, appointed for a military post under 19 St. 97, ch. 226, § 3, which authorizes the appointment of one trader at each post, and which, though apparently intended to supersede § 1113, does not necessarily repeal it (Winthrop's Digest, 383), are removable at the pleasure of the Secretary of War (15 A. G. Op. 278), and are subject to the Army Regulations like sutlers. 16 A. G. Op. 658. An officer in command of a military post has authority to protect, but not to lease the premises. 9 A. G. Op. 476. A post-trader's license appears to be held at the pleasure of the appointing power. *Ex parte* Hennen, 13 Pet. 230. By 22 St. 122, § 3, recruits may be furnished on credit by traders and laundrymen, at depots for recruits, with laundry work and articles necessary for their cleanliness and comfort.

SECT. 1115. — See notes, §§ 1094, 1102. Aliens, though not naturalized, may enlist in the United States army. *United States v. Wyngall*, 5 Hill (N. Y.), 16; 6 A. G. Op. 474; 4 Id. 350; 3 Id. 670; *Wilson v. Izard*, 1 Paine, 68; *Juando v. Taylor*, 2 Id. 652. A volunteer is bound by his enlistment when he has been mustered in and performed labor under it, although the mustering officer has omitted formalities prescribed in the Army Regulations. *Re* Stevens, 24 L. R. 205.

SECT. 1116. — The revisers considered that the provision of 1802, making 35 the maximum age, was not repealed, although not always regarded by the recruiting officers, and although superseded by temporary provisions in every exigency for additional troops. 1 Com. D. 589. This and the two following sections are directory, and make the enlistments voidable only at the option of the government. *United States v. Wyngall*, 5 Hill, 16; *United States v. Cottingham*, 1 Rob. Va. 631; *Re* Graham, 8 Jones (N. C.), 416; *Com. v. Barker*, 5 Binney, 427. Under them, the validity of the enlistment cannot be determined on *habeas corpus* by a State court (*Tarble's Case*, 13 Wall. 397; *Re* Neill, 8 Blatch. 156; *cf.* *Com. v. Leake*, 8 Phila. 523); but the enlisted person may be discharged by a Federal court upon *habeas corpus* or by the Secretary of War. *Ex parte* Schmeid, 1 Dillon, 587; *Re* McDonald, 1 Lowell, 100; *Seavey v. Seymour*, 3 Cliff. 440; *Com. v. Gamble*, 11 Serg. & R. 93; *Ex parte* Anderson, 16 Iowa, 599; *McConologue's Case*, 107 Mass. 154; 14 A. G. Op. 210. The fact that a recruit, who enlists as a single man, has a wife and child, does not entitle him to be discharged. *Ex parte* Schmeid, *supra*; *Re* Ferrens, 3 Ben. 442; *Baker v. Gordon*, 23 Ind. 204. As to the oath of recruits under earlier acts, see *United States v. Wright*, 5 Phila. 296; *Re* Stokes, 1 Ben. 341; *Re* Cline, Id. 338; 14 A. G. Op. 210.



SECT. 1117. — See notes, §§ 1418, 1625. This applies only to enlistments in "The Army" under Title 14, and not to the marine corps. *Re Doyle*, 18 F. R. 369. In the absence of the required written consent, the minor may be released on *habeas corpus* on petition of a parent or guardian, notwithstanding the duty imposed upon the Secretary of War to discharge a person illegally enlisted; and a court-martial cannot retain jurisdiction of the enlisted man under charges of desertion. *United States v. Hanchett*, 18 F. R. 26; *Re Baker*, 23 Id. 30; *Re Wall*, 8 Id. 85; *Re McDonald*, 1 Lowell, 100; *Re Keeler*, Hempst. 306; 6 A. G. Op. 607; *United States v. Wright*, 5 Phila. 296; *Green v. Ewell*, 1 New Mex. 166; *United States v. Anderson*, Cooke (Tenn.), 143; *Re Zimmerman*, 12 Sawyer, 257; 30 F. R. 176; *Re Kimball*, 9 Law Rep. 500, 510; *Wassum v. Feeney*, 121 Mass. 95. The enlistment is voidable only, not void; it is valid as to the minor, and he is bound by his representations forming part of the contract of enlistment. *Re Davison*, 22 Blatch. 473; 21 F. R. 618; 6 A. G. Op. 182; *Re Wall*, 8 F. R. 85; *Re McLave*, 8 Blatch. 67; *Re Tarble*, 25 Wis. 390; *Re Cline*, 1 Ben. 338, 341, 408; *Re Andrews*, 1 Hask. 87. The mother's written consent was held not necessary if the father is living (*Shorner's Case*, 2 Car. L. R. 59; *United States v. Gibbon*, 24 F. R. 135; *Com. v. Murray*, 4 Binney, 487; *cf. Com. v. Callan*, 6 Id. 255; *Com. v. Barker*, 5 Id. 423; *Ex parte Mason*, 1 Murph. (N. C.) 336); and if a minor, who enlists when over eighteen, has neither parent nor guardian, and makes oath that he is twenty-one, he will not be discharged on his own application. *United States v. Gibbon*, 24 F. R. 135; *Re Hearn*, 32 Id. 141. The minor's oath of enlistment, if it deceives the enlisting officer, is conclusive upon his parent as well as himself. *Re Riley*, 1 Ben. 408; 39 How. Pr. 108; *Re Higgins*, 16 Wis. 351. A minor, who has no parent, guardian, or master to give the required consent, cannot be enlisted. *Com. v. Cushing*, 11 Mass. 67. But a minor's enlistment may be ratified by himself after reaching maturity, like other acts of infants. *State v. Dimick*, 12 N. H. 194. The Secretary of War is not bound to discharge minors from the Army on the application of alleged parents or guardians who are domiciled in another country. 6 A. G. Op. 607. St. 1872, ch. 162, modified the previous law so as to prohibit the enlistment of persons under the age of twenty-one, who have parents or guardians entitled to their custody or control, without their written consent, but left in full force the provision making the oath of enlistment conclusive as to the age of the recruit. 14 A. G. Op. 210. Under the act of 1851, a minor who had a parent or guardian, and who enlisted without his consent, was not entitled to claim his discharge unless the parent or guardian concurred in the application therefor. 5 A. G. Op. 313.

SECT. 1118. — Amended by substituting "felony" for "any criminal offense" in the third line. 19 St. 240, ch. 69, § 1. "Felony" was employed in the act of 1865, and "any criminal offense" in the act of 1833. 1 Com. D. 590.

SECT. 1119. — See note, § 1342, arts. 48, 103. The term of five years is not enlarged by an infraction of the contract by desertion or otherwise, unless the soldier consents to an extension before the term is up, and the 48th Article of War, being a penal provision, operates only after a conviction, to prolong the term originally contracted. 15 A. G. Op. 152; 16 Id. 170. But a soldier who, having served out his time, is refused his discharge, is subject to the barrack rules while he remains there. *United States v. Travers*, 2 Wheeler Cr. Cas. 490; *Bowman v. United States*, 10 Ct. Cl. 408. Enlistments cannot be lawfully made upon condition that the soldiers shall be discharged on the happening of any other event than the expiration of the designated five years. 4 A. G. Op. 537.

SECT. 1126. — 19 St. 240, ch. 69, inserts a comma after "Post" in the first line.

SECT. 1128. — Omit "of cavalry" in the third, fourth, and fifth lines, and substitute "ten" for "thirteen" in the fifth line. 18 St. 478, ch. 142, § 1. See note, § 1194. The duties of the adjutant and inspector-general are those of an officer of the staff, and not of



the line. *Parker v. United States*, 1 Pet. 293. St. Feb. 28, 1887 (24 St. 434), ch. 287, provides (see also the earlier act, 18 St. 478, ch. 142)—

“That the Adjutant-General's Department of the Army shall consist of one Adjutant-General, with the rank, pay, and emoluments of brigadier-general; four assistant adjutants-general, with the rank, pay, and emoluments of colonel; six assistant adjutants-general, with the rank, pay, and emoluments of lieutenant-colonel; and six assistant adjutants-general, with the rank, pay, and emoluments of major: *Provided*, That the vacancies in the grade of colonel and lieutenant-colonel created by this act shall be filled by the promotion by seniority of the officers now in the Adjutant-General's Department.”

SECT. 1129. — See note, § 1131.

SECT. 1131. — 19 St. 240, ch. 69, inserts, after “cavalry” in the second line, “provided no promotion shall be made until the number of inspectors-general is reduced to four.” By 23 St. 297, ch. 50, this department now consists of one inspector-general, with rank of brigadier-general; two inspectors-general ranking as colonels; two ranking as lieutenant-colonels, and two more ranking as majors; provided that these offices are to be filled by promotion of officers in the department, and that future appointments and promotions are to be made in conformity with Rev. Stats. §§ 1129, 1193, 1204, and in the same manner as in the other staff departments of the Army; repealing conflicting laws and parts of laws. Earlier acts are 18 St. 244, ch. 458; 20 St. 257, ch. 2. And see 16 A. G. Op. 638.

SECT. 1132. — 16 A. G. Op. 16. See note, § 1144. Amended by 19 St. 240, ch. 69, § 1, by adding that all appointments in this department shall be filled from the Army, and that, during the absence of the Quartermaster-General, or the chief of any military bureau of the War Department, the President may empower some officer of the same department or corps to perform the duties of the absent officer. “Six” changed to “four” in 2d line of this section; “ten” to “eight” in 4th line; “twelve” to “fourteen” in 5th line, by 18 St. 338, ch. 126, which also abolishes the grade of military store-keepers, as soon as the same becomes vacant. 24 St. 98 provides that no civilian employee paid from the sums appropriated shall receive as salary more than \$150 per month, unless the same shall be specifically affixed by law, and that no part of any of the moneys so appropriated shall be paid for commutation of fuel, and for quarters to officers or enlisted men. Vacancies occurring in the Quartermaster's and Commissary's Departments of the Army may, in the President's discretion, be now filled from civil life. 22 St. 457.

An order assigning a regimental quartermaster to special duty as acting assistant commissary is not an appointment to a staff office. *Morrison v. United States*, 96 U. S. 232; 13 Ct. Cl. 1.

SECT. 1133. — A quartermaster, even in time of war, cannot bind the government to take unlimited quantities of articles to be bought by contractors, without reference to its own wants. *Cobb v. United States*, 18 Ct. Cl. 514. But during the Rebellion cases of “emergency,” in contracts for supplies, were provided for by 13 St. 394 (see 4 Ct. Cl. 75, 401, 537, 542); and it was the duty of an assistant quartermaster at a remote post to assume that the post would be kept up, and a proper contract, made by him to provide forage therefor, till notified to the contrary, is valid without approval. *Cohen v. United States*, 15 Ct. Cl. 253; *Cobb v. United States*, 7 Ct. Cl. 470; 13 St. 370. An order of a chief quartermaster to an assistant quartermaster to accept a bid and award a contract ratifies the assistant's previous acts. *Tenney v. United States*, 10 Ct. Cl. 269. And the government may ratify an unauthorized contract by receiving and using the goods. *Adams v. United States*, 7 Ct. Cl. 437. But a military officer's agreement for the benefit of this department does not bind the government until approved by the quartermaster-general. *Filot v. United States*, 9 Wall. 45. See also, *United States v. Lent*, 1 Paine, 417; *Burrough v. United States*, 4 Ct. Cl. 555; *United States v. Webster*, 2 Ware, 38.



SECT. 1134. — The cited section of St. 1821 was enacted as a permanent provision. 3 A. G. Op. 84.

SECT. 1136. — Amended by 19 St. 242, ch. 69, cited *supra* § 1132, by adding at the end of the section —

“It shall be the duty of all officers of the United States having any of the title papers (property purchased, or about to be purchased, for erection of public buildings) in their possession, to furnish them forthwith to the Attorney-General. No public money shall be expended until the written opinion of the Attorney-General shall be had.”

The appropriation act of Sept. 22, 1888, ch. 1027 (25 St. 486), contains the provisos —

“That no expenditures exceeding \$500 shall be made upon any building or military post, or grounds about the same, without the approval of the Secretary of War for the same, upon detailed estimates by the Quartermaster's Department; and the erection, construction, and repair of all buildings and other public structures in the Quartermaster's Department shall, as far as may be practicable, be made by contract, after due legal advertisement: *And provided further*, That no more than \$1,300,000 of the sums appropriated by this act shall be paid out for the services of civilian employees in the Quartermaster's Department, including those heretofore paid out of the funds appropriated for regular supplies, incidental expenses, barracks and quarters, Army transportation, clothing, and camp and garrison equipage; and that no employee paid therefrom shall receive as salary more than \$150 per month, unless the same shall be specially fixed by law; and no part of any of the moneys so appropriated shall be paid for commutation of fuel and for quarters to officers or enlisted men.”

SECT. 1137. — Amended by the same act, by adding after “service” in the third line —

“Who shall be entitled to receive each \$40 per month and three rations per day, and forage for one horse.”

SECT. 1139. — Amended by the same act by adding after “marines” —

“And he shall account to the Secretary of War at least once in three months for all property and money that may pass through his hands, or the hands of his subordinate officers.”

24 St. 96, 397, appropriating for supplies and printing for the Quartermaster's Department, contains the proviso —

“That no part of this appropriation shall be expended on printing unless the same shall be done by contract, after due notice and competition, except in such case as the emergency will not admit of the giving notice for competition.”

SECT. 1140. — 18 St. 244, ch. 458, § 3, provides that thereafter there shall be three assistant commissaries-general of subsistence ranking as lieutenant-colonels; reduces the number of commissaries of subsistence ranking as captains of cavalry, to twelve, no appointment to fill a vacancy in said grade to be made until its number is reduced to twelve, which number is thereafter to remain fixed. The quartermaster and the commissary departments are separate and distinct. *Shrewsbury v. United States*, 7 Ct. Cl. 374.

SECT. 1144. — See note, § 3714. By 23 St. 108, ch. 217, all future sales of subsistence supplies to officers and enlisted men are to be made at cost price only, such prices being the invoice price of the last lot of that article received by the officer making the sale prior to the first day of the month in which the sale is made. By prior like acts, ten per cent was to be added to such sales, to cover wastage, transportation, and other incidental charges, except that such sales to companies, detachments, and hospitals, upon certificate that they are for their exclusive use, from the officer commanding or in charge, and sales of tobacco may be at cost price. 22 St. 119; 21 St. 30, 111, 346. By 22 St. 459, ch. 93, civilian employees of the Army stationed at military posts may, under the regulations of the Secretary of War, purchase necessary medical supplies, prescribed by an Army medical officer, at cost, with ten per cent added. 25 St. 484 provides that of the amount thereby appropriated for the subsistence of the Army, to be expended under the direction of the Secretary of War, —



“Not more than \$110,000 shall be applied to the payment of civilian employees of the Subsistence Department.”

As to the pay of enlisted men on extra duty, see 23 St. 110, 359. The appropriation act of July 5, 1884, ch. 217 (23 St. 109), provides —

“That hereafter all sales of subsistence supplies to officers and enlisted men shall be made at cost price only; and the cost price of each article shall be understood, in all cases of such sales, to be the invoice price of the last lot of that article received by the officer making the sale prior to the first day of the month in which the sale is made. *Provided*, that hereafter all purchases of regular and miscellaneous supplies for the Army furnished by the Quartermaster's Department and by the Commissary Department for immediate use shall be made by the officers of such Department, under direction of the Secretary of War, at the places nearest the points where they are needed, the conditions of cost and quality being equal: *Provided also*, That all purchases of said supplies, except in cases of emergency, which must be at once reported to the Secretary of War for his approval, shall be made by contract after public notice of not less than 10 days for small amounts for immediate use, and of not less than from 30 to 60 days whenever, in the opinion of the Secretary of War, the circumstances of the case and conditions of the service shall warrant such extension of time. The award in every case shall be made to the lowest responsible bidder for the best and most suitable article, the right being reserved to reject any and all bids. The Quartermaster-General and the Commissary-General of Subsistence shall report promptly all purchases of supplies made by his Department, with their cost-price and place of delivery, to the Secretary of War, for transmission to Congress annually: *Provided further*, That in time of peace the number of draught and pack animals in the Quartermaster's Department of the Army shall not exceed 6000, and that all transportation of stores by private parties for the Army shall be done by contract, after due legal advertisement, except in cases of emergency, which must be at once reported to the Secretary of War for his approval. That the Secretary of War is authorized to appoint, on the recommendation of the Quartermaster-General, as many post quartermaster sergeants, not to exceed eighty, as he may deem necessary for the interests of the service, said sergeants to be selected by examination from the most competent enlisted men of the Army who have served at least four years, and whose character and education shall fit them to take charge of public property and to act as clerks and assistants to post and other quartermasters. Said post quartermaster sergeants shall, so far as practicable, perform the duties of storekeepers and clerks, in lieu of citizen employees. The post quartermaster sergeants shall be subject to the rules and articles of war and shall receive for their services the same pay and allowances as ordnance sergeants. For purchase of horses for the cavalry and artillery, and for the Indian scouts, and for such infantry as may be mounted, \$200,000: *Provided*, That the number of horses purchased under this appropriation, added to the number actually on hand, shall not at any time exceed the number of enlisted men and Indian scouts in the mounted service. (Cf. 23 St. 358; 24 St. 97; 25 St. 485.) *And provided further*, That hereafter all purchases of horses under appropriations for horses for the cavalry and artillery and for the Indian scouts shall be made by contract, after legal advertisement, by the Quartermaster's Department, under instructions of the Secretary of War, the horse to be inspected under the orders of the General commanding the Army; and no horse shall be received and paid for until duly inspected. The Quartermaster-General shall report to the Secretary of War promptly, for transmission to Congress annually, all purchases and contracts for horses, mules, and military supplies for the Army made by his Department. *Provided*, That the whole number of civilian employees, including agents, superintendents, mechanics, packers, teamsters, train-masters, and so forth, paid from this appropriation for transportation, shall not at any one time hereafter exceed 1000, nor shall any of said employees be graded for salary above fourth-class clerks of the Army Regulations; and the grade of sixth-class clerk in the Quartermaster's Department, is hereby abolished: *Provided further*, That hereafter all purchases of horses, mules, or oxen, wagons, carts, drays, ships, and other sea-going vessels, also all other means of transportation, shall be made by the Quartermaster's Department, by contract, after due legal advertisement except in cases of extreme emergency; and hereafter all purchases and contracts of every kind made by the Quartermaster's Department shall be promptly reported to the Secretary of War for transmission annually to Congress: *Provided also*, That hereafter the Quartermaster-General and his officers, under his instructions, wherever stationed, shall receive, transport, and be responsible for all property turned over to them, or any one of them, by the officers or agents of any Government survey, for the National Museum, or for the civil or naval departments of the Government, in Washington or elsewhere, under the regulations governing the transportation of Army supplies, the amount paid for such transportation to be refunded or paid by the Bureau to which such property or stores pertain.”

SECT. 1145. — See preceding note.

SECT. 1149. — See note, § 1144.



SECT. 1151. — The proviso was repealed by 21 St. 45, ch. 57.

SECT. 1158. — St. March 16, 1802, establishing the corps of engineers, did not authorize the President to employ the corps for any duty not belonging to military or civil engineering. *Gratiot v. United States*, 15 Pet. 336; *United States v. Eliason*, 16 Id. 291.

SECT. 1159. — St. June 23, 1874 (18 St. 244), ch. 458, in part provides —

“SEC. 5. That the Ordnance Department shall consist of one Chief of Ordnance, with the rank, pay, and emoluments of a brigadier-general; three colonels, four lieutenant-colonels, ten majors, twenty captains, sixteen first lieutenants; and all vacancies which may hereafter exist in the grade of first lieutenant in said Department shall be filled by transfer from the line of the Army: *Provided*, That no appointment or promotion in said Department shall hereafter be made until the officer or person so appointed or promoted shall have passed a satisfactory examination before a board of ordnance-officers senior to himself.

“SEC. 6. That no officer now in service shall be reduced in rank or mustered out by reason of any provision of law herein made reducing the number of officers in any department or corps of the staff.

“SEC. 7. That as vacancies shall occur in any of the grades of the Ordnance and Medical Departments, no appointments shall be made to fill the same until the numbers in such grade shall be reduced to the numbers which are fixed for permanent appointments by the provisions of this act; and thereafter the number of permanent officers in said grades shall continue to conform to said reduced numbers, and all other grades in said Ordnance and Medical Departments than those authorized by the provisions of this act shall cease to exist as soon as the same shall become vacant by death, resignation or otherwise; and no appointment or promotion shall hereafter be made to fill any vacancy which may occur therein.

“SEC. 8. That so much of § 6 of an act entitled ‘An act making appropriations for the support of the Army for the year ending June 30, 1870, and for other purposes,’ approved March 3, 1869, as applies to the Ordnance, Subsistence and Medical Departments of the Army be, and the same is hereby repealed; *Provided*, That this section repealing said section shall not apply to any of the grades of the Medical or Ordnance Departments which are omitted or abolished by the provisions of this act.”

The proviso of 20 St. 178, ch. 329, § 1, par. 12, authorizes the Secretary of War to employ in this bureau not exceeding ten enlisted men. Section 8 of the above act of 1874 repeals so much of § 6 of St. 1869, ch. 124 (15 St. 318), which is incorporated in Rev. Stats. §§ 1159, 1168, 1194, 1208, as applies to the Ordnance, Subsistence, and Medical Departments of the Army, provided that the repealing section shall not apply to any of the grades of the Medical or Ordnance Departments omitted or abolished by this act of 1874. 22 St. 52, ch. 111, provides for the appointment of an ordnance storekeeper in the Army. The President may remove military storekeepers from office at his pleasure. 6 A. G. Op. 4. Under the statutes in force in 1853 military storekeepers were all of the same grade, and were subject, as to their place of duty, to the orders of the Secretary of War. 6 A. G. Op. 7.

SECT. 1162. — 19 St. 240, ch. 69, strikes out all after “many” in the first line, and inserts in place thereof —

“sergeants of ordnance, corporals of ordnance, and first and second class privates of ordnance, as the Secretary of War may direct.”

SECT. 1163. — The same act changes “privates of first class,” in the third line, to “ordnance enlisted men.”

SECT. 1167. — Amended by the same act, by adding at the end of the section, —

“Every officer of the Ordnance Department, every ordnance-store keeper, every post ordnance sergeant, each keeper of magazines, arsenals, and armories, every assistant and deputy of such, and all other officers, agents, or persons who shall have received or may be entrusted with any stores or supplies, shall quarterly, or oftener if so directed, and in such manner and on such forms as may be directed or prescribed by the Chief of Ordnance, make true and correct returns to the Chief of Ordnance of all ordnance-arms, ordnance-stores, and all other supplies and property of every kind, received by or entrusted to them and each of them, or which may in any manner come into their and each of their possession or charge. The Chief of Ordnance, subject to the approval of the Secretary of War, is hereby authorized and directed to draw up and enforce in his department a system of rules and regulations for the government of the Ordnance Department, and of all persons in said department, and for the safe-keeping and



preservation of all ordnance property of every kind, and to direct and prescribe the time, number, and forms of all returns and reports, and to enforce compliance therewith."

SECT. 1168. — See note, § 1159. St. June 23, 1874, ch. 458, § 4 (18 St. 244), provides —

"SEC. 4. That the Medical Department of the Army shall hereafter consist of one Surgeon-General, with the rank, pay, and emoluments of a brigadier-general; one assistant surgeon-general, and one chief medical purveyor, each with the rank, pay, and emoluments of a colonel; and two assistant medical purveyors, with the rank, pay, and emoluments of lieutenant-colonels, who shall give the same bonds which are or may be required of assistant paymasters-general of like grade, and shall, when not acting as purveyors, be assignable to duty as surgeons by the President; 50 surgeons, with the rank, pay, and emoluments of majors; 150 assistant surgeons, with the rank, pay, and emoluments of lieutenants of cavalry for the first five years' service, and with the rank, pay, and emoluments of captains of cavalry after five years' service; and 4 medical store-keepers, with the same compensation as is now provided by law; and all the original vacancies in the grade of assistant surgeon shall be filled by selection by competitive examination; and the Secretary of War is hereby authorized to appoint, from the enlisted men of the Army, or cause to be enlisted, as many hospital stewards as the service may require, to be permanently attached to the Medical Department, under such regulations as the Secretary of War may prescribe." The further provision of this section limiting to 75 the number of contract-surgeons on or before Jan. 1, 1875, was suspended until otherwise provided by law, by 18 St. 294, ch. 12.

19 St. 61, ch. 146, reduces the number of assistant surgeons to 125, abolishes the office of medical storekeeper, adds, to the grades then allowed by law, four surgeons ranking as colonels and eight ranking as lieutenant-colonels, to be promoted by seniority from the medical officers of the Army, and provides that the act shall not deprive any medical officer or storekeeper then in office of his commission in the Army. 20 St. 178, ch. 329, § 1, par. 11, authorizes the Secretary of War to detail not exceeding 20 enlisted men for clerical service in the Surgeon-General's bureau, if the public necessity so requires. By 23 St. 111, officers of the Medical Department take rank and precedence according to date of commission or appointment, and are so borne on the official Army Register, provided that medical officers of the Army and contract surgeons are, whenever practicable, to attend the families of the officers and soldiers free of charge. 21 St. 67, ch. 38, authorizes the Secretary of War to appoint 70 additional clerks, 40 for the Surgeon-General's office, and 30 for the Adjutant-General's office, to expedite the settlement of pension applications called for by the Commissioner of Pensions. 23 St. 339, ch. 315, provides for the erection of a building to contain the records, library, and museum of the Medical Department of the Army. 14 A. G. Op. 10 construes St. 1866, ch. 299, and St. 1869, ch. 124, § 6.

SECT. 1170. — See note, § 1168; 16 A. G. Op. 605.

SECT. 1174. — See note, § 1168. 19 St. 240, ch. 69, inserts, after "line" in second line —

"Under such rules and regulations as shall be prescribed by the Secretary of War."

SECT. 1176. — Amended by 20 St. 353, ch. 173, to read as follows: —

"Every soldier of the Union Army, or petty-officer, seaman, or marine in the naval service, who was ruptured while in the line of duty during the late war for the suppression of the rebellion, or who shall be so ruptured thereafter in any war, shall be entitled to receive a single or double truss of such style as may be designated by the Surgeon-General of the United States Army as best suited for such disability; and whenever the said truss or trusses so furnished shall become useless from wear, destruction, or loss, such soldier, petty-officer, seaman, or marine shall be supplied with another truss on making a like application as provided for in § 2 of the original act of which this is an amendment: *Provided*, That such application shall not be made more than once in two years and six months. *And provided further*, That §§ 2, 3 of said act of May 28, 1872 (17 St. 164; now Rev. Stats. §§ 1177, 1178), shall be construed so as to apply to petty-officers, seamen, and marines of the naval service, as well as to soldiers of the Army."



SECTS. 1177, 1178. — See note, § 1176. The purpose of §§ 1176, 1177, 1178 was to provide the best truss procurable. The Surgeon-General has the discretion to adopt one style or different styles, always keeping in view the selection of that which, in his judgment, is best adapted to the particular case for which it is intended. 14 A. G. Op. 72.

SECT. 1179. — St. Sept. 22, 1888, ch. 1027 (25 St. 486), making appropriation for construction of quarters for hospital stewards, contains the proviso, —

“That the posts at which such quarters shall be constructed shall be designated by the Secretary of War, and the quarters shall be built by contract, after legal advertisement, whenever the same is practicable; but the cost of construction of quarters at any one post shall in no case exceed \$800, except where a post is situated at a city of more than 50,000 inhabitants, the cost of construction of such quarters may be not to exceed \$1200.”

St. March 1, 1887 (24 St. 435), ch. 311, of which § 8 repeals all acts and parts of acts contravening its provisions, provides, —

“That the Hospital Corps of the United States Army shall consist of hospital stewards, acting hospital stewards, and privates; and all necessary hospital services in garrison, camp, or field (including ambulance service) shall be performed by the members thereof, who shall be regularly enlisted in the military service; said Corps shall be permanently attached to the Medical Department, and shall not be included in the effective strength of the Army nor counted as a part of the enlisted force provided by law.

“SEC. 2. That the Secretary of War is empowered to appoint as many hospital stewards as, in his judgment, the service may require; but not more than one hospital steward shall be stationed at any post or place without special authority of the Secretary of War.

“SEC. 3. That the pay of hospital stewards shall be \$45 per month, with the increase on account of length of service as is now or may hereafter be allowed by law to other enlisted men. They shall have rank with ordnance-sergeants and be entitled to all the allowances appertaining to that grade.

“SEC. 4. That no person shall be appointed a hospital steward unless he shall have passed a satisfactory examination before a board of one or more medical officers as to his qualifications for the position, and demonstrated his fitness therefor by service of not less than twelve months as acting hospital steward; and no person shall be designated for such examination except by written authority of the Surgeon-General.

“SEC. 5. That the Secretary of War is empowered to enlist, or cause to be enlisted, as many privates of the Hospital Corps as the service may require, and to limit or fix the number, and make such regulations for their government as may be necessary; and any enlisted man in the Army shall be eligible for transfer to the Hospital Corps as a private. They shall perform duty as wardmasters, cooks, nurses, and attendants in hospitals, and as stretcher-bearers, litter-bearers, and ambulance attendants in the field, and such other duties as may by proper authority be required of them.

“SEC. 6. That the pay of privates of the Hospital Corps shall be thirteen dollars per month, with the increase on account of length of service as is now or may hereafter be allowed by law to other enlisted men; they shall be entitled to the same allowances as a corporal of the arm of service with which on duty.

“SEC. 7. That privates of the Hospital Corps may be detailed as acting hospital stewards by the Secretary of War, upon the recommendation of the Surgeon-General, whenever the necessities of the service require it; and while so detailed their pay shall be \$25 per month, with increase as above stated. Acting hospital stewards, when educated in the duties of the position, may be eligible for examination for appointment as hospital stewards as above provided.”

SECT. 1180. — Substantially repeated in 18 St. 244, ch. 458, § 4, stated in note, § 1168.

SECT. 1182. — 16 A. G. Op. 419; *Wetmore v. United States*, 10 Pet. 647; *United States v. Gwynne*, 1 McLean, 270; *Clark v. Woodbury*, 23 Iowa, 61. The Paymaster-General now ranks as brigadier-general, under 19 St. 95, ch. 222. The provision of the cited act of 1866 that paymasters should be “selected from persons who have served as additional paymasters,” which is not contained in the Revised Statutes, was repealed by 18 St. 338, ch. 118, § 2. Sect. 1 of the act of 1875 and Res. 7 of 1875 (18 St. 524) limit the number of paymasters with the rank of major to fifty, the resolution also repealing so much of § 1194 as applies to the paymasters with the rank of major. 22 St. 457, ch. 93, contains the proviso —



"That vacancies that may hereafter occur in the pay corps of the Army in the grades of lieutenant-colonel and major, by reason of death, resignation, dismissal, or retirement, shall not be filled by original appointment until the pay corps shall by such vacancies be reduced to 40 paymasters, and the number of the pay corps shall then be established at 40, and no more."

St. July 5, 1884 (23 St. 108), ch. 217, provides —

"That hereafter any paymaster of the rank of major who has served 20 years in the United States Army as a commissioned officer may, upon his own application or by direction of the President, be placed upon the retired-list of the Army, until the Pay Department shall be reduced to 35 members, as follows: One Paymaster-General, with the rank of brigadier-general; 2 assistant paymasters-general, with the rank of colonel; 3 deputy paymasters-general, with the rank of lieutenant-colonel, and 29 paymasters, with the rank of major; and no more appointments of paymasters shall be made in the Pay Department until the number shall be reduced below 29 majors, and thereafter the number of officers in the Pay Department shall not exceed 35: *Provided further*, That nothing herein shall be construed to change the present relative rank of any officer now in the pay corps."

SECT. 1190. — The cited act of 1838 related to clerks of paymasters paying the regular Army, not to the paying of militia and volunteers. 4 A. G. Op. 94.

SECT. 1191. — 15 A. G. Op. 211. 19 St. 240, ch. 69, adds at the end of this section —

"But the Quartermaster General shall not be liable for any money or property that may come into the hands of the subordinate officers of his department."

A paymaster's compensation runs from the date of the acceptance of his appointment, not from the approval of his bond. 16 A. G. Op. 38. The liability of the sureties in the original bond extends only through the first of several commissions, but the *laches* of any government officer in neglecting to sue does not discharge the sureties. *United States v. Kirkpatrick*, 9 Wheat. 720; *United States v. Vanzandt*, 11 Id. 184; *Dox v. Postmaster-General*, 1 Pet. 318; *United States v. Linn*, 15 Id. 290; *United States v. Lent*, 1 Paine, 417. An official bond, though not binding as a statutory bond, may be valid as a contract to perform the duties of the office. *United States v. Maurice*, 2 Brock. 96; *Cox v. United States*, 6 Pet. 172. The appointment of a paymaster in the Army is complete when made and confirmed. Giving a bond is a mere ministerial act for the security of the government, and not a condition precedent to his authority to act as a paymaster. *United States v. Bradley*, 10 Pet. 343. Upon the neglect of an officer or agent of the government to account, where the laws require quarterly or other periodical accounts or settlements, the mere omission to bring suit will not discharge the sureties upon his bond. *United States v. Kirkpatrick*, 9 Wheat. 720. Under the act of April 24, 1816, ch. 69, § 4, an omission by the proper officer to recall a delinquent paymaster did not discharge his sureties, the act being merely directory. *United States v. Vanzandt*, 11 Wheat. 184. As to the competency of Treasury transcripts as evidence in suits against public officers, see *Smith v. United States*, 5 Pet. 292; *Cox v. United States*, 6 Id. 172. As to sureties on official bonds, judgment cannot be rendered beyond the penalty provided for in the bond. *Farrar v. United States*, 5 Pet. 373; *Lawrence v. United States*, 2 McLean, 581.

SECT. 1193. — See note, § 1131.

SECT. 1194. — See notes, §§ 1128, 1159, 1182. 18 St. 338, ch. 126, § 4, provides that no officer shall be promoted or appointed in the Quartermaster's Department in excess of the organization thereby prescribed (see note, § 1132), and repeals so much of § 6 of St. 1869, ch. 124 (see note, § 1159), as applies to that department. 15 A. G. Op. 330. 18 St. 478, ch. 142, repeals so much of this § 6 as applies to the Adjutant-General's Department. Sect. 1194, as applying only to grades in the Pay Department of the Army above the rank of major, was repealed by 19 St. 270, ch. 100.

SECT. 1195. — The Signal Corps is a branch of the army service, authorized by law,



and under the direction of the Department of War. *United States v. Rogers*, 28 F. R. 608.

SECT. 1196. — See notes, §§ 222, 1094. By 21 St. 30, ch. 35, § 1, the force of enlisted men in the signal service is not to exceed 450 after the then terms of enlistment expired. See also 19 St. 97, ch. 226; 20 St. 145, ch. 263, § 1. By 20 St. 206, ch. 359, § 1, par. 8, the enlisted force of the Signal Corps consists of 150 sergeants, 30 corporals, and 270 privates, who receive the pay of engineer soldiers of similar grades, and two sergeants may, in each year, be appointed to be second lieutenants: *Provided*, That signal service men shall not receive extra-duty pay unless specially directed by the Secretary of War. Such promotion, not being made for the year ending June 30, 1881, was specially authorized by joint resolution of June 11, 1884. 23 St. 274. The Secretary of War is now required to report to Congress each year, in the annual estimates, the number of persons employed in the signal office and the amount paid to each. 23 St. 180; 22 St. 239, 551. By St. March 3, 1885, ch. 339 (23 St. 357), appropriations for the Army are not to be used for the signal service, except for the pay of commissioned officers detailed by the Secretary of War for service therein, and sums specifically appropriated. See also 22 St. 319. By 24 St. 266, none of the work of making plates and publishing weather maps is to be done except under specific appropriations therefor made in advance.

SECT. 1198. — By § 2 of St. 1874, ch. 458 (cited in note, § 1140), this bureau consists of one judge-advocate-general, with the rank, pay, and emoluments of a brigadier-general, and the duties prescribed in § 1199; and in the corps of judge-advocates no appointment is to be made as vacancies occur until the number is reduced to four, which is thereafter to be the permanent number of the officers of the corps. 23 St. 113, ch. 218, provides —

“That the Bureau of Military Justice and the corps of judge-advocates of the Army be, and the same are hereby, consolidated under the title of Judge-Advocate-General's Department; and shall consist of one Judge-Advocate-General, with the rank, pay, and allowances of a brigadier-general; one assistant judge-advocate-general, with the rank, pay, and allowances of a colonel; three deputy judge-advocate-generals, with the rank, pay, and allowances of lieutenant-colonels; and three judge-advocates, with the rank, pay, and allowances of majors; the colonel and lieutenant-colonels to be selected by seniority from the present corps of judge-advocates. And the Secretary of War is hereby authorized to detail such number of officers of the line as he may deem necessary to serve as acting judge-advocates of military departments, who shall have while on such duty the rank, pay, and allowances of captains of cavalry.

“SEC. 2. Promotions in the Judge-Advocate-General's Department, as provided in the first section of this act, shall be by seniority up to and including the rank of colonel.

“SEC. 3. That nothing herein shall be construed to interfere with the rank or position of any officer now holding a commission in either the Bureau of Military Justice or corps of judge-advocates.”

SECTS. 1199, 1200. — See preceding note. By 18 St. 60, ch. 217, the Secretary of War may assign one of the judge-advocates of the Army to be professor of law at the military academy. The judge-advocates are officers of the regular Army. 13 A. G. Op. 96.

SECT. 1202. — Prior to the enactment of this provision, the attendance of civil witnesses before a court-martial could not be enforced, but persons subject to military jurisdiction were bound, and could be compelled, to attend when summoned. 9 A. G. Op. 312. This statute authorizes compulsory process for the attendance of civilians as witnesses before courts-martial, and such process may be directed to the officers charged with the executive business of such courts. 12 A. G. Op. 501.

SECT. 1204. — See note, § 1131. 20 St. 145, ch. 263, § 4, provides for the promotion of non-commissioned officers by report of conduct, education and services, and by examination.

SECT. 1205. — The Army Regulations requiring vacancies in regimental offices to be filled by promotion according to seniority, the re-appointment of an officer who has



resigned, or been dismissed from the service, cannot be made, without special authority of Congress, if he would thereby be made to outrank other officers already holding commissions in the regiment. 14 A. G. Op. 499; note, § 1229; *Collins v. United States*, 15 Ct. Cl. 22. The officer acquires a vested right to his office only when his commission is signed by the President. 13 A. G. Op. 44; *Greer v. United States*, 3 Ct. Cl. 182.

SECT. 1207.—19 St. 240, ch. 69 (cited in note, § 1132), inserts "or Ordnance Corps" after "Engineers," in the first line.

SECT. 1208.—See note, § 1159.

SECT. 1209.—See cases cited in note, § 1264. By 22 St. 457, Army officers are only to be assigned to duty or command according to their brevet rank when actually engaged in hostilities. A nomination for brevet promotion by reason of meritorious service in engagements with the Indians, is within this section, and such promotion, when made during the existence of Indian hostilities, is viewed as conferred in time of war. 13 A. G. Op. 31. As to the pay of these officers, see § 1264.

SECTS. 1213, 1215.—St. May 17, 1886, ch. 338 (24 St. 50), provides—

"That when any cadet of the United States Military Academy has gone through all its classes and received a regular diploma from the academic staff, he may be promoted and commissioned as a second lieutenant in any arm or corps of the Army in which there may be a vacancy and the duties of which he may have been judged competent to perform; and in case there shall not at the time be a vacancy in such arm or corps, he may, at the discretion of the President, be promoted and commissioned in it as an additional second lieutenant, with the usual pay and allowances of a second lieutenant, until a vacancy shall happen."

By the previous acts of 1878, chs. 181, 263 (20 St. 108, 145, Sup. 346, 361), such graduates, after July 1, 1882, were entitled to appointment as second lieutenants only to fill vacancies; ch. 181 further provided that "hereafter" (construed to mean "thereafter," 16 A. G. Op. 49) no supernumerary officers shall be attached to any company or corps of the Army; that the graduates not appointed to the Army were to be discharged upon graduation, and restricts the appointment of civilians as second lieutenants. *United States v. Redgrave*, 116 U. S. 481. St. Dec. 20, 1886 (24 St. 351), ch. 2, provides—

"That every cadet who has heretofore graduated or may hereafter graduate at the West Point Military Academy, and who has been or may hereafter be commissioned a second lieutenant in the Army of the United States, under the laws appointing such graduates to the Army, shall be allowed full pay as second lieutenant from the date of his graduation to the date of his acceptance of and qualification under his commission and during his graduation leave, in accordance with the uniform practice which has prevailed since the establishment of the Military Academy."

SECT. 1216.—Under this section and § 1285, the certificate cannot be issued to a soldier who applies therefor after his discharge. 16 A. G. Op. 9; *J. A. Gen. Op.* 141.

SECT. 1218.—Insert "or Navy" after "Army" in the last line, and in place of "has" in the first line insert "held a commission in the Army or Navy of the United States at the beginning of the late Rebellion, and afterwards." St. May 13, 1884, ch. 46 (23 St. 21).

SECT. 1219.—15 A. G. Op. 334. Commissions need not be issued to assistant surgeons upon their passing from the grade of lieutenant to that of captain, as their promotion from the rank of first lieutenant to that of captain, being consequent upon duration of service, results by mere operation of law. 16 A. G. Op. 651. See 15 Id. 330, 334.

SECT. 1220.—Amended, by 19 St. 240, ch. 69, by adding at the end of the section—

"It shall be lawful for the commanding officer of each regiment, whenever it may be necessary, to cause the coats, vests, and overalls or breeches which may from time to time be issued to and for his regiment to be altered and new-made, so as to better fit them to the persons respectively for whose use they shall be delivered; and for defraying the expense of such alterations, to cause to be deducted and applied out of the pay of such persons a sum or sums not exceeding twenty-five cents for each coat, eight cents for each vest and for each pair of overalls or breeches."



Under St. 1813, ch. 48, and St. 1815, ch. 38, one complete annual return of ordnance and ordnance stores, with quarterly reports noting all intermediate changes since the last return, if sanctioned by the chief of ordnance and approved by the Secretary of War, was sufficient. 14 A. G. Op. 289.

SECT. 1221. — Amended, by the same act, by adding at the end of the section —

“Said returns and vouchers, after due examination by the Quartermaster General, shall be transmitted for settlement to the proper accounting officer of the Treasury Department.”

SECT. 1222. — See notes, §§ 179, 1254, 1259, 2062. 15 St. 58, ch. 38, § 2, relating to the holding of diplomatic and consular offices, was regarded by the revisers as superseded by the cited provision of 1870. 1 Com. D. 609. Detailing an Army officer for duty on the Geological Survey, if such detail requires him to be separated from his company, regiment, or corps, is within the prohibition of § 1224, but not of § 1222. 16 A. G. Op. 499. Such officer may be assigned to perform the duties of Indian agent, if his military duties are not thereby interfered with. 15 A. G. Op. 405; 14 Id. 573. An officer on the active list of the Army cannot be appointed to discharge the duties of Secretary of War, nor can he exercise such functions without vacating his commission. 14 A. G. Op. 200. The position of trustee of a railroad whose duties are defined by a State statute, and whose appointment, removal, and compensation are controlled by a State court, is a “civil office” within § 1222. 15 A. G. Op. 551. So is the place of city park commissioner (13 A. G. Op. 370); or any public charge, employment, or continuing duty defined by rules prescribed for the appointee by the government and not by contract. *United States v. Maurice*, 2 Brock. 96. Congress may at any time impose upon retired officers of the Army special duties which they are forced to perform. *Tyler v. United States*, 16 Ct. Cl. 235; *Collins v. United States*, 15 Id. 22. Such officers, except those described in St. March 3, 1875, ch. 178 (see note § 1254), are not precluded from holding civil offices not in the diplomatic or consular service. 15 A. G. Op. 306, 407. Sect. 1222 applies to State as well as Federal offices, and to both those with and those without compensation. 13 A. G. Op. 310. As to the employment of an Army officer as an Indian agent, see notes, §§ 2062, 2071. Sect. 2062 constitutes an exception to this section; and under that section, subject to the restrictions of § 1224, the President may direct the military commandant in Alaska to execute the duties of Indian agent there. 14 A. G. Op. 573.

SECT. 1223. — See notes, §§ 1222, 1254.

SECT. 1224. — See notes §§ 1222, 2062. 18 St. 240, ch. 69, strikes out the text and substitutes —

“No officer of the Army shall be employed on civil works or internal improvements, or be allowed to engage in the service of any incorporated company, or be employed as acting paymaster or disbursing-agent of the Indian Department, if such extra employment requires that he shall be separated from his company, regiment, or corps, or if it shall otherwise interfere with the performance of the military duties proper.”

SECT. 1225. — An army officer detailed by peremptory order to act as professor in a college, under St. July 28, 1868 (14 St. 336, § 26), was entitled to fuel and quarters or commutation therefor. *Long's Case*, 8 Ct. Cl. 398.

19 St. 74, ch. 167, substituted “thirty” for “twenty” in the sixth line of § 1225. The number was made forty by St. 1884, ch. 217 (23 St. 108). By St. Sept. 26, 1888, ch. 1037 (25 St. 491), this section, as amended by St. 1884, was further amended to read as follows:—

“SEC. 1225. The President may, upon the application of any established military institute, seminary or academy, college or university, within the United States having capacity to educate at the same time not less than one hundred and fifty male students, detail an officer of the Army or Navy to act as superintendent, or professor thereof; but the number of officers so detailed shall not exceed 50 from the



Army, and ten from the Navy, being a maximum of 60, at any time, and they shall be apportioned throughout the United States, first, to those State institutions applying for such detail that are required to provide instruction in military tactics under the provisions of the act of Congress of July 2, 1862, donating lands for the establishment of colleges where the leading object shall be the practical instruction of the industrial classes in agriculture and mechanic arts, including military tactics; and after that, said details to be distributed, as nearly as may be practicable, according to population. The Secretary of War is authorized to issue, at his discretion and under proper regulations to be prescribed by him, out of ordnance and ordnance stores belonging to the Government, and which can be spared for that purpose, such number of the same as may appear to be required for military instruction and practice by the students of any college or university under the provisions of this section, and the Secretary shall require a bond in each case, in double the value of the property, for the care and safe keeping thereof, and for the return of the same when required: *Provided*, That nothing in this act shall be so construed as to prevent the detail of officers of the Engineer Corps of the Navy as professors in scientific schools or colleges as now provided by act of Congress approved February 26, 1879, entitled 'An act to promote a knowledge of steam-engineering and iron-ship building among the students of scientific schools or colleges in the United States:' and the Secretary of War is hereby authorized to issue ordnance and ordnance stores belonging to the Government on the terms and conditions hereinbefore provided to any college or university at which a retired officer of the Army may be assigned as provided by § 260 of the Revised Statutes.

"SEC. 2. That the said § 1225 of the Revised Statutes of the United States, as amended by the said act of Congress approved July 5, 1884, and all acts and parts of acts inconsistent or in conflict with the provisions of this act, be, and the same are hereby repealed, saving always, however, all acts and things done under the said amended section as heretofore existing."

SECT. 1226. — St. June 3, 1884 (23 St. 34), ch. 63 (of which § 1 was amended by 24 St. 377, ch. 92, to read as below), provides (see Myers' Case, 20 Ct. Cl. 284; North's Case, 21 Id. 15) —

"That the joint resolution approved July 11, 1870, entitled 'Joint resolution amendatory of joint resolution for the relief of certain officers of the Army,' approved July 26, 1866, is hereby so amended and shall be so construed that in all cases arising under the same any person who was duly appointed and commissioned, whether his commission was actually received by him or not, shall be considered as commissioned to the grade therein named from the date from which he was to take rank under and by the terms of his said commission, and shall be entitled to all pay and emoluments as if actually mustered at that date: *Provided*, That at the date from which he was to take rank by the terms of his commission there was a vacancy to which he could be so commissioned and that he was actually performing the duties of the grade to which he was so commissioned, or, if not so performing such duties, then from such time after the date of his commission as he may have actually entered upon such duties: *And provided further*, That any person held as a prisoner of war, or who may have been absent by reason of wounds or in hospital by reason of disability received in the service in the line of duty, at the date of his commission, if a vacancy existed for him in the grade to which so commissioned, shall be entitled to the same pay and emoluments as if actually performing the duties of the grade to which he was commissioned and actually mustered at such date: *And provided further*, That this act and the resolution hereby amended shall be construed to apply only in those cases where the commission bears date prior to June 20, 1863, or after that date when their commands were not below the minimum number required by existing laws and regulations: *And provided further*, That the pay and allowances actually received shall be deducted from the sums to be paid under this act.

"SEC. 2. That the heirs or legal representatives of any officer whose muster into the service has been or shall be amended hereby shall be entitled to receive the arrears of pay due such officer, and the pension, if any, authorized by law, for the grade into which such officer is mustered under the provisions of this act.

"SEC. 3. That all claims arising under this act shall be presented to and filed in the proper Department within three years from and after the passage hereof, and all such claims not so presented and filed within said three years shall be forever barred, and no allowance ever made thereon.

"SEC. 4. That the pay and allowances of a rank or grade paid to and received by any military or naval officer in good faith for services actually performed by such officer in such rank or grade during the war of the rebellion shall not be charged to or recovered back from such officer because of any defect in the title of such officer to the office, rank, or grade in which such services were so actually performed."

By St. Aug. 13, 1888, ch. 868 (25 St. 437), these provisions were —



“Revived and extended for a period of five years from the third day of June, 1887.

“SEC. 2. That the limitation heretofore imposed by law on the presentation by officers or soldiers of claims for the loss of horses and equipments in the military services during the late war, is hereby suspended for the period of three years.”

SECT. 1228.—This appears to be a recognition by Congress that the restoration of dismissed Army officers is authorized in some cases, if not usually, without confirmation by the Senate. See next note; *Collins's Case*, 14 Ct. Cl. 573.

SECTS. 1229, 1230.—The text changes and makes certain the previous laws as to the effect of dropping an officer from the rolls, namely, St. July 15, 1870, ch. 294, § 17 (16 St. 319); St. 1865, ch. 79, § 12 (13 St. 489); St. July 20, 1868, ch. 185 (15 St. 125). 1 Com D. 611. The phrase “any officer dismissed,” in § 1230 is prospective only. 16 A. G. Op. 599; *Steiner's Case*, 8 Id. 328. One is not an officer in the Army or Navy until the commission appointing him such has been signed by the President, although his nomination has been confirmed by the Senate. 13 A. G. Op. 44. This section does not take away the President's power, with the advice and consent of the Senate, to displace an Army or Navy officer by appointing another in his place. *Keyes v. United States*, 109 U. S. 336; *McElrath v. United States*, 102 Id. 426; *Blake v. United States*, 103 Id. 227, 236. It does not improperly restrict the President's power to dismiss an officer, and is not on that ground unconstitutional. 12 A. G. Op. 14; *McElrath v. United States*, 102 U. S. 426; 12 Ct. Cl. 201. If an officer is sentenced to dismissal, and the President fills the vacancy by appointment or nomination, this operates as a confirmation of the sentence. 16 A. G. Op. 298; *Kilburn v. United States*, 15 Ct. Cl. 41. But the President cannot revoke an order dismissing an officer of the Army so as to enable him to regain his position and become entitled to its emoluments. *Corson v. United States*, 114 U. S. 619; 17 Ct. Cl. 344; *Mimmack v. United States*, 97 U. S. 426; 10 Ct. Cl. 584; 4 A. G. Op. 8, 318; *Montgomery's Case*, 19 Ct. Cl. 370; 5 Id. 93; *Miller's Case*, 19 Id. 338; *McBlair's Case*, Id. 528; *Palen's Case*, Id. 389; *Bennett's Case*, Id. 379; *Burchard's Case*, Id. 137; 4 A. G. Op. 274. 22 St. 285, providing for the discharge of surplus naval-cadet graduates, being prospective only, is not applicable to previous classes. *Leopard v. United States*, 18 Ct. Cl. 546. Naval cadet-engineers are officers and not employees, and are entitled to the benefit of § 1229. *United States v. Perkins*, 116 U. S. 483; 20 Ct. Cl. 438; *United States v. Germaine*, 99 U. S. 508; *Moore v. United States*, 95 Id. 760; *United States v. Hartwell*, 6 Wall. 385. The President's power to dismiss an Army officer, being discretionary, cannot be reviewed in the Court of Claims, at least after a long lapse of time. *Gratiot v. United States*, 1 Ct. Cl. 258; *Newton v. United States*, 18 Id. 435. And the officer's application for a court-martial must be made within a reasonable time. *Newton v. United States*, *supra*.

SECT. 1233.—Repealed by 20 St. 276, ch. 34.

SECT. 1237.—This section does not apply to an action brought by a soldier in a State court against a non-commissioned officer for assault within the limits of a fort. 3 A. G. Op. 498. This act, being for the defence and support of the country, is to receive a favorable construction, and was therefore held to apply where several small debts, each less than \$20, were purchased by the plaintiff after the defendant's enlistment. *Re Roode*. 2 *Wheeler's Crim. Cas.* 541.

SECT. 1240.—20 St. 150, ch. 263, § 5, provides—

“That hereafter women shall not be allowed to accompany troops as laundresses: *Provided*, That any such laundress, being the wife of a soldier as is now allowed to accompany troops, may, in the discretion of the regimental commander, be retained until the expiration of such soldier's present term of enlistment.”

SECT. 1241.—*Cooper v. United States*, 1 Ct. Cl. 85.



## CHAPTER II.

## RETIREMENT.

SECT. 1243. — See note § 1095, and 23 St. 107. By 22 St. 118, ch. 254, officers who have served for forty years as officers or soldiers in the regular or volunteer service, or both, are, upon application to the President, to be retired from active service and placed on the retired list, and, when an officer is sixty-four years of age, he shall be retired and placed on the retired list; and any officer who is supernumerary to the permanent organization of the Army as provided by law, may at his own request be honorably discharged from the Army, and shall thereupon receive one year's pay for each five years of his service, but no officer shall receive more than three years' pay in all. Retirements under this act are declared by 22 St. 457, to be in addition to, and not in restriction of, those previously authorized by law.

St. Feb. 14, 1885 (23 St. 305), ch. 67, provides —

"That when an enlisted man has served as such thirty years in the United States Army or Marine Corps, either as a private or as a non-commissioned officer, or both, he shall, by making application to the President, be placed on the retired list hereby created, with the rank held by him at the date of retirement; and he shall thereafter receive seventy-five per centum of the pay and allowances of the rank upon which he was retired."

As to retiring paymasters, see note § 1182. St. March 3, 1875 (18 St. 497), ch. 159 § 2, provides —

"SEC. 2. That hereafter whenever any person, who was mustered out as a supernumerary officer of the Army with one year's pay and allowances, in addition to the pay and allowances due him at the date of his discharge, under the provisions of the act making appropriations for the support of the Army for the year ending June 30, 1871, and for other purposes, approved July 15, 1870, shall be re-appointed by the President, an officer of the Army, such appointment shall be under and with the express condition, that fifty per cent of such officer's pay shall be stopped monthly, until the sum total of the extra years' pay and allowances received by him, when mustered out as aforesaid, shall have been refunded to the United States."

This provision is limited to those who were mustered out as supernumerary officers under § 12 of St. 1870, and were re-appointed after the act of 1875. 15 A. G. Op. 177. The revisers considered that the provision of 1870 as to thirty years did not supersede the right to retire at the end of forty years given by the act of 1861, although the language of the latter was "may be placed on the retired list." 1 Com. D. 615. Congress may constitutionally place an officer upon the retired list upon a different rank from that attaching to his office by general laws, and change the mere rank of an officer on the active or retired list at pleasure. *Wood v. United States*, 15 Ct. Cl. 151; 107 U. S. 414. A retired officer, being "an officer of the United States," cannot appear in the Court of Claims as attorney for claimants against the government. *Re Tyler*, 18 Ct. Cl. 25.

SECTS. 1244, 1245. — It is not the intention of the statutes to place retired officers wholly out of the service. *Tyler's Case*, 16 Ct. Cl. 223. An officer retired by the President can be reinstated on the active list only when vacancies exist therein to be filled, and by a new appointment approved by the Senate; but if assigned by the President to any duty in the service, he is entitled, while so employed, to the full pay and emoluments of his grade. 13 A. G. Op. 99, 209. But he is so entitled only while on the assigned duty. *Gates' Case*, 11 Id. 524. If such an officer superintends the construction of a government building, under an act of Congress and the directions of the department, he is entitled to



compensation for the service. *Meigs v. United States*, 19 Ct. Cl. 497. See also note, § 1262.

SECT. 1246. — Upon the act of August 3, 1861, see 10 A. G. Op. 116.

SECT. 1248. — A captain in the marine corps, upon whose case an examining board has reported favorably, may nevertheless be afterwards dismissed from the service by a general order of the Navy department. 13 A. G. Op. 3.

SECT. 1252. — 15 A. G. Op. 442. The President's determination that an officer be wholly retired is conclusive upon himself. *McBlair v. United States*, 19 Ct. Cl. 528; *Miller v. United States*, Id. 338. The following indorsement by the President on the proceedings and finding of a board retiring a naval officer is in conformity with this section: "I concur in opinion with the retiring board in the case of W. Let him be retired on furlough pay." *Welles' Case*, 15 A. G. Op. 442.

SECT. 1253. — The revisers found no act as to retirement from the Army corresponding to 16 St. 333, ch. 295, § 6, providing that Navy officers guilty of misconduct shall not be placed on the retired list, but be tried by court-martial. 1 Com. D. 617. This section does not authorize the President to send a case back to a retiring board after he has once approved and acted upon its report; such approval and action determines that the officer has had "a full and fair hearing," and by his order of approval the officer's legal status becomes that of a private citizen. *Miller's Case*, 19 Ct. Cl. 338; *McBlair's Case*, Id. 528.

SECT. 1254. — See note § 1222. It is competent for Congress to retire an officer from active service and place him on the retired list upon a rank different from that which attaches to his office by general laws, and to change the mere rank of an officer on the active or retired list at pleasure. *Wood v. United States*, 15 Ct. Cl. 151; 107 U. S. 414.

St. March 3, 1875 (18 St. 512), ch. 178, provides —

"SEC. 2. That all officers of the Army who have been heretofore retired by reason of disability arising from wounds received in action shall be considered as retired upon the actual rank held by them, whether in the regular or volunteer service, at the time when such wound was received, and shall be borne on the retired list and receive pay hereafter accordingly; and this section shall be taken and construed to include those now borne on the retired list placed upon it on account of wounds received in action: *Provided*, That no part of the foregoing act shall apply to those officers who had been in service as commissioned officers twenty-five years at the date of their retirement; nor to those retired officers who had lost an arm or leg, or had an arm or leg permanently disabled by reason of resection, on account of wounds, or both eyes by reason of wounds received in battle; And every such officer now borne on the retired list shall be continued thereon notwithstanding the provisions of § 2, ch. 38, of March 30, 1868 (now Rev. Stats. § 1223); *And be it also provided* that no retired officer shall be affected by this act, who has been retired or may hereafter be retired on the rank held by him at the time of his retirement; And that all acts or parts of acts inconsistent herewith be, and are hereby, repealed."

As used in the proviso to § 2 of the act of 1875, above quoted, "resection" signifies the removal by excision of dead or diseased bone,—more especially the removal of such bone in that way from the articular extremities or the unconsolidated extremities of fractured bones. *Kiddoo's Case*, 15 A. G. Op. 83. In that act, "such" refers only to the officers in the excepted clauses. 15 A. G. Op. 409. A partial resection of an arm or leg on account of wounds received in battle, when the operation partly causes a permanent disability of the limb, is also within the excepting clauses. 15 A. G. Op. 199. In case of doubt as to resection causing the disability, the officer is entitled to the benefit of it, because the act of 1875 took away rights previously granted by law. *Kiddoo's Case*, *supra*. Under 2 St. 137 and 12 St. 326 an officer of volunteers discharged for physical disability incurred in the line of his duty was entitled to one day's pay and subsistence for every twenty miles' travel from the place of his discharge to the place of enrolment. *Erdman's Case*, 13 Ct. Cl. 249.

SECT. 1257. — "*According to the established rules of the service.*" — The established rules of the service in force when this statute was originally enacted provided that all



vacancies in established regiments and corps, to the rank of colonel, shall be filled by promotion according to seniority, except in case of disability or other incompetency. It is for the President and Senate to determine concerning disability and incompetency, and after an appointment is made it is presumed that the facts established it. *Montgomery v. United States*, 19 Ct. Cl. 370. This section applies to officers retired from active service by the President under the authority given him by § 12 of the act of July 17, 1862. 13 A. G. Op. 99.

SECT. 1258. — Substitute "four" for "three" in the second line. 20 St. 145, ch. 263, § 7. The limit of 300 applied to and included the officers placed upon the retired list under St. May 10, 1872, ch. 153; St. March 3, 1875, ch. 187, and St. June 26, 1876, ch. 244. 16 A. G. Op. 26.

SECTS. 1259, 1260. — 19 St. 243, ch. 69, adds, at the end of § 1259, "*Provided*, that they receive from the government only the pay and emoluments allowed by law to retired officers"; and at the end of § 1260, "But while so serving, such officer shall be allowed no additional compensation."

These sections, in connection with §§ 1222, 1223, do not preclude a retired Army officer from holding a purely civil office, unless in the consular or diplomatic service. 15 A. G. Op. 306. See note, § 1225.

### CHAPTER III.

#### PAY AND ALLOWANCES.

In general, an officer's pay begins when he accepts his appointment. 16 A. G. Op. 38; *United States v. Henry*, 17 Wall. 405. In case of promotion, express acceptance is not necessary, but will be presumed. 12 A. G. Op. 229. If the office is new, or a transfer is made from one corps to another, the pay begins when the officer is subject to duty. 2 A. G. Op. 638. It ends (1) when he is notified of the acceptance of a resignation by him. *Barger's Case*, 6 Ct. Cl. 35; *Greer's Case*, 3 Id. 182. (2) If his connection with the service ceases in consequence of his conviction by court-martial, from the time when the sentence takes effect, unless forfeiture of previous pay is expressed in the sentence. 13 A. G. Op. 104. (3) When he is actually discharged, although the discharge is ordered dated as of a prior day. *Allstaedt's Case*, 3 Ct. Cl. 284. (4) In case of dismissal while held a prisoner by the enemy, an officer is entitled to pay to the time of dismissal, if his capture was not culpable. *Jones's Case*, 4 Ct. Cl. 197; *Phelps' Case*, Id. 209. If an order of dismissal is revoked without qualification as to pay, the officer, if he has performed duty during the interval, is entitled to pay and allowances during such interval. *Barnes's Case*, 4 Ct. Cl. 216; *Reynolds's Case*, 3 Id. 197; *Montgomery's Case*, 5 Id. 93; *Smith's Case*, 2 Id. 206; *Blake's Case*, 14 Id. 463; 103 U. S. 227; 15 A. G. Op. 468; 12 Id. 555: *Mimmack's Case*, 97 U. S. 426; 10 Ct. Cl. 584; *Helm's Case*, 13 A. G. Op. 16; *Price's Case*, 4 Ct. Cl. 164. But if the President approves a dismissal with forfeiture of pay, he cannot reinstate the officer so as to entitle him to the pay thus forfeited. *Vanderslice v. United States*, 19 Ct. Cl. 480; 2 A. G. Op. 123; 3 Id. 105; note, § 1229. The executive department, or any branch of it, cannot reduce the pay of an Army officer. *United States v. Williamson*, 23 Wall. 416.

A claim cannot be maintained for extra services which are within the officer's special duties. *Gratiot v. United States*, 15 Pet. 336. Money paid to Army officers *de facto*, who render services and receive their pay in good faith, cannot be recovered back. *Miller v. United States*, 19 Ct. Cl. 338; *Montgomery v. United States*, Id. 370; *Palen v. United States*, Id. 389; *Bennett v. United States*, Id. 379.



SECT. 1261. — See note, § 1270. An ordnance storekeeper who is assigned to duty as acting assistant commissary, which is not an office, but additional duty, is entitled to the compensation fixed by this section for the latter service. *Grealish v. United States*, 20 Ct. Cl. 486. A quartermaster of a regiment of cavalry, who also serves as acting assistant commissary, is entitled to the additional compensation of \$100 per year, here provided for. *United States v. Morrison*, 96 U. S. 232; 13 Ct. Cl. 1. Under 21 St. 346, ch. 79, and 22 St. 117, ch. 257, providing that additional pay to officers for length of service, to be paid with their current pay, and the actual time of service in the Army, shall be allowed all officers in computing their pay, service as a cadet at West Point is to be reckoned as service in the Army. *Morton v. United States*, 19 Ct. Cl. 200; 112 U. S. 1; *Mitchell v. United States*, 33 Int. Rev. Rec. 282. If an officer's claim for pay is barred by limitation in a case where he was commissioned but not mustered in, his right of action depends upon St. June 3, 1884 (23 St. 34). *Myers v. United States*, 20 Ct. Cl. 284.

SECTS. 1262, 1263. — See note, § 1222. By 20 St. 145, ch. 263, § 7, officers who served as officers in the volunteer forces during the Rebellion, or as enlisted men in the regular or volunteer armies, are to be credited with the full time of such service in computing their service for longevity pay and retirement. Under this provision, Army officers, who served as medical cadets during the Rebellion, were held entitled to compute the period of such service in computing their "service" or "longevity" pay under § 1262. *United States v. Williamson*, 23 Wall. 411; 9 Ct. Cl. 503; *United States v. Phisterer*, 94 U. S. 219; *United States v. Lippitt*, 100 Id. 663. And the ten per cent increase allowed by § 1262 is, after July 1, 1882, computed on the yearly pay of the grade fixed by §§ 1261, 1274. 22 St. 118. No distinction is made in §§ 1262, 1274, or in St. 1878 (20 St. 145), ch. 263 (§ 7 of which extends longevity pay so as to include service in the volunteers), between officers on the active and retired list; the method of computing longevity pay is by taking one-tenth of the "current yearly pay," so that the officer's second longevity pay includes ten per cent of his first, &c., subject to the limitation in § 1263 of the total amount of such increase to forty per cent of the fixed annual pay. *Tyler v. United States*, 105 U. S. 244; 16 Ct. Cl. 224; 16 A. G. Op. 223; *Babbitt v. United States*, 16 Ct. Cl. 202; *Roberts v. United States*, 10 Id. 283; *Davis v. United States*, 10 Id. 285; *Collins's Case*, 15 Id. 22; 15 A. G. Op. 444; *Thornley v. United States*, 113 U. S. 310. The time served by an officer in the marine corps as a paymaster's steward is to be credited to him in computing his longevity pay. *Muse v. United States*, 19 Ct. Cl. 441; *Hawkins v. United States*, Id. 611; *Jordan v. United States*, Id. 621. So under 22 St. 473. *United States v. Dunn*, 120 U. S. 249. In computing the increase of pay, a cadet's time of service at West Point from July 1, 1865, to June 15, 1869, is "actual time of service in the Army," under 21 St. 346 and 22 St. 118. *United States v. Morton*, 19 Ct. Cl. 200; 112 U. S. 1. Statutes, such as those granting the longevity increase and pensions, being benefits, are to be construed against the claimant and in favor of the Government. *Donnelly v. United States*, 17 Ct. Cl. 105; *Morton v. United States*, *supra*.

Sect. 7 of the above act of 1878, ch. 263, applies to retired officers. *Tyler v. United States*, 16 Ct. Cl. 223. It also applies to officers coming into the army from the volunteer service or from the ranks, and not to those coming in from West Point. The provision relating to officers who have served as enlisted men refers to officers who have risen from the ranks. The words "enlisted men" refer to certain classes of such men, but not to cadets. *Babbitt v. United States*, 16 Ct. Cl. 202; 16 A. G. Op. 611; 1 Id. 276, 469; 2 Id. 251; 7 Id. 323. The word "service," as used in § 7 of St. 1878, and 22 St. 118, ch. 254, means actual service performed under color of office or other authority, without regard to any defects in the legal title of the claimant to the office or position in which he served. *Bennett v. United States*, 19 Ct. Cl. 379; *Palen v. United States*, Id. 389; *Gould v. United States*, Id. 593. The words of § 7 of that act, "during



the war of the Rebellion," are a limitation upon its provisions only with respect to officers of the Army who have served as officers in the volunteer forces, and do not apply to Army officers who have served as enlisted men in either the regular or volunteer forces. Hence, in computing the service of officers of the latter description for longevity pay and retirement, service performed by them as enlisted men previous to the civil war must be taken into account. 16 A. G. Op. 611.

SECT. 1264. — As to brevet rank under earlier statutes, see *United States v. Hunt*, 14 Wall. 550; 6 Ct. Cl. 8; *United States v. Vinton*, 2 Sumner, 299. *United States v. Freeman*, 1 Wood. & M. 45; 3 How. 565, decides that a captain in the marine corps cannot receive pay both as captain and brevet lieutenant-colonel, when acting in the latter capacity. Cf. *Pope v. United States*, 19 Ct. Cl. 693. See note, § 1209.

SECT. 1265. — Under St. March 3, 1863, providing that "any officer absent from duty with leave, except from sickness or wounds, shall during his absence receive half of the pay and allowances prescribed by law, and no more," an Army officer ordered home on his own request to there await orders, reporting thence, was entitled to full pay. *United States v. Williamson*, 23 Wall. 411; *United States v. Phisterer*, 94 U. S. 219; *United States v. Lippitt*, 100 Id. 663; 14 Ct. Cl. 148; *Chilson v. United States*, 11 Id. 691; *Crosby v. United States*, 13 Id. 110. Where an Army officer was adjudged by court-martial to have been absent without leave, was sentenced to a reprimand and suspension from rank and pay, and the compensation due him was not withheld, and twelve years thereafter the proper officers charged him with the amount he received under the circumstances stated, it was held recoverable, the lapse of time not being a bar. *Crowell v. United States*, 22 Ct. Cl. 69. St. 1876, ch. 239, taken in connection with § 24 of St. 1870, ch. 294, continued to Army officers on leave of absence (during the period for which such leave may be granted to them thereunder "without deduction of pay or allowance") quarters in kind, but it did not authorize an allowance of commutation therefor. 16 A. G. Op. 619. Where an Army officer who has had leave of absence granted under St. 1876, ch. 239, "without deduction of pay or allowance," is at the time he takes his leave entitled to an allowance of commutation for quarters under § 9, ch. 263, St. 1878, such allowance is, by the act of 1876, continued to him while he is absent on leave for a period not exceeding that for which his leave was granted. 16 A. G. Op. 577. The officer's absence may be excused as unavoidable. *Smith's Case*, 23 Ct. Cl. 452.

St. July 29, 1876, ch. 239 (19 St. 102), extending St. May 8, 1874, ch. 154 (18 St. 43), provided —

"That all officers on duty shall be allowed, in the discretion of the Secretary of War, sixty days' leave of absence without deduction of pay or allowance: *Provided*, That the same be taken once in two years: *And provided further*, That the leave of absence may be extended to three months, if taken once only in three years, or four months if taken only once in four years. This act shall take effect from and after its passage."

Commutation for quarters, but not for quarters in kind, continues to an officer so absent on leave. 16 A. G. Op. 577, 619. A post chaplain is an officer. 12 A. G. Op. 519.

SECT. 1266. — The revisers considered that, under the cited act of 1870, the officer's legal right relates to his pay, and that it is the duty of the Quartermaster's Department to make him allowances according to regulations, while by the earlier acts certain allowances constituted "emoluments," being commutable and a part of the officer's pay. 1 Com. D. 621.

SECT. 1267. — The \$4500 limits the full pay upon which, when retired, a colonel's seventy-five per cent allowance is computed. *Marshall v. United States*, 20 Ct. Cl. 370; 124 U. S. 391.



SECT. 1269. — See, on the construction of earlier acts, *Minis v. United States*, 15 Pet. 423; *Gratiot v. United States*, Id. 336; 4 How. 80; *United States v. Eliason*, 16 Pet. 291; *United States v. Webster*, Dav. 38. Where an Army officer, while on leave of absence from his command, was ordered to serve and did serve on a court-martial, he was held not entitled to *per diem* compensation therefor. 13 A. G. Op. 526. An officer in the marine corps, attached to a sea-going vessel, is, by Rev. Stats. § 1612, subject to the provisions of this section. *Reid v. United States*, 18 Ct. Cl. 625.

SECT. 1270. — Amended by 19 St. 243, ch. 69, by adding at the end of the section the following: —

“*Provided, however*, That when forage in kind cannot be furnished by the proper departments, then and in all such cases, officers entitled to forage may commute the same according to existing regulations: *Provided further*, That officers of the Army and of Volunteers assigned to duty which requires them to be mounted shall, during the time they are employed on such duty, receive the pay, emoluments, and allowances of cavalry officers of the same grade respectively.”

Officers are not “assigned to duty which requires them to be mounted,” within this amendment, when they are merely mounted upon government horses captured from the Indians, and have not furnished at their own expense accoutrements therefor, or the usual cavalry equipments. *Forbes v. United States*, 17 Ct. Cl. 132; *Harrold v. United States*, 23 Id. 295. An officer who is unassigned and is awaiting orders at headquarters is only entitled to commutation for quarters and fuel by showing that he applied unsuccessfully for quarters, or that none could be had. *Crosby v. United States*, 13 Ct. Cl. 110. An Army officer’s right to commutation of fuel and quarters arises from the general authority of the War Department, and is sanctioned by the long-continued action of Congress. *Whittlesey’s Case*, 5 Ct. Cl. 99. An officer, who is ordered to the headquarters of the military department, and kept there awaiting further orders, is entitled to quarters or commutation of quarters. If such headquarters are in a large city in which there are no quarters assignable to officers on duty, an officer ordered there need not demand that quarters be assigned him, in order to be entitled to commutation. *Lippitt v. United States*, 14 Ct. Cl. 148.

St. June 18, 1878, ch. 263, §§ 8, 9, provides that fuel shall not be allowed, but may be sold, to commissioned Army officers; that forage in kind may be furnished, according to rank as specified, for horses owned and kept by officers in the field or west of the Mississippi (the last clause being repealed by 21 St. 346, ch. 79; 22 St. 119; see 16 A. G. Op. 577, 619); that officers may be furnished with quarters in kind in public quarters; and where there are no such quarters, specified commutation may be made therefor. As to such commutation, see, also, St. June 23, 1879, ch. 35, § 1 (21 St. 30), and St. Feb. 24, 1881, ch. 79 (21 St. 346), by which the Lieutenant-General has \$100 per month for commutation of quarters, and no allowance is to be made for servants’ quarters. 13 A. G. Op. 1; *United States v. Gilmore*, 8 Wall. 830; 2 Ct. Cl. 364. The act of 1879 further provides —

“That the rate of commutation shall hereafter be \$12 per room per month for officers’ quarters, in lieu of \$10, as now provided by law.”

The above § 8 of St. 1878, as to purchase of fuel, does not extend to retired officers of the Army. The words of that section “or at an equivalent rate for other kinds of fuel, according to the regulations now in existence,” only authorize a sale of the quantity of other fuel for \$3 (viz. 1500 pounds of anthracite coal or 30 bushels of bituminous coal), which, by the regulations, is made the equivalent of a cord of standard oak wood. 16 A. G. Op. 92. A post or station where there are public quarters for officers, but which are not sufficient to accommodate all the officers there, is, with regard to those who are excluded, a place where there are “no public quarters,” within the meaning of § 9 of St.



1878, and the officers thus excluded are entitled to commutation for quarters. 16 A. G. Op. 611.

SECT. 1271. — See preceding note. The revisers regarded the right of chaplains to forage, under St. 1864, ch. 53, and St. 1867, ch. 145, § 7, as not limited by their rank as captains of infantry. 1 Com. D. 623.

SECT. 1273. — Barr's Case, 14 Ct. Cl. 272; Andrew's Case, 15 Id. 264; 15 A. G. Op. 496. See note, § 74. St. July 24, 1876, ch. 226 (19 St. 97), reduced the mileage to eight cents per mile, no payment to be made for officers' travel on railroads on which United States troops and supplies are entitled to be transported free of charge, and distances to be "calculated by the shortest usually travelled route." Cf. St. March 3, 1875, ch. 133. Such mileage was held allowable to members of the Mississippi River Commission created by St. June 28, 1879, ch. 43. 16 A. G. Op. 559. 22 St. 456, ch. 93, requires the mileage of officers to be computed over the shortest usually travelled routes between the points named in the order, and the necessity for such travel to be certified to by the officer issuing the order, and stated therein. If the route is left to the officer's discretion, the subsequent approval of the department is conclusive upon the accounting officers. Billings' Case, 23 Ct. Cl. 166. Romeyn v. United States, 20 Ct. Cl. 373, decides that an officer who is on leave of absence and is ordered to rejoin his company, which has meanwhile changed its post, cannot recover mileage. 24 St. 95, ch. 574, contains the proviso:—

"That in disbursing this allowance the maximum sum to be allowed and paid shall be four cents per mile, distance to be computed over the shortest usually traveled routes, and, in addition thereto, the cost of transportation actually paid, exclusive of sleeping or parlor car fare."

25 St. 483 (see, also, 24 St. 396), contains the proviso—

"That the maximum sum to be allowed paymasters' clerks and contract surgeons when travelling on duty shall be four cents per mile, and, in addition thereto, when transportation cannot be furnished by the Quartermaster's Department, the cost of same actually paid by them, exclusive of sleeping or parlor car fare and transfers."

The appropriation act, 24 St. 533 (see, also, 24 St. 95, 396; 25 St. 483), contains the proviso, as to officers when travelling on Signal Service duty under orders—

"That in disbursing this amount the maximum sum to be allowed and paid to an officer shall be four cents per mile, distance to be computed over the shortest usually traveled routes, and, in addition thereto, upon the officer's certificate that it was not practicable to obtain transportation from the Quartermaster's Department, the cost of transportation actually paid by the officer over said route or routes, exclusive of sleeping or parlor car fare and transfers: *And provided further*, That when any officer so traveling shall travel in whole or in part on any railroad on which the troops and supplies of the United States are entitled to be transported free of charge, he shall be allowed for himself only four cents per mile as a subsistence fund for every mile necessarily traveled over any such last-named railroad. . . . And the Secretary of War is authorized, in his discretion, to detail for the service in the Signal Corps not to exceed five commissioned officers of the Regular Army, to be exclusive of the second lieutenants of the Signal Corps authorized by law; and the Regular Army officers herein authorized to be detailed for the Signal Corps shall receive their pay and allowances from the appropriation for the support of the Army; and no money herein appropriated shall be used for pay and allowances of second lieutenants appointed or to be appointed from the sergeants of the Signal Corps, under the provisions of the act approved June 20, 1878, in excess of the number of 16, or for the pay and allowances of exceeding 470 enlisted men of the Signal Corps."

While § 1273 was in force, Army officers who travelled abroad upon public business (their transportation not being furnished or being on a conveyance belonging to or chartered by the United States) were entitled to mileage at the rate of 10 cents per mile for sea travel as well as for land travel. 15 A. G. Op. 496. It did not authorize transportation in kind for servants of officers in the Army at the expense of the government, or reimbursement in money to the officers for the cost thereof. 13 A. G. Op. 417. Where an Army officer, while on leave of absence from his command, was ordered to serve and did serve on a court-martial, and the court adjourning before the expiration of his leave, he



immediately returned to his command, he was held not entitled to mileage from the place where the court met to the place where his command was stationed, as at the time he was not an officer travelling under orders. 13 A. G. Op. 526.

SECT. 1274.—See notes, §§ 1254, 1262. The pay of a retired officer is to be determined by first ascertaining what would have been his pay had he not been retired, and then allowing him 75 per cent of that sum. *Marshall v. United States*, 124 U. S. 391; 20 Ct. Cl. 370; *Tyler v. United States*, 16 Id. 236; *Roberts v. United States*, 10 Id. 283. Thus, 75 per cent of \$4500 is the maximum pay to which an officer placed on the retired list as a colonel is entitled. *Marshall v. United States*, *supra*. Sect. 1261 fixes the pay of a lieutenant-colonel at \$3000; by § 1263, 40 per cent may be added for length of service, making \$4200, while § 1267 limits his pay to \$4000. A lieutenant-colonel of 35 years' service retired on the pay provided by this section, and claimed 75 per cent of \$4200. In construing this section, the court says, "We hold that the true construction of the statute is that retired officers are entitled to receive 75 per cent of the whole pay which they were receiving as officers in active service, when placed on the retired list, including their current yearly pay and their allowance for length of service, limited by the maximum fixed by said act, which, in the case of a lieutenant-colonel, is \$4000. This would make the claimant's pay \$3000 as a retired officer." *Roberts's Case*, *supra*. The rate of pay prescribed by this section governs, notwithstanding the President may have designated a different rate in his approval of the finding of the board. *Welles' Case*, 15 A. G. Op. 442.

This section does not preclude an officer on the retired list from having his pay computed, including longevity pay, precisely as is that of an officer of his rank on the active list, subject only to the reduction of one-fourth. *Tyler v. United States*, 16 Ct. Cl. 223.

SECTS. 1278, 1279.—See notes, §§ 1111, 1270. Sect. 1279 was amended by 19 St. 243, ch. 69, by adding at the end thereof the following words:—

"Artificer of artillery and infantry, \$15 per month; wagoner of cavalry, artillery, and infantry, \$14 per month. The principal assistant in the Ordnance Bureau shall receive a compensation, including pay and emoluments, not exceeding that of a major of ordnance."

SECT. 1280.—The same act substitutes "additions" for "conditions" in the third line. As to the Hospital Corps, see note, § 1119.

SECTS. 1282, 1283.—See note, § 1111.

SECT. 1284.—The additional pay depends upon two conditions, an honorable discharge and a voluntary re-enlistment. *Webb's Case*, 23 Ct. Cl. 58.

SECT. 1285.—See note, § 1216.

SECT. 1288.—See preliminary note, ch. 3, *supra*.

SECTS. 1289, 1290.—See note, § 74. In the first line of both sections, 19 St. 240, ch. 69, strikes out "honorably," and inserts "except by way of punishment for an offense" after "service." "Pay," "allowances," or "emoluments," do not include travelling expenses in returning home after being mustered out. *Sherburne v. United States*, 16 Ct. Cl. 491.

SECT. 1291.—This is not made applicable to officers, in order to avoid the inconvenience that would arise if they, making provision for themselves out of their pay, could not transfer their accounts. 15 A. G. Op. 273.

SECT. 1292.—This and the 123d article of war (*post*, § 1342) seem applicable only when both regular and volunteer forces exist as distinct organizations. 15 A. G. Op. 333.

SECT. 1299.—See note, § 1144.

SECT. 1304.—See note, § 1342, art. 15.

SECT. 1306.—22 St. 456, ch. 93, substitutes "five" for "fifty" in the first line of this section.



## CHAPTER IV.

## THE MILITARY ACADEMY.

**SECT. 1309.** — See notes, §§ 1111, 1199, 1262. The offices here named, being established by statute, cannot be abolished by an executive order. 16 A. G. Op. 17. 18 St. 467, ch. 135, provides that the President may fill any vacancy, arising from death or other cause, of a person appointed by him at the Academy; that the assistant instructors of tactics commanding cadet companies at West Point shall receive the same pay and allowances as assistant professors in other branches of study; and that text-books and books of reference shall be sold to cadets at cost. 19 St. 124, ch. 255, directs a competent officer to be detailed to act as quartermaster and commissary for the battalion of cadets, who is also to act as purveyor and furnish supplies at cost; and 22 St. 123, ch. 255, authorizes a commissary-sergeant to be detailed to act as such commissary's assistant. By 21 St. 30, ch. 35, § 4, one professorship of modern languages is established in place of the French and Spanish professorships, upon a vacancy in either. The Secretary of War, in his discretion, may assign any Army officer as professor of law at the Academy. 21 St. 153; 22 St. 125; 18 St. 60. 24 St. 69, ch. 362, provides for the study of the nature and effects of alcoholic drinks and narcotics in the military and naval academies, &c. 25 St. 488 authorizes negotiations for the purchase of two hundred and twenty-five acres of land south of the Military Reservation at West Point. 25 St. 108, ch. 212, making appropriations for the support of the Military Academy, contains the provisos —

“That the extra pay provided for by the seven preceding paragraphs [for enlisted men acting as employees] shall not be paid to any enlisted man who receives extra-duty pay under existing laws or Army regulations. . . . That all technical and scientific supplies for the departments of instruction of the Military Academy shall be purchased by contract or otherwise, as the Secretary of War may deem best. Also, that all funds arising from the rent of the hotel on Academy grounds, and other incidental sources, from and after this date be, and are hereby, made a special contingent fund, to be expended under the supervision of the Superintendent of the Academy, and that he be required to account for the same annually, accompanied by proper vouchers, to the Secretary of War.”

**SECT. 1310.** — Prior to the cited act of 1858, the superintendency of the institution pertained exclusively to the corps of engineers; the phrase “any arm of the service” in § 1314 comprehends all departments of the Army, and does not exclude any of its branches, and therefore a major-general may be assigned to the place of superintendent. 15 A. G. Op. 110.

**SECT. 1311.** — Persons unauthorized by law or the superintendent have no right to enter the limits of the post at West Point, even to visit the post-office there. 3 A. G. Op. 268.

**SECT. 1313.** — See note, § 1309. By 22 St. 123, ch. 255, no graduate of the Academy is thereafter to be assigned or detailed there as a professor, instructor, or assistant to either, within four years after his graduation.

**SECT. 1314.** — See note, § 1310.

**SECT. 1315.** — See note, § 1262. By 20 St. 108, ch. 181, § 4, the cadets appointed at large are not to exceed ten in all. The corps of cadets is a part of the Army, and additional pay to an Army officer, based on “actual time of service in the Army,” is computed by including the time of service as a cadet at West Point. *United States v. Morton*, 112 U. S. 1. As a rule, minors whose fathers reside within the United States, are, by reason of their minority, ineligible to appointment as cadets from any other congressional districts than those in which their fathers reside. 13 A. G. Op. 130.

**SECTS. 1320, 1321.** — Suspended by Res. of Feb. 2, 1884 (23 St. 266), as to one resi-



dent of Guatemala and one of Nicaragua, permitting them to receive instruction at the Academy without expense to the United States. See also 25 St. 622.

SECT. 1326.—7 A. G. Op. 323. See note, § 1339.

SECT. 1329.—By 19 St. 382, ch. 109, § 1, and 20 St. 108, ch. 181, § 1, each member receives not exceeding eight cents per mile by the most direct route from his residence and return, and \$5 per day during each day of service at West Point. Later acts appropriate "for expenses of the board of visitors, including mileage, \$3000." 22 St. 125, 418; 23 St. 9, 301; 24 St. 90.

SECT. 1331.—See note, § 1310.

SECT. 1332.—The original act further provided that the clerk of the House of Representatives should furnish the House documents.

SECT. 1335.—23 St. 7,299, appropriates \$400 for pay of the adjutant, in addition to pay as second lieutenant, the sum paid him not to exceed \$1800 per year. See 20 St. 260, ch. 19; 22 St. 416; 24 St. 87.

SECT. 1336.—See note, § 1309. 21 St. 30, ch. 35, § 4, inserts "as professor" after "service" in the first line.

SECT. 1337.—See note, § 1309. 19 St. 240, ch. 69, strikes out the seven words after "tactics" in the second line.

SECT. 1339.—See note, § 1213. Each cadet now receives no more than at the rate of \$540 per year. 22 St. 123, 416; 24 St. 87. Any cadet dismissed for hazing is not eligible to re-appointment. 23 St. 7, 299.

## CHAPTER V.

### ARTICLES OF WAR.

OFFICERS or soldiers of an army of occupation are not in general amenable to local courts of civil or criminal jurisdiction. *Coleman v. Tennessee*, 97 U. S. 509; *Dow v. Johnson*, 100 U. S. 158; *Beard v. Burts*, 95 U. S. 434; *State v. Hibdon*, 23 F. R. 795; *State v. Hall*, 6 Baxter (Tenn.), 3; *Coolidge v. Guthrie*, 8 Am. Leg. Reg. N. S. 22. So a citizen or corporation obeying an order issued by the constituted military authority in time of war is entitled to protection. *Railroad v. Hurst*, 11 Heisk. (Tenn.) 625. The mere military occupation of a country does not *ipso facto* displace municipal law. *Wingfield v. Crosby*, 5 Cold. (Tenn.) 246; *Kimball v. Taylor*, 2 Woods, 37; *Pepin v. Lachenmeyer*, 45 N. Y. 27; *Murrell v. Jones*, 40 Miss. 565; *Ex parte Milligan*, 4 Wall. 2.

If a military officer in command in insurgent States seizes property of a citizen there in reprisal for property taken by the insurgents from a loyal citizen, to whom such seized property is given, he is liable in the civil courts. *Moran v. Snell*, 5 W. Va. 26. A sale by an officer, if not authorized by the usages of war, or not under a valid condemnation, is a trespass and passes no title. *Bowles v. Lewis*, 48 Mo. 32. A military officer's power to arrest deserters does not authorize him to seize the private property of the person arrested. *Clark v. Cumins*, 47 Ill. 372; 13 A. G. Op. 210. Even in time of war the emergency must be pressing to justify the military authorities in impressing private property before making or providing for compensation. *Sellards v. Zomes*, 5 Bush (Ky.), 90; *Ferguson v. Loar*, Id. 689; *Smith v. Owens*, 42 Mo. 508.

The government is not responsible for injury to private property caused by its military operations in time of war, nor are private persons chargeable for works erected on their property to facilitate such operations. *United States v. Pacific Railroad*, 120 U. S. 227; *Heflebower v. United States*, 21 Ct. Cl. 228. In time of peace military officers are liable for trespasses if they act under orders from an unauthorized source. *Bates v. Clark*, 95 U. S.



204; *Despan v. Olney*, 1 Curtis, 306; *Green v. United States*, 18 Ct. Cl. 93; *Tracy v. Cloyd*, 10 W. Va. 19. Inferior officers are not liable for acts done under lawful orders of their superiors. *Baldwin v. United States*, 15 Ct. Cl. 297; *Luther v. Borden*, 7 How. 1; *Despan v. Olney*, 1 Curtis, 306; *Walker v. Crane*, 13 Blatch. 1. So held where such superiors were officers in the Confederate service, and the act was belligerent. *Stafford v. Mercer*, 42 Ga. 556. But see *Hedges v. Price*, 2 W. Va. 192. The act commanded must appear legal and justifiable to a person of ordinary understanding (*Mitchell v. Harmony*, 13 How. 115; 1 Blatch. 549; *Riggs v. State*, 3 Cold. (Tenn.) 85); provided his orders do not amount to duress. *Weatherspoon v. Woodey*, 5 Id. 149. Yet a military officer ordering a civilian's arrest and confinement, is bound to see that his subordinates treat him without unnecessary severity. *McCall v. McDowell*, 1 Abb. U. S. 212; *Walker v. Crane*, 13 Blatch. 1; *Hickey v. Huse*, 56 Maine, 493. In *Clay v. United States*, *Devereux*, 25, an Army officer who broke into a dwelling house to arrest deserters, was held not entitled to reimbursement. And in *Castle v. Duryee*, 32 Barb. 483; 1 Abb. App. Dec. (N. Y.) 327, the officer commanding the regiment was held liable to a spectator for injury caused by a shot fired by a soldier at a parade or drill. A court-martial may try a retired officer for offences committed after his retirement. *Runkle v. United States*, 122 U. S. 543; 19 Ct. Cl. 396. But its sentence, dismissing an officer from the Army, is not operative, until all the proceedings have been laid before the President and are approved by him. *Id.* Its sentence, when approved by the revising authority, cannot be impeached collaterally for mere errors or irregularities, or revised by courts of law. *Ex parte Reed*, 100 U. S. 13; *Kurtz v. Moffit*, 116 Id. 487; *Re McVey*, 23 F. R. 878; *Keyes' Case*, 15 Ct. Cl. 532; *Tyler v. Pomeroy*, 8 Allen, 484; *Commonwealth v. McClean*, 2 Pars. Sel. Cas. (Pa.) 367; *Vanderheyden v. Young*, 11 Johns. 150; *Mills v. Martin*, 19 Id. 7; *Brown v. Wadsworth*, 15 Vt. 170. Where there is jurisdiction, and fraud or corruption is not shown, its members are not liable to an action for seizure under their sentence. *Macon v. Cook*, 2 Nott & M. (S. C.) 379; *Shoemaker v. Nesbit*, 2 Rawle, 201. If the sentence of a court-martial discharging a soldier is afterwards set aside as void, his status in the interim is not affected. *Re Bird*, 2 Sawyer, 33; 13 A. G. Op. 459. Its sentence is void, if rendered against the accused without notice. *Meade v. Deputy Marshal*, 1 Brock. 324. The accused may waive all objections to the jurisdiction of the court. *Vanderheyden v. Young*, 11 Johns. 150. But his appearance before it and pleading guilty does not amount to such waiver. *Duffield v. Smith*, 3 Serg. & R. 590. The common-law distinction between felonies and misdemeanors is not applicable to military offences. *United States v. Clark*, 31 F. R. 710.

18 St. 337, ch. 115, repeals so much of § 20 of St. 1870, ch. 294 as requires the system of General Regulations for the Army therein authorized to be reported to and approved by Congress at its next session, and provides—

“The President is hereby authorized under said section, to make and publish regulations for the government of the Army in accordance with existing laws.”

SECT. 1342. — See notes, §§ 858, 1094, 1117, 1342. Courts-martial are lawful tribunals with like jurisdiction as civil courts in cases within their recognizance; their proceedings, though erroneous, cannot be reviewed collaterally by *habeas corpus*, those in the Army and Navy having surrendered their right of trial by the civil courts. *Re Davison*, 22 Blatch. 473; 21 F. R. 618; *Re White*, 17 Id. 723; *Re McVey*, 11 Sawyer, 25; 23 F. R. 878; *Ex parte Milligan*, 4 Wall. 123; *Ex parte Kearney*, 7 Wheat. 38; *Ex parte Reed*, 100 U. S. 13; *Ex parte Watkins*, 3 Pet. 393; *State v. Stillman*, 7 Cold. (Tenn.) 341; *Tennessee v. Hibdon*, 23 F. R. 795; 20 Rep. 38; note, § 751; 11 A. G. Op. 297. A writ of prohibition does not lie to a court-martial to correct mistakes in question of law or fact within its jurisdiction (*Smith v. Whitney*, 116 U. S. 167); or to an executive officer, like the Secretary of the Navy, not being a member of the court, but merely convening it. *Id.*; *State*



*v. Wakely*, 2 Nott & M. (S. C.) 410. But the jurisdiction of a court-martial may always be inquired into on *habeas corpus*. *Dynes v. Hoover*, 20 How. 65; *Barrett v. Hopkins*, 7 F. R. 312; 2 McCrary, 129; 12 A. G. Op. 128; *Re Egan*, 5 Blatch. 319. If a soldier or officer does an act criminal under the civil and military law, he is to be tried by the former in preference to the latter, under conditions and limitations stated. A discharge or conviction in the civil courts does not relieve him from responsibility to the military tribunals for the same offence. 6 A. G. Op. 413. See *Id.* 506.

Army contractors are subject to the rules of this section. *Holmes v. Sheridan*, 1 Dillon, 351; *Hill v. United States*, 9 Ct. Cl. 173. So are post-traders and sutlers (note, § 1113, *ante*), and cadets. *Babbitt v. United States*, 16 Ct. Cl. 202; 7 A. G. Op. 323; 1 *Id.* 276. The Army Regulations made in 1861, and confirmed by Congress in 1866, are controlled by later acts of Congress. *Morrison v. United States*, 96 U. S. 232; 13 Ct. Cl. 1. A civilian employed as a quartermaster's clerk is not subject to the jurisdiction of a court-martial. Neither are the superintendents of national cemeteries. 16 A. G. Op. 13, 48.

The revisers have here placed certain enactments as Articles of War which had not previously borne that name, regarding a statute providing for the trial of an offence by court-martial as amounting to an article of war so providing. 1 Com. D. 639. A military officer can arrest and detain, for an offence against Federal laws, a person not subject to the rules and articles of war, only in aid of the judicial power and subject to its control. *Ex parte Merryman*, Taney, 246; *Re Murphy*, Woolw. 141. A military officer who has been detailed for other than his usual duties and who misappropriates money contrary to the rules and regulations governing disbursing officers of the Army, may be tried by court-martial. 14 A. G. Op. 269.

Art. 3. See note, § 1117. "Any infamous criminal offence" is intended to include both the conviction of "any criminal offence" in St. 1833, and the conviction "of any felony" in St. 1863. 1 Com. D. 643.

Art. 4. Such a discharge is legal evidence of the fact of discharge and the circumstances thereof stated therein. *Commissioners v. Mertz*, 27 Ind. 103; *Hanson v. South Scituate*, 115 Mass. 336; *Fitchburg v. Lunenburg*, 102 Mass. 358.

Art. 9. By international law, enemy's captured property belongs not to the captors but to the capturing government. *Lamar v. Browne*, 92 U. S. 195; *United States v. Klein*, 13 Wall. 136; *White v. Red Chief*, 1 Woods, 40; *Worthy v. Kinamon*, 44 Ga. 299.

Art. 15. The word "lost" in the second line was added by the Revision. The revisers treated those parts of the 36th and 39th Articles of War which related to unlawful selling, embezzlement, and misapplication, as superseded as to the punishment, by St. 1863. 1 Com. D. 646, 656. St. March 3, 1885 (23 St. 350), ch. 335, provides —

"That the proper accounting officers of the Treasury be, and they are hereby, authorized and directed to examine into, ascertain and determine the value of the private property belonging to officers and enlisted men in the military service of the United States which has been, or may hereafter be, lost or destroyed in the military service, under the following circumstances: First. When such loss or destruction was without fault or negligence on the part of the claimant. Second. Where the private property so lost or destroyed was shipped on board an unseaworthy vessel by order of any officer authorized to give such order or direct such shipment. Third. Where it appears that the loss or destruction of the private property of the claimant was in consequence of his having given his attention to the saving of the property belonging to the United States which was in danger at the same time and under similar circumstances. And the amount of such loss so ascertained and determined shall be paid out of any money in the Treasury not otherwise appropriated, and shall be in full for all such loss or damage: *Provided*, That any claim which shall be presented and acted on under authority of this act shall be held as finally determined, and shall never thereafter be reopened or considered: *And provided further*, That this act shall not apply to losses sustained in time of war or hostilities with Indians: *And provided further*, That the liability of the Government under this act shall be limited to such articles of personal property as the Secretary of War, in his discretion shall decide to be reasonable, useful, necessary, and proper for such officer or soldier while in quarters, engaged in the public service, in the line of duty: *And provided further*, That all claims now



existing shall be presented within two years and not after from the passage of this act; and all such claims hereafter arising be presented within two years from the occurrence of the loss or destruction."

Art. 21. Striking even a warrant officer, as here described, constitutes mutiny. 8 A. G. Op. 396.

Art. 22. Intent is a necessary element in mutiny, distinguishing it from offences under other articles. *United States v. Smith*, 1 Mason, 147; *United States v. Kelly*, 4 Wash. 528; *United States v. Thompson*, 1 Sumner, 171. In suppressing a mutiny, violent measures, if clearly unnecessary, are not justifiable. *United States v. Carr*, 1 Woods, 480.

Arts. 26, 38. 19 St. 240, ch. 69, strikes out "corporal" in both the fourth line of Art. 26 and the third line of Art. 38.

Art. 32. The amount of the reward paid for the apprehension of a deserter, convicted of absence without leave, cannot be deducted from his pay unless the sentence of the court-martial so provides. Such deduction cannot be made unless there has been a conviction of the offence of desertion or a restoration to duty without trial on conditions which include that. 16 A. G. Op. 474.

Art. 38. See note, Art. 26. 18 St. 316, ch. 80, § 1, which also strikes out "corporal" in the third line of this article, adds at its end —

"No court-martial shall sentence any soldier to be branded, marked, or tattooed."

Art. 41. The original act contained the words "in action or" after "alarms" in the second line.

Art. 47. Statutes providing for arrest for desertion are to be strictly construed. *Hawley v. Butler*, 48 Barb. 101; *Huber v. Reily*, 53 Penn. St. 112. A police officer of a State, or private citizen, has no authority, as such, without a warrant or military order, to arrest and detain a deserter from the United States army. *Kurtz v. Moffitt*, 115 U. S. 487; *United States v. Gleason*, Woolw. 128; *cf. Hutchings v. Van Bokkelen*, 34 Maine, 126. St. May 17, 1886, ch. 341 (24 St. 51), provides for the removal of the charge of desertion, against soldiers who served in the Rebellion, by reason of re-enlistment without a discharge.

Art. 48. See notes, § 1119; Art. 103, *post*. There can be no criminal desertion if the enlistment was illegal, as of a minor without the required consent of parents. *United States v. Wright*, 5 Phila. 296. *Contra*, where the parent's consent is given. *Wilbur v. Grace*, 12 Johns. 68. Desertion involves a forfeiture of all pay and allowances due at the time, and when such forfeiture is imposed by a court-martial, it is not remitted by subsequent service and an honorable discharge. *United States v. Landers*, 92 U. S. 77; 9 Ct. Cl. 242; 10 Id. 408; *Tapia's Case*, 16 Ct. Cl. 561. But where the deserter was restored to duty, without trial, by order of his department commander, on condition of making good the lost time, which was done, and he was afterwards honorably discharged, he was held entitled to bounty money without a formal removal of the charge from the rolls. *United States v. Kelly*, 15 Wall. 34; 5 Ct. Cl. 476. Absence without leave, with the intention to return to the service, is not desertion; and an indorsement of desertion upon a discharge certificate, without the soldier's consent, does not affect its admissibility in evidence to prove that he was honorably discharged. *Hanson v. South Scituate*, 115 Mass. 336. The status of a soldier is not affected by the sentence of a court-martial discharging him from service before the expiration of his term of enlistment, where such sentence is afterwards set aside as null and void, and he is adjudged to have been in service during the whole period intervening between the sentence and the order setting it aside. *Re Bird*, 2 Sawyer, 33.

Art. 49. This article fixes definitely the time when and the means by which an officer ceases to belong to the Army by resignation. The President's revocation of an



order accepting an officer's resignation does not work his restoration; and after an officer has sent in his resignation, and it has been accepted by the President, the officer is still a member of the army, and subject to military law and orders, until he has received due notice of such acceptance; when he has received such notice he is no longer a member of the army. *Mimmack's Case*, 10 Ct. Cl. 584, 597; 97 U. S. 426.

Art. 54. The original article contained the words "or other public assemblages," after "markets" in the sixth line.

Art. 58. — Private property may lawfully be taken by a military officer, when necessary for the safety of the government or army, or to prevent it falling into the enemy's hands. *Mitchell v. Harmony*, 13 How. 115; 1 Blatch. 549. Whether such taking is necessary and justifiable is for the jury (*Holmes v. Sheridan*, 1 Dillon, 351); and the burden of proof is upon the party charged. *Bryan v. Walker*, 64 N. C. 141. Without a special order, a private soldier cannot lawfully capture anything contraband of war. *Branner v. Felkner*, 1 Heisk. (Tenn.) 228.

Art. 59. 2 A. G. Op. 10. This article is not applicable to an offence against United States laws, such as that prohibiting the introduction of liquor into the Indian Country, or to an offence committed in a place within the exclusive jurisdiction of the United States (1 J. Ad. Gen. Op. 30); or to a soldier absent on furlough, who may be arrested like any civilian. *Ex parte McRoberts*, 16 Iowa, 603.

Art. 60. See note, Art. 15. St. March 3, 1875, ch. 144 (18 St. 479) provides —

"SEC. 1. That any person who shall embezzle, steal, or purloin any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States, shall be deemed guilty of felony, and on conviction thereof before the district or circuit court of the United States in the district wherein said offence may have been committed, or into which he shall carry or have in possession of said property so embezzled, stolen, or purloined, shall be punished therefor by imprisonment at hard labor in the penitentiary not exceeding five years, or by a fine not exceeding five thousand dollars, or both, at the discretion of the court before which he shall be convicted.

"SEC. 2. That if any person shall receive, conceal, or aid in concealing, or have, or retain in his possession with intent to convert to his own use or gain, any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States, which has theretofore been embezzled, stolen, or purloined from the United States by any other person, knowing the same to have been so embezzled, stolen, or purloined, such person shall, on conviction before the circuit or district court of the United States in the district wherein he may have such property, be punished by a fine not exceeding five thousand dollars, or imprisonment at hard labor in the penitentiary not exceeding five years, one or both, at the discretion of the court before which he shall be convicted; And such receiver may be tried either before or after the conviction of the principal felon, but if the party has been convicted, then the judgment against him shall be conclusive evidence in the prosecution against such receiver that the property of the United States therein described has been embezzled, stolen, or purloined."

Amenability to court-martial jurisdiction under this article is not determined by the nature of the person's employment, whether military or not, but by his belonging or not belonging to the military establishment as defined by § 1094 *et seq.*, except those who come within Art. 63, or §§ 1343, 1361, 4824, 4835; it does not include a civilian employed as a quartermaster's clerk or a superintendent of a national cemetery. 16 A. G. Op. 16, 294. A court-martial may try a soldier for larceny, although he has been tried and acquitted on an indictment found by a grand jury. *Re Esmond*, 5 Mackey, 64.

Art. 62. This article authorizes conviction for a lesser offence proved, if embraced within a larger one charged. *Dynes v. Hoover*, 20 How. 65; *Bankhead's Case*, 20 Ct. Cl. 405; *Barrett v. Hopkins*, 7 F. R. 312. Such court-martial has jurisdiction of an attempted shooting, by an officer on duty within a jail, of a prisoner there confined. *Ex parte Mason*, 105 U. S. 696. A sensational publication in a newspaper by one officer of charges against another, before lodging them with the proper officer for investigation, is conduct prejudicial to good order and discipline, but such publication, if made by an officer as an editor, and



not in connection with the military service, is cognizable only by a civil court. *People v. Townsend*, 10 Abb. N. C. (N. Y.) 169.

Art. 63. See above note. "In the field" includes service against the Indians. 14 A. G. Op. 22.

Art. 64. The State militia are not subject to this section unless they are in the actual service of the United States, which usually commences upon arrival at the place of rendezvous. *Houston v. Moore*, 5 Wheat. 20; *Martin v. Mott*, 12 Id. 35, overruling *Mills v. Martin*, 19 Johns. 7; *Rathburn v. Martin*, 20 Id. 343. But a militia man who refused to obey the order calling him into service could be tried by a court-martial under § 5 of the act of Feb. 28, 1795 (1 St. 424). *Houston v. Moore*, *supra*.

Art. 70. This applies only to confinement preliminary to trial, but not to confinement of soldiers during trial and awaiting judgment. *Re Corbett*, 9 Ben. 274; Art. 66 of this section.

Art. 72. Amended by 23 St. 121, ch. 224, to read as follows:—

"Any general officer commanding an army, a Territorial Division or a Department, or colonel commanding a separate Department may appoint general courts martial whenever necessary. But when any such commander is the accuser or prosecutor of any officer under his command the court shall be appointed by the President; and its proceedings and sentence shall be sent directly to the Secretary of War, by whom they shall be laid before the President, for his approval or orders in the case."

Art. 73. If the record of a court-martial trial fails to show who originated or signed the charges, evidence *aliunde* is admissible for the purpose; and a commander of division, who, being informed by a colonel of misconduct by one of his regimental officers, directs the colonel to prefer charges against him, and sees that they are put in proper form, is not "the accuser or prosecutor" within this article. 16 A. G. Op. 106.

Art. 75. This article is merely directory to the officer appointing the court, and his decision as to the number which can be convened without manifest injury to the service is a matter for his sound discretion, and is conclusive. *Martin v. Mott*, 12 Wheat. 35; 1 A. G. Op. 297; 6 Id. 511. It is irregular for a member of the court-martial to take part in the sentence, if he has not been present throughout the trial. 2 A. G. Op. 414; 4 Id. 7, 17; 7 Id. 98, 338; *Van Orsdall v. Hazard*, 3 Hill (N. Y.), 243. A sentence of a court-martial, when confirmed by the proper superior officer, is beyond the jurisdiction or inquiry of any civil tribunal, except in a case in which the court had no jurisdiction over the subject matter or charge, or one in which, though having jurisdiction over the subject-matter, it has failed to observe the rules prescribed by the statute for its exercise. In such cases all the parties to such illegal trial are trespassers upon the person aggrieved by it, and he may recover damages from them on a proper suit in a civil court, by the verdict of a jury. *Dynes v. Hoover*, 20 How. 81.

Art. 82. 18 St. 316, ch. 80, § 1, changes "ninety-five" to "eighty," in the third line.

Art. 84. In *Re Mackenzie*, 1 Clark's Pa. L. J. R. 356, members of a naval court-martial were compelled in a civil court, against their objection, to state their votes upon the findings at a trial before them.

Art. 85. See Opinion of Justices, 3 Mass. 568.

Art. 86. The original act contained the words "or contemptuous" after "menacing," in the second line.

Art. 90. The original act contained the words "or when the same has been entered by the court" after "plea," in the fourth line; and the clause in the first and second lines, beginning with "or" and ending with "garrison," was added by the Revision.

Art. 96. If the accused escapes after sentence of death, he may, upon a recapture long afterwards, be delivered over to the military authorities and the sentence be legally executed, although the war has ceased and the soldier has been discharged from the service. *Coleman v. Tennessee*, 97 U. S. 519.



Art. 101. Bounty, although not strictly pay or allowance, is included in a forfeiture of "pay and allowances" imposed by sentence. *United States v. Landers*, 92 U. S. 77; 9 Ct. Cl. 242; 13 A. G. Op. 197.

Art. 102. "Tried" here means duly prosecuted before a court-martial to final conviction or acquittal; and, therefore, if one court, after full investigation, fails to agree in a finding, the accused may be again brought to trial. *United States v. Perez*, 9 Wheat. 579; *United States v. Haskell*, 4 Wash. 409; 1 A. G. Op. 233, 294; J. Adv. Gen. Op. 84. Acquittal or conviction before a civil court does not bar a trial by court-martial or *vice versa*. 6 A. G. Op. 413, 506; 3 Id. 749. This article does not apply to a discharge without trial following arrest. 1 A. G. Op. 295.

Art. 103. See notes, §§ 1117, 1119, and Art. 48 *ante*. This limitation applies to a desertion, which is a continuing offence from the time of its commission and completion, and as to which the limitation begins to run only when the obligation to serve ceases. 15 A. G. Op. 152; 16 Id. 170, 396; 14 Id. 266; 13 Id. 280, 462; *Re Davison*, 4 F. R. 507; *Lunenburg v. Shirley*, 132 Mass. 498; *Re Zimmerman*, 12 Sawyer, 257; 30 F. R. 176. It applies to all offences triable and punishable by court-martial, including those under St. 1863, ch. 67. 14 A. G. Op. 52. "Absented" here means absence from the reach or jurisdiction of the military courts, not absence beyond the civil jurisdiction; "impediment" refers only to such impediment as operates to prevent the military court from exercising its jurisdiction. *Re Davison*, *supra*. Concealment by the accused and lack of knowledge by the authorities for more than two years do not constitute such impediment. 14 Id. 52, 266. As here used, "manifest impediment" does not mean merely want of evidence, or ignorance as to the offender or offence by the military authorities, but want of power, or physical inability to bring the accused to trial. Id.

A civil court cannot determine the question of this limitation. *Re White*, 17 F. R. 723. It does not apply to courts of inquiry, and cannot be waived by the accused, who, after the lapse of the two years, cannot be tried by court-martial, even with his consent, unless the time is extended by the required absence or impediment. 6 A. G. Op. 239; 9 Id. 181; 1 Id. 383; 3 Id. 749; 13 Id. 462. It does, however, apply to the liability to trial after discharge imposed by the last clause of Art. 60 (14 Id. 52); and to the liability to trial after the expiration of the term of enlistment under Art. 48. 13 Id. 462; *Re Bird*, 2 Sawyer, 33. See note, Art. 96. The limitation does not apply to proceedings begun within the two years and suspended for more than two years after a plea of the pendency of civil proceedings arising out of the same matter. 6 A. G. Op. 506. The exception in this article does not produce any effect where the limitation itself would not otherwise run. Hence absence without leave during the term of enlistment is unimportant, as the period of limitation would not begin to run until such term expired. 16 A. G. Op. 170, 396.

Art. 106. See note, § 1229. This article contemplates judicial action by the President; it must affirmatively appear that the matter came under his personal notice, and that his approval is the result of his own judgment. *Runkle v. United States*, 122 U. S. 543. This article supersedes the 65th Article of War contained in the act of April 10, 1806. 15 A. G. Op. 290. The President need not attach his sign-manual to the approval of a sentence rendered by a court-martial in time of peace, cashiering a commissioned officer, in order to make the sentence effectual, but the approval of the sentence may be signified through and attested by the Secretary of War in a statement signed by the latter. Id. See § 216. Such statement need not recite that it is made by direction of the President, that being presumed. Id. The same rule applies to an act of the President in remitting part of a sentence. Where this is done at the time of confirmation, the two acts are, in practice, signified and attested together in the same way. Id. If the sentence of a court-martial, lawfully confirmed, has been executed, the President can no longer review the



proceedings. *Id.* If a sentence dismissing an officer from the service is carried into effect, under orders from the War Department, without having been approved by the President, and the latter subsequently recognizes the vacancy thus occasioned by making an appointment to fill it, this operates as a confirmation of the sentence. 16 *Id.* 298.

Art. 109. If the reviewing officer disapproves the findings and sentence of the court, it is, in effect, an acquittal. 13 A. G. Op. 459.

Art. 111. The President may mitigate the sentence of a court-martial, as by commuting a sentence of dismissal from the service to suspension for a limited time. 5 A. G. Op. 43. But the sentence of a court-martial, approved and executed by one President, cannot be revised by his successor. 6 *Id.* 506. And a sentence approved by the President cannot be revised except upon suggestion of absolute nullity in the proceedings. *Id.* 369.

Art. 112. The appointment of an officer to a new commission was regarded as constructive pardon of a previous sentence, pronounced but not yet executed, in 6 A. G. Op. 123. In mitigating a sentence, the President may substitute suspension for a period without pay for an absolute dismissal from the service, suspension being but an inferior degree of the same punishment. 4 A. G. Op. 432. The power given to the President to mitigate punishment does not authorize him to substitute one form of punishment for another, as by suspending the pay of an officer whose pay was not suspended by the court. *Id.* 444. See 1 *Id.* 327.

Art. 113. 19 St. 310, 315, ch. 102, § 1, provides,—

“That hereafter the records of regimental, garrison, and field officers and courts-martial shall after having been acted upon, be retained and filed in the Judge Advocate’s office at the Headquarters of the Department Commander in whose department the courts were held for two years, at the end of which time they may be destroyed.”

Art. 118. See note, § 858.

Art. 123. This article seems designed only for a condition of the military service in which both volunteers and regulars exist as distinct organizations. 15 A. G. Op. 330, 333.

Art. 123. See note, § 1292. Undergraduate cadets are not commissioned officers, are not competent to sit on a court-martial, and are triable by a regimental or garrison court-martial. 7 A. G. Op. 323.

SECT. 1343. — 16 A. G. Op. 15, 294. If the spy escapes to his own army or country, he cannot, upon a subsequent capture, be properly tried as a spy. *Re Martin*, 45 Barb. 142; 31 How. Pr. 228.

## CHAPTER VI.

### MILITARY PRISON.

AMENDED by 18 St. 48, ch. 186, so that all acts and things here required to be done at Rock Island, Illinois, shall be done and performed on the military reservation at Fort Leavenworth, Kansas, the Government building on this reservation to be modified and used so far as practicable for the prison. By 20 St. 377, ch. 182, § 1, such supplies for the Army as can be economically and properly manufactured at this prison are to be there fabricated. 25 St. 486, contains the proviso —

“That out of the money hereby appropriated for clothing and equipage of the Army there shall not be expended at the military prison at Fort Leavenworth a sum in excess of \$125,000.”

SECT. 1347. — 22 St. 457 and 23 St. 457, appropriate \$1000 for the officer in command of the prison in addition to his pay in the Army for the next fiscal year.



SECT. 1351. — See above note.

SECT. 1360. — "Other person" refers only to an enlisted man, as appears from § 1347.  
16 A. G. Op. 15.

SECT. 1361. — Prisoners in the military prisons remain subject to military discipline and punishment, and are triable by court-martial, though part of their sentence is dismissal from the service. 16 A. G. Op. 292.



## TITLE XV.

## THE NAVY.

## CHAPTER I.

## ORGANIZATION.

PROVISION is made for increasing the naval establishment by the construction of steel cruisers, &c., by 25 St. 472; 24 St. 7, 151, 154; 23 St. 262, 292, 433; 22 St. 291, 477. 22 St. 599, § 5, provides for the appraisal and sale of condemned naval vessels. 22 St. 296, § 2, provides for the appraisal of naval stores and the sale of such as are unserviceable. 22 St. 291, 476, provides for the preservation and repair of existing vessels of war. 22 St. 291, 293, 478, authorizes the organization of a naval advisory board. As to the repair of wooden ships and ships damaged in foreign waters, see 23 St. 291, 430; 25 St. 467. By 25 St. 463, commissions of officers are to be appointed to locate a navy yard on or near the coast of the Gulf of Mexico and the South Atlantic coast, and another in Oregon, Washington Territory, or Alaska, reporting to the Secretary of the Navy, who is to transmit the report, with his recommendations, to Congress. As to the new Naval Observatory, see 21 St. 64; 25 St. 463.

SECT. 1362. — “Admiral” and “vice-admiral” here express title, rank, and grade. 16 A. G. Op. 417; *Wood v. United States*, 15 Ct. Cl. 151. *Cf. Rutherford v. United States*, 18 Ct. Cl. 339; *McClure v. United States*, Id. 347. As to the examination of midshipmen under 12 St. 583, see *Benjamin v. United States*, 10 Ct. Cl. 474. The Secretary of the Navy may adopt a rule regulating the relative rank of Navy officers, and afterwards rescind it and adopt another, and the civil courts cannot interfere therein by *mandamus*. *United States v. Whitney*, 5 Mackey, 370. See note, § 416. St. March 3, 1883, ch. 97 (22 St. 472), appropriates for —

“100 masters, the title of which grade is hereby changed to that of lieutenants, and the masters now on the list shall constitute a junior grade of, and be commissioned as, lieutenants, having the same rank and pay as now provided by law for masters, but promotion to and from said grade shall be by examination as provided by law for promotion to and from the grade of master, and nothing herein contained shall be so construed as to increase the pay now allowed by law to any officer in the line or staff.” [See note, § 1521.]

SECT. 1363. — 16 A. G. Op. 589.

SECT. 1368. — Amended by 22 St. 285, stated in note, § 1521.

SECT. 1371. — The position of passed assistant surgeon is an office, and a valid appointment thereto is made by a notification from the Secretary of the Navy, though the statutes do not prescribe the manner of appointment. *Collin's Case*, 14 Ct. Cl. 568; *Moore's Case*, 95 U. S. 760; *Germaine's Case*, 99 U. S. 503. 22 St. 472 provides that —

“Two assistant surgeons not in the line of promotion shall hereafter, after 15 years' service, be entitled to receive, as annual pay, when at sea, \$2100, when on shore duty, \$1800, and when on leave or waiting orders, \$1600.”

SECT. 1375. — 19 St. 240, ch. 69, adds at end of this section, as of the date of the Revised Statutes, the words: “Who shall receive the highest shore-pay of his grade.” 15 A. G. Op. 259.



SECT. 1376. — See 22 St. 285, stated in note, § 1521.

SECT. 1378. — In the absence of a duly appointed purser, the commander of a naval squadron on a foreign station may appoint an acting purser. 6 A. G. Op. 357. A purser's pay stops when his resignation is accepted, although the office may be kept alive for settlement. 1 Id. 346; *Goldsborough v. United States*, Taney, 80. Pursers are not allowed extra compensation for any official duty. *United States v. Buchanan*, 8 How. 83; *Crabbe*, 563; *Carpenter v. United States*, 15 Ct. Cl. 247. Nor are navy agents. *United States v. White*, Taney, 152. Under § 1378, the pay corps is limited to officers commissioned by the President, and clerks and others not so commissioned do not belong to the pay corps. *United States v. Mouat*, 124 U. S. 303, 308; 22 Ct. Cl. 293.

SECT. 1381. — The acting appointment provided for in this section does not depend upon a discharge of the appointee or a revocation of his authority. It ends when another paymaster reports for duty. *Ostrander v. United States*, 22 Ct. Cl. 218.

SECT. 1383. — A purser's bond to the government, even when not prescribed by law, is valid as a common-law obligation, and if his duties are undefined by statute and are regulated by usages or the orders of the department, these should be pleaded in a suit for breach of the bond. *United States v. Tingey*, 5 Pet. 115; *Strong v. United States*, 6 Wall. 788; *United States v. Buchanan*, 8 How. 83.

SECT. 1389. — The offices of navy agent and of navy pension-agent are not created by law, nor are their duties defined by law; but the former and pursers are both disbursing officers whose accounts are kept separately at the Treasury Department. 1 A. G. Op. 302; 4 Id. 351; *United States v. Hawkins*, 10 Pet. 125; *United States v. Cutter*, 2 Curtis, 617; *United States v. Wendell*, 2 Clif. 340.

SECT. 1390. — 16 A. G. Op. 417, 419; note, § 1475. St. Feb. 24, 1874, ch. 35, (18 St. 17), changes the title of first assistant engineer to passed assistant engineer, and that of second assistant engineer to assistant engineer, provided that the regulations relating to examinations and amount of sea-service previous to each examination be complied with. St. Feb. 26, 1879, ch. 105 (20 St. 322), authorizes the President, upon the application of an established scientific school or college within the United States, to detail an officer of this corps as professor in such school or college, the number detailed not to exceed twenty-five at any time, and such details, which are to be governed by rules prescribed by the President, may be withheld or withdrawn whenever, in the judgment of the President, the public service so requires. A naval engineer derives no authority from his office alone to charter a steamer for the use of the quartermaster's department. *Slawson's Case*, 4 Ct. Cl. 87. See, further, 22 St. 285, stated in note, § 1521.

SECT. 1394. — See preceding note.

SECT. 1395. — St. March 3, 1871, ch. 117 (16 St. 536), fixing the relative rank of chaplains, accounts for only eighteen, but it does not appear that Congress thereby intended to so limit the number. 1 Com. D. 691.

SECT. 1400. — St. Jan. 20, 1881, ch. 24 (21 St. 317), requires such professors, before appointment, to pass a physical and a professional examination.

SECT. 1406. — In *Johnson v. United States*, 2 Ct. Cl. 167, warrant officers were held included under the words "said officers" in statutes relating to the Navy, though not expressly named therein.

SECT. 1407. — See note, § 1417.

SECT. 1410. — There are three kinds of officers in the Navy, commissioned, warrant, and petty; cadets at the Naval Academy have neither warrants nor commissions, and are not "officers" as that word is generally used in Federal legislation. 15 A. G. Op. 561, 635; *Grambs' Case*, 23 Ct. Cl. 420. The power of the Secretary of the Navy to appoint acting gunners is implied by this section; such gunners are not petty officers. 15 A. G. Op. 564. See *Muse v. United States*, 19 Ct. Cl. 441; *Foster's Case*, 23 Id. 90.



SECTS. 1411, 1412. — St. Feb. 15, 1879, ch. 83 (20 St. 294), requires line officers of the volunteer navy and the passed assistant surgeons then in the service, to be examined, and authorizes them, if found qualified, to be appointed in the regular navy, or, if not qualified, to be mustered out of the service; provided, that such officers, if physically disabled in the line of duty, may be placed upon the retired list with the pay of like officers in the regular navy; and acting assistant surgeons for temporary service are not to be thereafter appointed, except in case of war.

To entitle an officer to credit for sea-service, under § 1412, he must have been in the volunteer navy at the time of his appointment to the regular navy; and if he ceased to be an officer in the volunteer navy prior to such appointment, however brief the interval, he is not within the statute. 14 A. G. Op. 142. The last clause of § 1412 means that officers transferred from the volunteer to the regular naval service shall have whatever benefits their past sea duty would entitle them to, if, during the period of its performance, they had belonged to the regular naval service, holding, not the same grades as those to which they are transferred, but grades corresponding to those at that period held by them in the volunteer naval service. 14 A. G. Op. 191, 358; 16 Id. 45.

SECT. 1413. — See note, § 1624, Art. 36. The services of these officers may be dispensed with when they are unnecessary, the appointment is local in its character, and the appointee is not a naval officer in the full sense of the term. 16 A. G. Op. 203. In the absence of any action by the President, conferring relative rank upon civil engineers, under the discretionary power given him by § 1478, which has never been exercised, they are not naval officers but civil officers. Id. They are, however, officers within § 1624, Art. 36, 37, and are subject to the jurisdiction of naval courts-martial. 15 Id. 165, 597.

SECT. 1417. — See note, § 1553. 21 St. 3, ch. 5, repealing 19 St. 65, ch. 159, in part, strikes out the words after "coal-heavers" and adds, —

"And including 750 apprentices and boys, hereby authorized to be enlisted annually, shall not exceed 8250: *Provided*, That in the appointment of warrant-officers in the naval service of the United States, preference shall be given to men who have been honorably discharged upon the expiration of an enlistment as an apprentice or boy, to serve during minority, and re-enlisted within three months after such discharge, to serve during a term of three or more years: *Provided further*, That nothing in this act shall be held to abrogate the provisions of § 1407."

As to enticing seamen to desertion within § 11 of St. March 2, 1855, ch. 136 (10 St. 628), see *United States v. Thompson*, 2 Sprague, 103.

SECT. 1418. — See notes, §§ 1117, 1625. The revisers regarded the act of 1865, ch. 79 (13 St. 490), as forbidding the mustering and enlistment of boys under sixteen, thereby raising the thirteen years' limit in St. 1837. 1 Com. D. 695. In this section, and also in §§ 1419, 1420, 21 St. 3, ch. 5, as amended by 21 St. 331, ch. 73, changes "sixteen" to "fourteen." The marine corps is part of the navy, not of the army, and that minors over eighteen may be enlisted therein without the consent of parents or guardians was held in *Re Doyle*, 18 F. R. 369; *cf. United States v. Bainbridge*, 1 Mason, 71; *Wilkes v. Dinsman*, 7 How. 89; *Re Hayes*, 15 Rep. 259; *Re McNulty*, 2 Lowell, 270; *United States v. Stewart*, Crabbe, 265; *Re Gregg*, 15 Wis. 479; *Re Shugrue*, 3 Mackey, 323; *Re Webb*, 24 How. Pr. (N. Y.) 247; *Re Collins*, 25 Id. 157. The parents' consent might be given after the enlistment, under St. Jan. 20, 1813. *Commonwealth v. Camac*, 1 Serg. & R. 87. In *Wilkes v. Dinsman*, 7 How. 89; 12 How. 390, marines were regarded as persons "enlisted for the navy" within St. 1837. Until the year 1858 there was no statute expressly regulating the age, size, citizenship, or other qualifications for recruits in the marine corps. Such a contract may be avoided by the minor himself, by the parent or guardian, or by the United States. *Re McNulty*, 2 Lowell, 270; *United States v. Stewart*, Crabbe, 265.



SECTS. 1419, 1420. — See notes, §§ 1117, 1418. Persons enlisted in the marine corps are not enlisted in the navy. *Re Shugrue*, 3 Mackey, 324.

SECT. 1421. — The revisers regarded this provision in the act of 1864 as intended rather for the exigencies of the war than for the permanent relations of the military and naval service. 1 Com. D. 696.

SECT. 1422. — St. March 3, 1875, ch. 155 (18 St. 484), inserts "or Pacific" after "Atlantic" in second and last lines; inserts, after "States," in third line: "As their enlistment may have occurred on either the Atlantic or Pacific coast of the United States;" substitutes "enlistment" for "service" in fifth line; strikes out "very" in the sixth line, and adds at end of the section, —

"All persons enlisted within the limits of the United States may be discharged, on the expiration of their enlistment, either in a foreign port or in a port of the United States, or they may be detained as above provided beyond the term of their enlistment; and that all persons sent home, or detained by a commanding officer, according to the provisions of this act, shall be subject in all respects to the laws and regulations for the government of the navy until their return to an Atlantic or Pacific port and their regular discharge; and all persons so detained by such officer, or re-entering to serve until the return to an Atlantic or Pacific port of the vessel to which they belong, shall in no case be held in service more than 30 days after their arrival in said port; and that all persons who shall be so detained beyond their terms of enlistment, or who shall, after the termination of their enlistment, voluntarily re-enter to serve until the return to an Atlantic or Pacific port of the vessel to which they belong, and their regular discharge therefrom, shall receive for the time during which they are so detained, or shall so serve, beyond their original terms of enlistment, an addition of one fourth of their former pay; *Provided, That the shipping articles shall hereafter contain the substance of this section.*"

SECT. 1425. — See end of preceding note.

## CHAPTER II.

### GENERAL PROVISIONS RELATING TO OFFICERS.

SECT. 1428. — Citizens of the United States, who resigned commissions in the navy thereof, and entered the Confederate service, were not thereby disqualified to be officers of vessels of the United States. 11 A. G. Op. 317.

SECT. 1432. — The words "passed assistant paymaster" were added by the Revision. 1 Com. D. 698.

## CHAPTER III.

### RETIRED OFFICERS OF THE NAVY.

SECT. 1443. — Of the two classes in the navy, the retired list is filled from the active list; the lowest rank of the active list is filled from without, and all the higher grades are filled by promotion. *Thompson v. United States*, 18 Ct. Cl. 604; *Thornley v. United States*, Id. 111; 113 U. S. 310; *Brown v. United States*, Id. 568; 18 Ct. Cl. 537. Officers on the retired list are not entitled to longevity pay. Id. A mate appointed, by private act, upon the retired list of the navy with the rank of master, is to be paid as if retired from the rank of master. *Bradbury v. United States*, 20 Ct. Cl. 187. St. March 3, 1883, ch. 97 (22 St. 473), provides —

"All officers of the Navy shall be credited with the actual time they may have served as officers or enlisted men in the regular or volunteer Army or Navy, or both, and shall receive all the benefits of such actual service in all respects in the same manner as if all said service had been continuous and in the



regular Navy in the lowest grade having graduated pay held by such officer since last entering the service: *Provided*, That nothing in this clause shall be so construed as to authorize any change in the dates of commission or in the relative rank of such officers: *Provided further*, That nothing herein contained shall be so construed as to give any additional pay to any such officer during the time of his service in the volunteer Army or Navy."

Under this act, Navy officers are to be credited as of the lowest grade with graduated pay held by them after re-entering the service. *United States v. Rockwell*, 120 U. S. 60; 21 Ct. Cl. 332. Service in the marine corps is service in the army or navy within the above act of 1883. *United States v. Dunn*, 120 U. S. 249; 21 Ct. Cl. 20.

SECT. 1447. — See note, § 1500. If, upon proceedings taken by a naval board without notice to the officer interested, its findings are approved by the President and the officer is retired, the order of retirement may be revoked and the officer allowed a hearing so long as the vacancy in the office remains unfilled. 16 A. G. Op. 20.

SECT. 1448. — St. 1861, ch. 42, § 23 (§§ 1448, 1455 Rev. Stats.), applies to warrant officers, and they, as well as commissioned officers, may be retired. *Brown v. United States*, 18 Ct. Cl. 537.

SECT. 1449. — St. 1861, ch. 42, § 17, gave the Secretary of the Navy discretionary power to select, for the trial of officers of the marine corps, such commissioned officers, under his control and orders, as he deemed proper. 10 A. G. Op. 129. See § 1246.

SECT. 1451. — If a naval retiring board, convened to inquire into the nature and cause of an officer's disability, has completed its work, rendered a perfect judgment, and adjourned, a subsequent reconsideration of the judgment, unless directed or authorized by competent authority, is without legal effect. *Rodney's Case*, 16 A. G. Op. 104. The finding of the board, when approved by the President, settles the fact as to the cause of an officer's incapacity. It is conclusive, and cannot be reviewed by the Secretary of the Navy. *Burchard v. United States*, 125 U. S. 176; 19 Ct. Cl. 137.

SECT. 1454. — *Magaw v. United States*, 16 Ct. Cl. 3. See note, § 1451. This does not apply to officers of the marine corps. 15 A. G. Op. 445.

SECTS. 1457, 1461. — See note, § 1594.

SECT. 1460. — 19 St. 204, ch. 302, adds at end of the section, —

"Or who, being at the outbreak of the late war of the rebellion citizens of any State which engaged in such rebellion, exhibited marked fidelity to the Union in adhering to the flag of the United States."

SECTS. 1463-1465. — The revisers regarded these provisions as referring to the late war, and as not adapted to the condition of the service at the time of the Revision. 1 Com. D. 704.

## CHAPTER IV.

### RANK AND PRECEDENCE, PROMOTION AND ADVANCEMENT.

SECT. 1466. — By St. March 3, 1883, ch. 97 (22 St. 472), the title of the grade of master —

"is changed to that of lieutenants, and the masters now on the list shall constitute a junior grade of, and be commissioned as, lieutenants, having the same rank and pay as now provided by law for masters, but promotion to and from said grade shall be by examination as provided by law for promotion to and from the grade of master, and nothing herein contained shall be so construed as to increase the pay now allowed by law to any officer in the line or staff."

SECT. 1475. — "Pay-inspector" here expresses both title and grade in the pay corps; this section confers upon such officers the rank of commander only by relation to the rank



of a line officer of that grade, and not the grade of commander. By "relative rank" the grades of this pay corps are made equal to, but not identical with, the grades of the line with which they are thereby associated. 16 A. G. Op. 414, 651.

SECT. 1476. — See note, § 1390. 23 St. 340, ch. 318, authorizes the President —

"to nominate and, by and with the advice and consent of the Senate, to appoint one passed assistant engineer, now on the retired-list of the Navy, a chief engineer on the retired-list of the Navy, with the highest retired pay of that grade."

SECT. 1478. — See note, § 1413. If the President has not fixed the relative rank of civil engineers, they are civil officers, and a successor to any one of them may be nominated, and the confirmation of a nominee operates to remove the person whom he has been designated to succeed. Granger's Case, 16 A. G. Op. 203.

SECT. 1480. — See note, § 1475. 19 St. 240, ch. 69, adds at the end of this section, —

"The grades established in the six preceding sections for the staff corps of the Navy shall be filled by appointment from the highest members in each corps, according to seniority; and new commissions shall be issued to the officers so appointed, in which the titles and grades established in said sections shall be inserted; and no existing commission shall be vacated in the said several staff corps, except by the issue of the new commissions required by the provisions of this section; and no officer shall be reduced in rank or lose seniority in his own corps by any change which may be required under the provisions of the said six preceding sections: *Provided*, That the issuing of a new appointment and commission to any officer of the pay corps under the provisions of this section shall not affect or annul any existing bond, but the same shall remain in force, and apply to such new appointment and commission."

A commission to D., "a pay-inspector from the — day of —, A. D. 187—, with the relative rank of commander," gives the appropriate title and grade of the officer it names, and satisfies this section. 16 A. G. Op. 414. See § 1475.

SECT. 1483. — See 23 St. 60, ch. 122, stated in note, § 1521.

SECTS. 1484, 1486. — Section 1484 operates as an exception to § 1486, excluding therefrom engineer officers graduated at the Naval Academy; engineer officers not so graduated stand on the same footing with other staff officers, and are entitled to the six years constructive service. 15 A. G. Op. 336. 21 St. 510, ch. 150, adds at the end of § 1486, —

"Provided that nothing in this section shall be so construed as to give to any officer of the staff corps precedence of, or a higher relative rank than that of, another staff officer in the same grade and corps, and whose commission in such grade and corps antedates that of such officer."

St. July 9, 1888, ch. 591 (25 St. 241), provides —

"That for the purpose of placing certain cadet engineers (graduates) in their proper grade and rank in the Navy, the President of the United States be, and is hereby, authorized to appoint and by and with the advice and consent of the Senate, commission, as assistant engineers in the Navy, the cadet engineers of the classes of 1881 and 1882 now in the Navy: *Provided*, That the commissions of the class of 1881 be dated from July 1, 1883, and their names be placed on the Navy Register immediately after the name of William D. Weaver, and that they take precedence in their grade and corps according to their proficiency as shown by their order of merit at the date of graduation; and that the commissions of the class of 1882 be dated from July 1, 1884, and their names be placed on the Navy Register immediately after the name of Charles E. Romnell, and that they take precedence in their grade and corps according to their proficiency as shown by their order of merit at the date of graduation: *Provided*, That any of such cadet engineers who failed to pass the physical examination at the Naval Academy made at the time of their graduation shall be subjected to further examinations before receiving their appointments, as above authorized."

SECT. 1493. — See note, § 1500. By 20 St. 165, ch. 267, in examinations for promotion in the Navy, no fact decided at a previous examination is to be inquired into, unless such fact continuing shows the unfitness of the officer to perform all his duties at sea; and where this rule has been violated, the President may order a re-examination. This act does not authorize the President and Senate to place officers on the retired or



active list, or repeal the laws limiting the active force of the Navy. As a general act, it was intended to regulate appeals for special legislation on the subject, substituting a judicial inquiry in the department for investigations by its committees. *Thompson v. United States*, 18 Ct. Cl. 604.

SECT. 1495. — By St. June 22, 1874, ch. 392 (18 St. 191), a Navy officer promoted in course has the pay of the grade to which he is promoted from the date he takes rank therein, if subsequent to the vacancy he is appointed to fill. This cuts off increase of pay until promotion. *Hunt v. United States*, 116 U. S. 396; *Adamson v. United States*, 19 Ct. Cl. 623.

SECT. 1500. — If after a naval officer has appeared before an examining board, the examination is temporarily suspended, and he, being given permission to be absent at home until notified, fails to receive notice until after the examination is concluded and he is retired, being thus debarred the right of presenting material testimony in his defence, the President may revoke his action in approving the proceedings and findings of the board, for the purpose of allowing the officer a rehearing. 16 A. G. Op. 20.

SECT. 1504. — The cited § 4 of St. 1862 did not authorize the appointment of an examining board to recommend the retirement or promotion of naval medical officers. 11 A. G. Op. 105.

SECT. 1505. — See note, § 1562. The loss of date need not be contemporaneous with the term of suspension, but must agree therewith in point of duration. 16 A. G. Op. 587.

SECT. 1506. — 20 St. 144 ch. 260, adds at end of the section, —

“And the rank of officers shall not be changed except in accordance with the provisions of existing law, and by and with the advice and consent of the Senate.”

Advancement in rank under this section is not one of the cases within Rev. Stats. §§ 1561, 1562, entitling the officer to pay from a date anterior to his commission. *Young v. United States*, 19 Ct. Cl. 145.

SECT. 1507. — See note, § 1495.

## CHAPTER V.

### THE NAVAL ACADEMY.

By St. June 23, 1874, ch. 453 (18 St. 203), hazing at the Academy is made punishable by dismissal, upon the finding and recommendation of a court-martial of not less than three commissioned officers and the approval of the Superintendent, and such dismissal makes the offender ineligible to reinstatement or reappointment. 15 A. G. Op. 80. St. Feb. 14, 1879, ch. 68 (20 St. 284), provides for a board of visitors to attend the annual examination of the Academy, each member to receive not exceeding eight cents per mile mileage by the most direct route to and from his residence and Annapolis. St. July 26, 1886, ch. 781 (24 St. 156), allows each member \$5 per day for expenses during actual attendance at the Academy, and provides for the erection of the Naval Observatory. See, also, 25 St. 463. St. Aug. 4, 1886, ch. 903 (24 St. 268), provides that no part of any appropriation by Congress for expenses of the Board shall be used to pay for intoxicating liquors. By 25 St. 459, the Secretary of the Navy is authorized to consolidate and place under one command the torpedo station and the naval war college at Newport, Rhode Island, after Jan. 1, 1889.

SECT. 1512. — See 22 St. 285, stated in note, § 1521.

SECT. 1513. — 20 St. 143, ch. 260, strikes out “annually” in last line, and adds at end of the section, —



*“Provided, however, That there shall not be at any time more in said academy appointed at large than ten : but the provisions of this section shall not be construed to apply to cadet-midshipmen appointed at large now in said academy.”*

SECTS. 1514, 1515. — While a previous notification may not be essential to the validity of a recommendation, yet the date is so; § 1515 is to be read as if the dates fixed by the regulations of the Academy for the examination of candidates were expressly inserted therein, and therefore the season for recommendations and nominations of cadet-midshipmen begins after March 5 and expires on Sept. 22 in each year; each member has the control of all appointments to be made during any current year of his term. 16 A. G. Op. 621, 623, disapproving 10 Id. 46, 315, 494; *Benjamin v. United States*, 10 Ct. Cl. 474.

SECT. 1517. — The candidate is ineligible unless he is between fourteen and eighteen years of age. 10 A. G. Op. 315, 320.

SECTS. 1519, 1525. — These provisions leave in the Secretary of the Navy no right to continue at the Academy, without the required recommendation, cadets found deficient in their studies. 15 A. G. Op. 634. The words “graduating examination” mean that examination which, under the regulations of the Naval Academy, takes place after the prescribed term of sea service has been performed. Assignments of relative rank, as between members of the same class, based upon the results of such examination, are in conformity with law. 15 A. G. Op. 637. But a naval cadet engineer, who is not deficient at examination, or dismissed for misconduct under § 1525, or under sentence of a court-martial, but is honorably discharged by the Secretary of the Navy against his will, still remains in the service and may recover his pay in the Court of Claims. *United States v. Perkins*, 116 U. S. 483. A naval cadet has no vested right to the office, which expires when his course is completed. *Harmon’s Case*, 23 Ct. Cl. 132; *Grambs’ Case*, Id. 420.

SECT. 1521. — St. Aug. 5, 1882, ch. 391 (22 St. 285), repeals so much of this section as is inconsistent with its provisions, viz. —

*“Provided, That hereafter there shall be no appointments of cadet-midshipmen or cadet-engineers at the Naval Academy, but in lieu thereof naval cadets shall be appointed from each Congressional district and at large, as now provided by law for cadet-midshipmen, and all the undergraduates at the Naval Academy shall hereafter be designated and called ‘naval cadets;’ and from those who successfully complete the six years’ course appointments shall hereafter be made as it is necessary to fill vacancies in the lower grades of the line and Engineer Corps of the Navy and of the Marine Corps: And provided further, That no greater number of appointments into these grades shall be made each year than shall equal the number of vacancies which has occurred in the same grades during the preceding year; such appointments to be made from the graduates of the year, at the conclusion of their six years’ course, in the order of merit, as determined by the academic board of the Naval Academy; the assignment to the various corps to be made by the Secretary of the Navy upon the recommendation of the academic board. But nothing herein contained shall reduce the number of appointments from such graduates below ten in each year, nor deprive of such appointment any graduate who may complete the six years’ course during the year 1882. And if there be a surplus of graduates, those who do not receive such appointment shall be given a certificate of graduation, an honorable discharge, and one year’s sea-pay, as now provided by law for cadet-midshipman. That any cadet whose position in his class entitles him to be retained in the service may, upon his own application, be honorably discharged at the end of four years’ course in the Naval Academy, with a proper certificate of graduation. That the Secretary of the Navy may prescribe a special course of study and training at home or abroad for any naval cadet. That the pay of naval cadets shall be that now allowed by law to cadet-midshipmen; and as much of the money hereby appropriated as may be necessary during the fiscal year ending June 30, 1883, shall be expended for that purpose. That the active-list of the medical corps of the Navy shall hereafter consist of fifteen medical directors, fifteen medical inspectors, fifty surgeons, and ninety assistant and passed assistant surgeons. That the active-list of the pay corps of the Navy shall hereafter consist of 13 pay-directors, 13 pay-inspectors, 40 paymasters, 20 passed assistant paymasters, and 10 assistant paymasters. That the active-list of the engineer-corps of the Navy shall hereafter consist of ten chief engineers with the relative rank of captain, fifteen chief engineers with the relative rank of commander, forty-five chief engineers with the*



relative rank of lieutenant-commander or lieutenant, sixty passed assistant engineers, and forty assistant engineers, with the relative rank for each as now fixed by law; and after the number of officers in the said grades shall be reduced as above provided, the number in each grade shall not exceed the reduced number which is fixed by the provisions of this act for the several grades. That no officer now in the service shall be reduced in rank or deprived of his commission by reason of any provision of this act reducing the number of officers in the several staff corps: *Provided*, That no further appointments of cadet-engineers shall be made by the Secretary of the Navy under St. June 22, 1874, ch. 392 (by which such appointments shall not exceed 25 each year). That as vacancies shall occur in any of the grades of the medical, pay, and engineer corps of the Navy, no promotion shall be made to fill the same until the number in said grade shall be reduced below the number which is fixed by the provisions of this act for such grade. . . . Hereafter only one-half of the vacancies in the various grades in the line of the Navy shall be filled by promotion until such grades shall be reduced to the following numbers, namely: rear admirals, 6; commodores, 10; captains, 45; commanders, 85; lieutenant commanders, 74; lieutenants, 250; masters, 75; ensigns, 75; and therefore promotions to all vacancies shall be made but not to increase either of said grades above the numbers aforesaid. Hereafter there shall be no promotion or increase of pay in the retired list of the Navy but the rank and pay of officers on the retired list shall be the same that they are when such officers shall be retired: *And provided further*, That whenever on an inquiry had pursuant to law, concerning the fitness of an officer of the Navy for promotion, it shall appear that such officer is unfit to perform at sea the duties of the place to which it is proposed to promote him, by reason of drunkenness, or from any cause arising from his own misconduct, and having been informed of and heard upon the charges against him, he shall not be placed on the retired-list of the Navy, and if the finding of the board be approved by the President, he shall be discharged with not more than one year's pay. . . . That officers of the Navy travelling abroad under orders hereafter issued shall travel by the most direct route, the occasion and necessity for such order to be certified by the officer issuing the same; and shall receive, in lieu of the mileage now allowed by law, only their actual and reasonable expenses, certified under their own signatures and approved by the Secretary of the Navy. . . . And all officers of the Navy shall be credited with the actual time they may have served as officers or enlisted men in the regular or volunteer Army or Navy, or both, and shall receive all the benefits of such actual service, in all respects in the same manner as if all said service had been continuous and in the regular Navy: *Provided*, That nothing in this clause shall be so construed as to authorize any change in the dates of commission or in the relative rank of such officers. And should the sums appropriated for the pay of the officers on the active and retired lists of the Navy be insufficient, then and in that case the Secretary of the Navy is hereby authorized to use any and all balances which may be due or become due to 'pay of the Navy,' from the other bureaus of the department, for that purpose."

The provision of the act of 1882 just quoted, for the discharge of surplus naval-cadet graduates, was prospective only, and did not apply to the classes of 1881 and 1882; and naval cadets, who prior to this act had fully completed their course at the Academy, and received their diplomas, became by this act graduates. *United States v. Redgrave*, 116 U. S. 474; 20 Ct. Cl. 226; *Leopard v. United States*, 18 Id. 546; *Harmon's Case*, 23 Id. 406.

St. March 3, 1883, ch. 97 (22 St. 472), provides for—

"Ninety-one midshipmen, the title of which grade is hereby changed to ensign, and the midshipmen now on the list shall constitute a junior grade of, and be commissioned as, ensigns, having the same rank and pay as now provided by law for midshipmen, but promotions to and from said grade shall be under the same regulations and requirements as now provided by law for promotion to and from the grade of midshipmen, and nothing herein contained shall be so construed as to increase the pay now allowed by law to any officer of said grade or of any officer of relative rank. . . . Hereafter only one-half of the vacancies in the various grades in the staff corps of the Navy shall be filled by promotion until such grades shall be reduced to the numbers fixed for the several grades of the staff corps of the Navy by the act of Aug. 5, 1882. . . . And all officers of the Navy shall be credited with the actual time they may have served as officers or enlisted men in the regular or volunteer Army or Navy, or both, and shall receive all the benefits of such actual service in all respects in the same manner as if all said service had been continuous and in the regular Navy in the lowest grade having graduated pay held by such officer since last entering the service: *Provided*, That nothing in this clause shall be so construed as to authorize any change in the dates of commission or in the relative rank of such officers: *Provided further*, That nothing herein contained shall be so construed as to give any additional pay to any such officer during the time of his service in the volunteer Army or Navy."



A paymaster's clerk in the navy is an officer of the navy within the last clauses of this act. *United States v. Hendee*, 124 U. S. 309; 22 Ct. Cl. 134. Neither this longevity act nor that above quoted authorize a restatement of an officer's pay accounts so as to allow him credit in the grade he held, before their enactment, for the time he served in the Army or Navy reaching that grade. *United States v. Foster*, 128 U. S. 435. See note, § 1600. The later act is a substitute for the earlier. *Barton's Case*, 23 Ct. Cl. 376. St. 1882 was constitutional, but did not create a vested right. *Id.*; *Harmon's Case*, *Id.* 406. A naval officer is entitled to credit for services in the Army in computing his pay under St. 1883. *Jordan v. United States*, 19 Ct. Cl. 621. The second proviso of that act merely prohibits additional pay for volunteer service, and does not forbid longevity pay founded on such service. *Hawkins v. United States*, *Id.* 611.

St. June 26, 1884, ch. 122 (23 St. 60), provides —

"That from and after the passage of this act all graduates of the Naval Academy who are assigned to the line of the Navy, on the successful completion of the six years' course, shall be commissioned ensigns in the Navy.

"SEC. 2. That the grade of junior ensign in the Navy is hereby abolished and the junior ensigns now on the list shall be commissioned ensigns in the Navy: *Provided*, That nothing in this act shall be so construed as to increase the number of officers in the Navy now allowed by law.

"SEC. 3. That all acts and parts of acts inconsistent with the provisions of this act be and the same are hereby repealed."

SECT. 1523. — St. June 22, 1874, ch. 392 (18 St. 191), repeals so much of this provision as provides that cadet-engineers, not to exceed fifty in number, shall be appointed by the Secretary of the Navy, and provides, repealing inconsistent acts, that —

"Cadet-engineers shall hereafter be appointed annually by the Secretary of the Navy, and the number appointed each year shall not exceed twenty-five."

SECT. 1524. — By St. Feb. 24, 1874, ch. 35, § 2 (18 St. 17), —

"The course of instruction at the Naval Academy for cadet-engineers shall be four years, instead of two as now provided by law."

SECT. 1525. — See notes, §§ 1229, 1519.

## CHAPTER VI.

### VESSELS AND NAVY YARDS.

SECT. 1529. — St. August 5, 1882, ch. 391 (22 St. 289), provides for the suspension of work at the navy yards, and for the appointment of a commission to report upon the advisability of their sale.

SECT. 1541. — A private sale of old material from the breaking up of a war vessel, by a naval officer to a contractor for repairs of a war vessel and machinery, violates this section. *Steele v. United States*, 113 U. S. 128; 19 Ct. Cl. 181. The Secretary of the Navy must proceed according to this provision, and cannot make an exchange, even when advantageous to the service, of a vessel belonging to the Navy. 14 A. G. Op. 369.

SECTS. 1543, 1544. — By St. June 30, 1876, ch. 159 (19 St. 65), no increase of the force at any navy-yard is to be made within sixty days next before any election for President or member of Congress except upon the Secretary of the Navy's certificate of public necessity therefor, which certificate is to be immediately published.



## CHAPTER VII.

## GENERAL PROVISIONS RELATING TO THE NAVY.

SECT. 1547. — The following words at the end of the original act, cited in the margin : " Provided that no order, regulation, or instruction contrary to any act of Congress is hereby recognized as valid," were omitted in the Revision. These orders, &c., must conform to the law, if a law exists upon the subject, not covered by statute ; the Secretary cannot change the character of an officer's service from sea service to shore service by ordering that it be so regarded. *Symond's Case*, 21 Ct. Cl. 148 ; 120 U. S. 46. See 6 A. G. Op. 10 ; 13 Id. 9 ; 16 Id. 494. The Army and Navy Regulations have the force of law ; but only with respect to a person or subject-matter over which the Secretary has official control. *Gratiot v. United States*, 4 How. 117 ; *United States v. Maurice*, 2 Brock. 105 ; *Smith v. Whitney*, 116 U. S. 180 ; J. Adv. Gen. Op. 116 ; 16 A. G. Op. 497 ; 2 Id. 209. The Navy Regulations concerning balances due deceased seamen and marines, wills of persons in actual service, payment of arrearages under wills, &c., govern only those in the naval service, and do not bind the accounting officers of the Treasury in the settlement of naval accounts. 16 A. G. Op. 494.

SECT. 1553. — Under the similar act of 1855, ch. 136, § 11, a seaman who had passed his examination at the naval rendezvous, but had not been examined and passed on the receiving ship, was held not to be enlisted. *United States v. Thompson*, 2 Sprague, 103.

## CHAPTER VIII.

## PAY, EMOLUMENTS, AND ALLOWANCES.

St. July 26, 1886, ch. 781, § 2 (24 St. 157), provides that —

" All balances of moneys appropriated for the pay of the Navy or pay of the Marine Corps, for any year existing after the accounts for said year shall have been settled shall be covered into the Treasury."

SECT. 1556. — See notes, §§ 1390, 1519, 1521, 1571, 1588. St. May 4, 1878, ch. 91 (20 St. 50), provides that —

" On and after July 1, 1878, there shall be no appointments made from civil life of secretaries or clerks to the Admiral, or Vice-Admiral, when on sea service, commanders of squadrons, or of clerks to commanders of vessels ; and an officer not above the grade of lieutenant shall be detailed to perform the duties of secretary to the Admiral or Vice-Admiral, when on sea-service, and one not above the grade of master to perform the duties of clerk to a rear-admiral or commander, and one not above the grade of ensign to perform the duties of clerk to a captain, commander, or lieutenant-commander when afloat : *Provided*, That the secretaries and clerks in service on July 1, 1878, on vessels abroad, shall continue as such until such vessel shall return to the United States on the termination of its cruise."

St. March 3, 1885, ch. 350 (23 St. 436), provides that thereafter —

" The passed assistant engineers of the Navy shall receive during the third five years after the date from which they take rank as passed (first) assistants, when at sea, \$2450 ; on shore duty, \$2250 ; on leave or waiting orders, \$1900. During and after the fourth five years from such date, when at sea, \$2700 ; on shore duty, \$2350 ; on leave or waiting orders, \$1950. And Rev. Stats. § 1556, is hereby amended accordingly."

By St. March 3, 1877, ch. 111 (19 St. 390), cadet midshipmen, when, during their course of instruction, they are at sea in other than practice ships, each receive as annual pay not exceeding \$950.



The words "after date of appointment," and "from such date," in the clause of § 1556 relating to passed assistant surgeons, &c., refer not to their original entry into the service but to the notification by the Secretary of the Navy that the officer has passed his examination for promotion. *United States v. Moore*, 95 U. S. 760. Under § 1556, sea pay is due for active service on a training ship stationed off shore, although the Navy Department may have decided otherwise. *United States v. Symonds*, 120 U. S. 46; 21 Ct. Cl. 148; *United States v. Bishop*, 120 U. S. 51; 21 Ct. Cl. 215. See note, § 1571. Under § 3 of the act of June 1, 1860, which provided that no service shall be regarded as sea service but such as shall be performed at sea, under the orders of a department, and in vessels employed by authority of law, the service which entitled an officer to the pay allowed for "duty at sea" began when, having been ordered to a particular duty, he reported at the place designated, and entered upon that duty. Even though the vessel lay in port, the pay allowed by that act to officers on duty at sea commenced. 10 A. G. Op. 191; *United States v. Strong*, 125 U. S. 656. 23 Ct. Cl. 10; *McRitchie's Case*, Id. 23.

The longevity pay is payable only from the date of commission, which is the actual time of the President's signing of the commission, and not an antecedent date mentioned in its body. *Young v. United States*, 19 Ct. Cl. 145. St. 1883, ch. 97 (see note, § 1521), deals with the credit for length of service as it might have been given when the grade having graduated pay was first held by an officer who had served in the volunteer navy. Subsequent service is not within it. It does not increase the salary of a lower grade antecedently held by an officer. The pay acts apply only to the grades held by officers while such acts were in force. Credit for length of service cannot be given in a grade which did not have graduated pay when held by the officer merely because such pay was subsequently attached to it. *United States v. Rockwell*, 120 U. S. 60; 21 Ct. Cl. 332; *United States v. Mullan*, 123 Id. 186. Under the act of 1883 a naval officer who served in the volunteer navy is entitled to credit for such service in the lowest grade in the regular navy having graduated pay at the time he held it. Id. So service as a midshipman, at the Naval Academy, is service as an officer in the Navy within the longevity acts. *United States v. Baker*, 125 U. S. 646; 23 Ct. Cl. 181, 496. And, under those acts, an officer in the Marine Corps, who served as paymaster's steward, is entitled to be credited with the time of such service. *Muse v. United States*, 19 Ct. Cl. 441.

A rear-admiral appointed to the office of chief of the bureau of yards and docks is not bound to accept the salary provided therefor, but may demand that allowed him for performing shore duty. 10 A. G. Op. 377.

Cadet engineers who finished their four years' course, passed their examination, and received their diplomas, before St. 1882, ch. 391, was enacted, were not made naval cadets by that act, and were entitled to the pay provided by this section. *Redgrave v. United States*, 20 Ct. Cl. 226; *Leopold v. United States*, 18 Id. 546.

SECT. 1558. — Before the act of 1835 (4 St. 757), the Secretary of the Navy could make allowances from appropriations in gross to naval officers, beyond their pay, for quarters, furniture, lights, fuel, &c., and the act of 1866 (14 St. 33), by repealing St. 1835, restored the right to make such allowances. *United States v. Philbrick*, 128 U. S. 52; *United States v. Allen*, 123 Id. 347.

SECT. 1559. — See note, § 1411. If a retired officer is designated by Congress to perform services which could not be required of him, such as the superintendence of the erection of a public building, he may receive extra compensation therefor. *Meigs v. United States*, 19 Ct. Cl. 497.

SECT. 1561. — See note, § 1506. The pay of an officer who has been advanced in rank "for eminent or conspicuous conduct in battle or extraordinary heroism" (see § 1506), is



not one of the cases within §§ 1561, 1562, and cannot run from a date anterior to that of his commission. *Young v. United States*, 19 Ct. Cl. 145. The words "the increased pay of a promoted officer shall commence from the date he is to take rank, as stated in his commission," as used in St. 1870, ch. 295, § 7, applied to such advancement or promotion in rank, and such only, as entitled the officer advanced or promoted to an increase of pay over what he received at the time his advancement or promotion actually transpired; the words "increased pay" being used relatively to the pay he then received. *Billings' Case*, 14 A. G. Op. 547.

SECT. 1562. — If the examination of a naval officer is postponed through no fault of his, and he, upon examination afterwards, is found unqualified and is suspended from promotion for one year, with corresponding loss of grade when re-examined (see § 1505), he is not entitled to the pay provided for by this section. *Austin v. United States*, 20 Ct. Cl. 269. See *Hunt v. United States*, Id. 554; 116 U. S. 394; 16 A. G. Op. 592.

SECT. 1566. — See notes §§ 74, 1596. St. June 30, 1876, ch. 159 (19 St. 65), repeals so much of St. 1874, cited in note, § 74, as applies to naval officers engaged on public business, allows them eight cents per mile in lieu of their actual expenses, and provides that thereafter enlistments in the navy shall cease until the number of enlisted men is reduced to 7500. Under this statute there is no distinction between travel by land and by sea. *United States v. Temple*, 105 U. S. 97; 14 Ct. Cl. 377; 15 A. G. Op. 309; *United States v. Graham*, 110 U. S. 219; 18 Ct. Cl. 83. Mileage is computed, in the absence of special circumstances, upon the basis of the shortest route of ordinary travel. *Du Bose v. United States*, 19 Ct. Cl. 514; *Hannum v. United States*, Id. 516; *Allderdice v. United States*, Id. 511. It may be forfeited by the officer's fault, as by his absence on private business and consequent failure to join his ship before sailing. *Perrimond v. United States*, 19 Ct. Cl. 509. See *Pendleton v. United States*, 21 Id. 5. Paymasters' clerks are not officers within the meaning of the act of 1876, and are not entitled to the mileage thereby allowed. *United States v. Mouat*, 124 U. S. 303; 22 Ct. Cl. 293. Under the act of 1876, a naval officer who travelled under orders, whether on land or on sea, is entitled to the eight cents mileage even when the government provides him with transportation. *Temple v. United States*, *supra*. As an officer's claim for travelling expenses depends upon the acts of Congress, and not upon contract, the compensation for that part of a journey performed by him after June 30, 1876, under an order made before that date, is determined by St. 1876, while the repealed act of 1874 applies to the preceding part of the journey. *United States v. McDonald*, 128 U. S. 471; 23 Ct. Cl. 104. See *United States v. Allen*, 123 Id. 345.

A journey by an officer for the purpose of reaching home, taken by authority of the Secretary of the Navy, before his discharge from the service of the government, is on public business. *Allderdice v. United States*, *supra*. If public business was an element in an officer's circuitry of route, he should recover mileage therefor. *Du Bose v. United States*, *supra*. If an officer is delinquent and is ordered to travel at his own expense, he cannot recover of the government. *Hannum v. United States*, *supra*. An officer, although bound to travel by the shortest usually travelled route, is not obliged to take an extraordinary and unusual route because it is the shortest. Id.; *Griffin v. United States*, 21 Ct. Cl. 13. When only the terminus of the journey is specified in the orders issued to a naval officer, the choice of route being left to his discretion, his mileage is to be calculated by the shortest usually travelled route, regardless of the distance actually travelled, unless good reason is shown for the deviation. This is true, although the order required the officer to leave for his station before a day stated, if other means of travel than those taken offered before that day. *Crosby v. United States*, 22 Ct. Cl. 131. If the commander of a squadron decides that the quarters assigned by the Department for certain warrant officers on their ship are not habitable, and detaches them with permission to



return home, the cause of the officer's travel is public business and they are entitled to mileage. *Barker v. United States*, 19 Ct. Cl. 288.

As to the ten cents per mile, no distinction is made by the statute between travelling within the United States and in a foreign country, and a contrary construction placed upon it by the Navy Department will not affect it. *United States v. Graham*, 110 U. S. 219; 18 Ct. Cl. 83. But under the act of 1876, mileage has been held allowable to officers of the Navy only when travelling on public business within the United States; for travel elsewhere their actual expenses alone being allowed. 15 A. G. Op. 309.

The following general conclusions are applicable to all mileage cases: 1. The right of an officer to mileage depends upon his having travelled upon public business, and it is ordinarily for his commanding officer to determine whether such business requires that he should travel; where an officer is delinquent and ordered to travel at his own expense, he is not entitled to mileage. 2. An officer is ordinarily bound to travel by the shortest usually travelled route. He is not bound to choose an extraordinary and unusual route because it is the shortest, but he has no right to choose another because it is the longest. 3. Where an officer does not travel by the most direct route, or, being ordered to travel by one route is compelled to travel by another, he must bring to the accounting officers the authority or ratification of the department, and if he neglects to do so, must establish in a judicial tribunal the facts upon which his right rests. *Ford v. United States*, 19 Ct. Cl. 519; *Griffin v. United States*, 21 Id. 13; *Billings' Case*, 23 Id. 166.

For a construction of the acts of 1835, 1866, 1870, as to the rights of naval officers to mileage, see *Graham v. United States*, *supra*.

SECT. 1568. — The commander of a squadron cannot appoint a civilian naval store-keeper, and a person so appointed cannot recover salary as such. *Larkin v. United States*, 5 Ct. Cl. 535.

SECT. 1571. — See note, § 1556. A naval officer assigned to duty as a lighthouse inspector, although making tours of inspection by sea, is not entitled to sea pay. *Schoonmaker v. United States*, 19 Ct. Cl. 170. But the words "at sea" in §§ 1556, 1571, mean not out of sight of land, but upon the waters of the sea, and sea service may include service upon a training ship at anchor in an arm of the sea. *Symonds v. United States*, 120 U. S. 46; 21 Ct. Cl. 148; *Bishop v. United States*, 120 U. S. 51; 21 Ct. Cl. 215; *Emory v. United States*, 19 Ct. Cl. 254; *Barker v. United States*, Id. 288. In *Carpenter v. United States*, 15 Ct. Cl. 247, a naval paymaster on shore duty at a navy yard, having charge of the accounts of certain ironclads temporarily at anchor off the yard, and in commission for sea service, was held not entitled to sea-duty pay.

St. March 3, 1883, ch. 97, § 2 (22 St. 481), provides —

"That hereafter no officer of the Navy shall be employed on any shore duty, except in cases specially provided by law, unless the Secretary of the Navy shall determine that the employment of an officer on such duty is required by the public interests, and he shall so state in the order of employment, and also the duration of such service, beyond which time it shall not continue."

SECT. 1578. — An officer of the marine corps is not a naval officer, and is not entitled to this ration when attached to a sea-going vessel; under § 1612 he is subject to § 1269. *Reid v. United States*, 18 Ct. Cl. 625.

SECT. 1579. — An apothecary in the Navy, doing detail duty at the marine barracks, is not "attached to the ordinary of a navy yard," and is not entitled to a daily ration under this section. *Herbert v. United States*, 21 Ct. Cl. 53. "Ordinary of a navy yard" here refers to ships laid up in ordinary at a navy yard, and this section authorizes allowance of a ration to petty officers and seamen attached to and doing duty on shipboard, though



not upon a sea-going vessel; but not to the apothecary of the Naval Academy when engaged on shore duty. *Button v. United States*, 20 Ct. Cl. 423.

The appropriation act of Jan. 30, 1885, ch. 43 (23 St. 291), contains the proviso:—

“That all enlisted men and boys in the Navy, attached to any United States vessel or station and doing duty thereon, and naval cadets, shall be allowed a ration, or commutation thereof in money, under such limitations and regulations as the Secretary of the Navy may prescribe.”

SECT. 1580. — By 21 St. 86, ch. 73, the Secretary of the Navy may substitute dessicated tomatoes for dessicated potatoes.

SECT. 1587. — The case of a naval officer who has started on a foreign service, but dies in a United States port, at which his vessel touches, is within this prohibition. 13 A. G. Op. 341.

SECTS. 1588, 1590, 1593. — See notes §§ 1454, 1594. These sections supersede and take the place of all provisions in force at the adoption of the Revised Statutes, regulating the compensation of retired naval officers, whether of the line or staff. 15 A. G. Op. 317. Naval officers, when on the retired list, whether commissioned or warrant, are not entitled to increase of pay by reason of longevity. *Thornley v. United States*, 113 U. S. 310; 18 Ct. Cl. 111; *Brown v. United States*, 113 U. S. 568; 18 Ct. Cl. 537. A lieutenant of the Navy, retired in the first five years of service because not recommended for promotion, is entitled to only one half his sea pay at the time of retirement under the last clause of § 1588. *McClure v. United States*, 18 Ct. Cl. 347. See *Thompson v. United States*, Id. 604; *Rutherford v. United States*, Id. 339; *Magaw v. United States*, 16 Id. 3. Section 1588 does not apply to officers retired on furlough pay. *Brown v. United States*, 113 U. S. 568; 16 A. G. Op. 22. It determines the rate of pay due a retired officer on retired pay. *Magaw v. United States*, 16 Ct. Cl. 3. An officer retired on furlough pay is to be paid according to the provisions of § 1593. Id.; 15 A. G. Op. 316. Navy officers on the retired list are not entitled to increase of pay by reason of longevity while thereon. The periods of five years' service contemplated by this statute for increase of pay are grades within § 1588. *Thornley v. United States*, *supra*. The term “grade” refers to the divisions of officers into five years' periods of service. A chief engineer retired in the third period of five years' service is entitled to seventy-five per cent of the sea pay of that grade, and not to the highest pay of a chief engineer who has served over twenty years. *Rutherford v. United States*, 18 Ct. Cl. 339. The cause of incapacity marks the line between the two classes of retired officers referred to in § 1588; those whose incapacity was caused by the service being entitled to three fourths of their sea pay; those whose incapacity was not so caused to one half such pay. *United States v. Burchard*, 125 U. S. 176; 19 Ct. Cl. 137; *Potts v. United States*, 125 U. S. 173.

SECT. 1593. — See note, § 1588.

SECT. 1594. — See note, § 1588. 18 St. 304, ch. 30, allows difference of pay to certain officers of the Navy who were dropped, furloughed, or retired under St. Feb. 28, 1855, and afterwards promoted and restored. The causes of the retirement of a naval officer, transferred under this section from the furlough list to the retired pay list, determine his rate of pay under § 1588; and an officer retired on furlough pay from causes not incident to the service cannot be transferred to the seventy-five per cent retired pay list thereby provided by action of the Executive. 16 A. G. Op. 22. Section 1594 is construed liberally, and authorizes a transfer as of the time of placing an officer on the furlough list. *United States v. Burchard*, 125 U. S. 176; 19 Ct. Cl. 137.



## CHAPTER IX.

## THE MARINE CORPS.

SECT. 1596. — See notes, §§ 1117, 1454, 1578. The commandant now has the rank and pay of colonel, and is appointed by selection by the President from the officers of the corps. 18 St. 58; Sup. 26, note. By St. June 30, 1876, ch. 159 (19 St. 65), no appointments are thereafter to be made, except by promotion, to fill vacancies in the list of commissioned officers of the Marine Corps until their number is reduced, by casualties or otherwise, to seventy-five. By St. Jan. 30, 1885, ch. 43 (22 St. 293), no appointments are thereafter to be made, except by promotion, to fill vacancies occurring in the list of commissioned officers of this corps until their number is reduced, by casualties or otherwise, below seventy-five, as fixed by the act of 1876, and after such reduction, the whole number of such commissioned officers on the active list shall not exceed seventy-five. 22 St. 295, 480; 23 St. 294, 432, provide that no commutation for forage for the Marine Corps shall be paid. As to retirement, see note, § 1243.

Marines, though not strictly seamen, were regarded, in *Wilkes v. Dinsman*, 7 How. 89; 12 How. 390, as "persons enlisted for the Navy," within 5 St. 153, allowing a premium for re-enlistment; and in 8 A. G. Op. 28, as entitled to the benefit of a special act for the relief of the "officers and seamen" of a United States vessel. The Marine Corps is a military body, belonging primarily to the Navy, and being under the control of the Navy Department; when ordered into service in connection with the Army, it is under the command of Army officers. *United States v. Dunn*, 120 U. S. 249; 21 Ct. Cl. 20. A captain in the Marine Corps, who acts as captain and has charge of clothing, is entitled to an allowance therefor. *United States v. Freeman*, 1 Wood. & M. 45.

SECT. 1600. — See note, § 1412. A marine officer is entitled to be credited with the length of time he was employed as a paymaster's steward in the volunteer service. *Muse v. United States*, 19 Ct. Cl. 441. And service by a naval officer as an enlisted man in the Marine Corps is to be credited to him in computing his longevity pay under 22 St. 497, stated in note, § 1521. *United States v. Dunn*, *supra*.

SECT. 1601. — Repealed. See note, § 1596.

SECT. 1602. — 19 St. 240, ch. 69, substitutes "each" for "the" after "major" in the second line.

SECT. 1608. — See notes, §§ 1117, 1418.

SECT. 1612. — See note, § 1578.

SECT. 1613. — The additional compensation provided for marines who compose the marine band, while performing at the capitol, may be claimed by all marines attached to the band, whether they are formally rated as musicians or not. *United States v. Bond*, 124 U. S. 301; 21 Ct. Cl. 457.

SECTS. 1622, 1623. — 15 A. G. Op. 444.

## CHAPTER X.

## ARTICLES FOR THE GOVERNMENT OF THE NAVY.

SECT. 1624. — See notes, §§ 858, 1342. Congress has constitutional power to provide for punishment of offences in the naval service by courts-martial, without indictment or jury trial. *Re Bogart*, 2 Sawyer, 396. The act of March 2, 1855, which established summary courts-martial in the Navy, did not take away the previously existing power of the



commander of a vessel to reduce seamen to inferior rate for incompetency. 10 A. G. Op. 168. The regulations established by the Secretary of the Navy with the President's approval have the force of law; and the regularly appointed clerk of a paymaster in the Navy is a person in the naval service and subject to this section. *Id. Ex parte Reed*, 100 U. S. 13; *United States v. Bogart*, 3 Ben. 257. Civil engineers in the Navy are subject to the jurisdiction of naval courts-martial. 15 A. G. Op. 597. The Secretary of the Navy, after a naval court-martial has returned its proceedings to him and he has adjourned it until further orders, may reconvene it to consider its proceedings. *Smith v. Whitney*, 116 U. S. 167.

Art. 5. The offence of corrupting a marine guard by bribery may be punished by imprisonment in the penitentiary of the District of Columbia, at hard labor, for a term of years, that punishment not being against the usages of the service. 10 A. G. Op. 158. See 9 *Id.* 80.

Art. 6. Provision was made by 25 St. 442, ch. 890, for the relief of certain appointed or enlisted men of the Navy and Marine Corps, who served in the late war, from the charge of desertion.

Art. 14. See note, § 1342, art. 60.

Art. 17. A prize court may award damages for personal ill usage, when captors wilfully injure a captured crew. *The Lively*, 1 Gall. 315.

Art. 19. 21 St. 3, ch. 5, changes "sixteen" to "fifteen" twice, and, in place of the last nine words, substitutes "punished as a court-martial may direct."

Art. 22. This does not confer upon a court-martial general criminal jurisdiction, but only jurisdiction over those offences, not specified in the preceding articles, which are injurious to the order and discipline of the Navy. 16 A. G. Op. 578. Under this article a naval general court-martial can take jurisdiction of an assault committed on board a naval vessel when she was under way in the Thames River, opposite New London, Conn., by a coal-heaver in the naval service, upon a second-class fireman in such service, from the effects of which the latter died, and try the accused upon a charge of manslaughter. *Id.*

Art. 24. "Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts." "Every public officer is presumed to act in obedience to his duty, until the contrary is shown." *Story, J., in Martin v. Mott*, 12 Wheat. 31.

Under the act of April 23, 1800 (2 St. 45, art. 3), providing that a refractory seaman, if a private, may "be put in irons, or flogged, at the discretion of the captain, not exceeding twelve lashes; but if the offence require severer punishment, he shall be tried by a court-martial, and suffer such punishment as said court shall inflict," every successive disobedience of orders was a new offence, subjecting the offender to twelve additional lashes at the discretion of the commanding officer; his judgment was conclusive as to whether or not the offence requires a severer punishment; and he could not only cause corporal punishment to be inflicted, but might resort to any reasonable measures necessary to insure obedience, and even imprison the refractory party on shore if he did so without any malice. *Wilkes v. Dinsman*, 7 How. 89. Under the act of March 2, 1837 (5 St. 153), authorizing the commander of a squadron to detain a marine, if in his opinion public interest required it, after the term of his enlistment had expired, the commander's opinion on the question of public interest was conclusive, and if the marine did not conform thereto, he was subject to punishment. The commander was also the judge of the degree of severity of punishment necessary to suppress disobedience and insubordination, and he was not liable to an action for mere error in judgment, even though the jury were of the opinion that milder measures would have accomplished the object. But he was bound to exercise his



best judgment and to act conscientiously and without malice. *Dinsman v. Wilkes*, 12 How. 390. See also, *Jecker v. Montgomery*, 18 How. 110, 123, where the rule laid down in *Dinsman v. Wilkes*, is followed.

Art. 29. The accused may testify. See note, § 858.

Art. 33. Officers and men in the naval service do not incur any forfeiture or loss of pay by confinement or suspension from duty under sentence of a court-martial, unless it is so specified in the sentence. A part of such sentence may be remitted in whole or in part by the proper officer. 15 A. G. Op. 175.

Art. 36. See note, § 1413. "Officers" in this article means, at most, warrant and commissioned officers; petty officers are included in art. 30. 15 A. G. Op. 634. Articles 36, 37, do not apply to acting gunners, who are not officers and are liable to dismissal at the will of the Secretary of the Navy. 15 A. G. Op. 564. Art. 36 does not extend to cadets at the Naval Academy, who may be dismissed from the Academy and the service without trial by court-martial. 15 A. G. Op. 634. Prior to its passage the President might dismiss an officer of the Navy upon any cause which seemed sufficient to him. 16 A. G. Op. 315. A naval cadet engineer is an officer within this section. *United States v. Perkins*, 116 U. S. 483; 15 A. G. Op. 165.

Art. 37. By St. June 22, 1874, ch. 392, § 2 (18 St. 191), a naval officer dismissed from the service and restored to the same under this article is not to be allowed more than pay as on leave for six months from the date of dismissal, unless he continues to demand, as often as once in six months, a trial as here provided. This authorizes payment only from the time a promoted officer takes rank in the higher grade. *Adamson v. United States*, 19 Ct. Cl. 623; *Hunt v. United States*, 116 U. S. 396. The demand of a trial as often as once in six months is not excused by illness. 15 A. G. Op. 569.

Art. 39. See note, § 1629. "Commissioned officers" here include volunteer naval officers appointed under the act of July 24, 1861. 10 A. G. Op. 522. Chaplains, surgeons, pursers, and other non-combatant officers are not qualified to act as members of a court-martial. 2 A. G. Op. 297. A sentence of dismissal, imposed by an irregular court-martial, when approved and carried into effect, is a consummated fact, whether legal or not, and the officer convicted can only be restored to the service by appointment. Even if the court had no authority to exclude him under the circumstances, the irregularity could not be taken advantage of after its action is approved. 7 A. G. Op. 98; 6 Id. 369. See notes, § 1342.

When the court-martial, having jurisdiction over the subject-matter, finds a seaman charged with desertion guilty of attempting to desert, an action of trespass for false imprisonment will not lie against the ministerial officer who executes its sentence. It is only where the court has no jurisdiction of the subject-matter, or having jurisdiction, violates some rules adopted by law for its proceedings, whereby they are rendered *coram non judice*, that such an action will lie. *Dynes v. Hoover*, 20 How. 65, 83. Naval courts-martial are not empowered to dispense with the attendance of witnesses and receive depositions, if the officer who preferred the charges objects. 2 A. G. Op. 343.

Art. 40. Where, at the organization of a naval court-martial, each member of the court was first sworn by the judge-advocate, who was then sworn by the president of the court, the fact that the oath was not administered as required by this article was held not to invalidate the proceedings. 13 A. G. Op. 374.

Art. 43. The restrictions of this article apply only to cases of charges preferred by others than the Secretary of the Navy. 4 A. G. Op. 410.

Art. 49. In *United States v. Cutler*, 1 Curtis C. C. 501, it was held that the act of 1850, abolishing flogging in the Navy and in vessels of commerce, was not a penal statute on which an indictment could be founded.

Art. 50. If a general court-martial, on being ordered to reassemble by the Secretary



of War, for the purpose of revising its sentence, is not attended by all its members, its jurisdiction to revise such sentence exists. 7 A. G. Op. 338.

Art. 53. If the approval of the President is required to the sentence of a court-martial before it can be carried into effect, he may direct a reconsideration of the judgment rendered. 4 A. G. Op. 19. An acting master's mate is neither a commissioned nor a warrant officer, under this article, and a sentence dismissing him from the service may be lawfully carried into execution without the approval of the President or the Secretary of the Navy. If the latter approves it, the President has no power, after it has been carried into execution, to set aside the Secretary's order and restore the party to the service. 11 A. G. Op. 251. Under the articles of war in force in 1852 the Secretary of the Navy had power to approve the sentence of a court-martial convened by his orders, if such sentence did not extend to the loss of life, or to the dismissal of a commissioned or warrant officer. 5 A. G. Op. 508.

Art. 57. See notes, §§ 858, 1342, Art. 60.



## TITLE XVI.

## THE MILITIA.

SECT. 1625. — See note, § 1342, Art. 64. A State legislature may exempt from enrolment persons under twenty-one or over thirty years of age. Judges' Opinion, 22 Pick. 571; § 1629, *note*. A minor eighteen years old may enlist in the regular or volunteer service without the consent of parents or guardians. Notes, §§ 1117, 1418; *Re Beswick*, 25 How. Pr. 449; *Wantlan v. White*, 19 Ind. 470; *Disinger's Case*, 12 Ohio St. 256; *Lanahan v. Birge*, 30 Conn. 438; *Grace v. Wilber*, 10 Johns. 453; 12 Id. 68. The President may place the militia under the command of any officer, and may require its service in any part of the United States. *Highsmith v. Ussery*, 25 Texas, 108; 2 Story Const. § 1197.

SECT. 1628. — St. May 19, 1882, ch. 172 (22 St. 93), making appropriations for fortifications and other works of defence, and their armament, provides, —

"SECT. 2. — That the Secretary of War is hereby authorized, at his discretion, to issue, on the requisition of the governor of a State bordering on the sea or gulf coast, and having a permanent camping ground for the encampment of the militia not less than six days annually, two heavy guns and four mortars, with carriages and platforms, if such can be spared, for the proper instruction and practice of the militia in heavy artillery drill, and for this purpose a suitable battery for these cannon will be constructed; and for said construction and the transportation of said cannon, and so forth, the sum of \$5000 is hereby appropriated for supplying each State that may so apply."

"The right of the people to keep and bear arms," under the Second Amendment to the Constitution, is a limitation upon the power of the United States Government, and not of the States, which cannot deprive the former of its reserved military force for maintaining public security, but which may control and regulate the organization, drilling, and parading of such military bodies as are not authorized by the United States militia laws. *Presser v. Illinois*, 116 U. S. 252; *State v. Shelby*, 90 Mo. 302; 2 S. W. Rep. 468.

SECT. 1629. — See notes, §§ 1342, Art. 64, 1624, Art. 39, 1625; *State v. Lewis*, 3 Hill (S. C.), 308. The Constitution empowers Congress to determine who shall compose the militia, and after that power is exercised, a State legislature cannot provide for the enrolment of any other persons in the militia. Justices' Opinions, 14 Gray, 614. In *Wise v. Withers*, 3 Cranch, 331 (reversing s. c. 1 Cranch C. C. 262), it was held that a justice of the peace in the District of Columbia is a "judicial and executive officer of the Government of the United States," and is therefore exempt from militia duty, the sentence of the court-martial not being conclusive on that question. In *Ex parte Smith*, 2 Cranch C. C. 693, a clerk in the Treasury Department was held to be such an executive officer. An alien is exempt. *Slade v. Minor*, Id. 139. So is a warrant officer of the Navy. *Sanford v. Boyd*, Id. 78. Under St. 1825, ch. 65, § 35, assistant postmasters have been held not exempt. *Slater v. Bates*, 10 Pick. 153. Fishermen on vessels of more than 20 tons burden, licensed for the cod or mackerel fishery, are exempt as mariners. *Commonwealth v. Douglas*, 17 Mass. 49; *Bayley v. Merritt*, 2 Pick. 597; *cf. Brush v. Bogardus*, 8 Johns. 157. A United States citizen, holding a foreign consulate here, is not exempt. 8 A. G. Op. 169.

Under St. April 16, 1862, providing for substitutes, the exemption from military service



was a gratuitous privilege, and not a contract which Congress could not impair. *Daly v. Harris*, 33 Ga. (Sup.) 38. Such substitute, if liable to draft and enrolment, was to be credited to the place of his actual residence; otherwise he might be credited to the locality in which his principal was drafted. 11 A. G. Op. 187. Without statutory authority a provost marshal could not require security for the appearance of a substitute. *Richardson v. Crandall*, 47 Barb. 335. But under St. Feb. 24, 1864, § 5, the Secretary of War might prescribe reasonable regulations to protect the Government, the person drafted, or the substitute. *Gates v. Thatcher*, 11 Minn. 204.

SECT. 1642. — A militiaman, who refuses to obey the order of the President, and to rendezvous, though he is not "employed in the service of the United States" in such a sense as to render him subject to the rules and articles of war, may be tried by a court-martial called under the authority of the United States. *Martin v. Mott*, 12 Wheat. 19. The judgment of the President as to whether an exigency, such as is contemplated by the Constitution and by this section, exists is conclusive upon all other persons. "When the President exercises an authority confided to him by law, the presumption is that it is exercised in pursuance of law. Every public officer is presumed to act in obedience to his duty, until the contrary is shown; and *a fortiori* this presumption ought to be favorably applied to the chief magistrate of the Union." *Id.* In 8 Mass. 549, the Justices' Opinion was that the commanders in chief of the militia in the several States have the right to determine when the exigencies exist which oblige them to place the militia in the service of the United States. "When the inhabitants of a country who are liable to be called into military service have been enrolled, and such of them as are to render the service have been ascertained by draft, and the persons thus drafted have been lawfully required to attend at an appointed time and place of muster, those who disobey are amenable to military discipline and military organization, unless the subject has been otherwise legislatively regulated." *McCall's Case*, 5 Phila. 259. Where a party whose Christian name is Cornelius, familiarly called Nele, or Neely, or Nale, or Naly, is enrolled as *Naylor McCall*, he is not subject to the draft. "A partial misnomer in a draft made from a proper enrolment may perhaps be immaterial, if the identity of the party is unquestionable. But without an accurate enrolment there can be no valid draft." *Id.*

SECT. 1643. — As to the militia in Utah, see 24 St. 641, ch. 397, § 27.

SECT. 1644. — See note, § 1629. A citizen cannot be subjected to the rules and articles of war if he is not in actual military service. *Kneedler v. Kane*, 45 Penn. St. 238; 3 Grant Cas. 465; *Smith v. Shaw*, 12 Johns. 257. So held as to discouraging volunteer enlistments and forcibly resisting a militia draft. *Re Kemp*, 16 Wis. 359; *cf.* *United States v. Scott*, 3 Wall. 642, and *United States v. Murphy*, *Id.* 649, under St. March 3, 1863, § 25, and St. Feb. 24, 1864. An action of trespass lies against an officer who makes distress, in order to satisfy a fine upon a justice of the peace who is exempt from militia duty; such fine being assessed by a court-martial having no jurisdiction of the justice of the peace as a militiaman. The court and its officer are all trespassers. *Wise v. Withers*, 3 Cranch, 331, 337. It is competent to a court-martial, deriving its jurisdiction under State authority, to try and to punish militiamen, drafted, detached, and called by the President into the service of the United States, who have refused or neglected to obey the call. Such militiamen are State militia until they have arrived at the place of rendezvous where service under the United States begins, and the State retains a right concurrent with the Government of the United States to enforce the laws of Congress, for such authority is not vested exclusively in courts-martial deriving their authority solely from the United States. In such a case the State court-martial has concurrent jurisdiction to enforce a law of Congress. *Houston v. Moore*, 5 Wheat. 1, 29.

SECT. 1649. — After a regiment is accepted and mustered into the United States service, the governor of a State cannot interfere with its organization or depose an officer thereof.



10 A. G. Op. 279. A militiaman who refused to obey an order of the President, calling him into the public service under St. 1795, ch. 101, was not subject to the rules and articles of war, but was liable to trial by a court-martial called under the authority of the United States under § 5 of that act. *Martin v. Mott*, 12 Wheat. 19; *Houston v. Moore*, 5 Wheat. 1. Under St. July 17, 1862, ch. 201, the subjection of the militiaman to military discipline was compellable by force. *McCall's Case*, 5 Phila. 259. The power to draft the State militia appears to be included in the power of Congress to raise and support armies. *Re Griner*, 16 Wis. 423, 443; *Druecker v. Salomon*, 21 Id. 621. *Contra*, *Kneedler v. Kane*, 45 Penn. St. 238; 3 Grant Cas. 465; *Kirkham v. United States*, 4 Ct. Cl. 223. In *Meade's Case*, 1 Brock. 324, Marshall, C. J., doubts whether a court-martial organized under the authority of a State has the power to assess fines upon delinquent militiamen who refuse to obey the order of the Secretary of War to enter into service, and says: "The idea originally suggested, that the tribunal for the trial of the offence should be constituted by, or derive its authority from, the government against which the offence had been committed, would seem to require that the court thus referred to in general terms, should be a court sitting under the authority of the United States. It would be reasonable to expect, if the power were to be devolved on the court of a State government, that more explicit terms would be used for conveying it." If a court-martial proceeds against a person without due notice, its sentence against him is absolutely void. Id.

SECT. 1650. — Although no acts of Congress provide pay, rations, and expenses to militia called out by State or Territorial authority, but disbanded without being mustered into the United States service before dismissal, such cases have been specially provided for. 3 A. G. Op. 528. A militia officer cannot lawfully impress a citizen's horse, even in time of war. *Jacobs v. Levering*, 2 Cranch C. C. 117. Under an appropriation act for "pay of the army," money may be distributed to the militia as well as to the regular troops. *United States v. Willard*, 1 Paine, 539.

SECT. 1651. — Under § 3 of St. Jan. 2, 1795, actual service was the criterion of national militia, the service commencing upon the arrival of the militia at the place of rendezvous. *Houston v. Moore*, 5 Wheat. 20; *Re Irons*, 5 Blatch. 166.

SECT. 1658. — Such a court-martial may be made up of officers of the militia of any State or States. *Mills v. Martin*, 19 Johns. 7. The proceedings of a militia court-martial have been held reviewable by the civil courts. *State v. Davis*, 2 Met. 296. But the weight of authority is *contra*. *Dynes v. Hoover*, 20 How. 81; *Brigadier-General's Election*, 1 Strob. 198; *State v. Mott*, 46 N. J. L. 328; and cases cited in note, § 1342.

SECT. 1661. — Although the statutes make no provision for accountability to the United States as to the disposition of arms thus delivered to the States, yet §§ 1661, 1667, 1670 do not give the States an absolute property in the arms distributed to them, or the right to sell or dispose of them. 14 A. G. Op. 490. Nor can the Secretary of War sell to a State serviceable munitions of war belonging to the Federal Government. 16 Id. 477.

St. July 23, 1888, Res. 32 (25 St. 627) authorizes —

"the Secretary of War to issue from the stores of the Army such arms, ordnance stores, quartermasters' stores, and camp equipage, to the militia of the District of Columbia as he may deem necessary for their proper equipment and instruction. The property so issued shall remain and continue to be the property of the United States, and shall be annually accounted for in such manner as the Secretary of War may require."

St. March 3, 1875, ch. 133, § 3, authorized the Secretary of War to credit the several States and Territories with the sum charged to them respectively, for arms and other ordnance stores issued to them during the Rebellion. See 24 St. 551. Sect. 1661 was amended by St. Feb. 12, 1887, ch. 129 (24 St. 401; see also 25 St. 487), which provides as follows: —



"SECTION 1. That the sum of \$400,000 is hereby annually appropriated, to be paid out of any money in the Treasury not otherwise appropriated, for the purpose of providing arms, ordnance stores, quartermaster's stores, and camp equipage for issue to the militia.

"SEC. 2. That said appropriation shall be apportioned among the several States and Territories under the direction of the Secretary of War, according to the number of Senators and Representatives to which each State respectively is entitled in the Congress of the United States, and to the Territories and District of Columbia such proportion and under such regulations as the President may prescribe: *Provided, however,* That no State shall be entitled to the benefits of the appropriation apportioned to it unless the number of its regularly enlisted, organized, and uniformed active militia shall be at least one hundred men for each Senator and Representative to which such State is entitled in the Congress of the United States. And the amount of said appropriation which is thus determined not to be available shall be covered back into the Treasury.

"SEC. 3. That the purchase or manufacture of arms, ordnance stores, quartermaster's stores, and camp equipage for the militia under the provisions of this act shall be made under the direction of the Secretary of War, as such arms, ordnance and quartermaster's stores and camp equipage are now manufactured or otherwise provided for the use of the Regular Army, and they shall be receipted for and shall remain the property of the United States, and be annually accounted for by the governors of the States and Territories, for which purpose the Secretary of War shall prescribe and supply the necessary blanks and make such regulations as he may deem necessary to protect the interest of the United States.

"SEC. 4. That all arms, equipments, ordnance stores, or tents which may become unserviceable or unsuitable shall be examined by a board of officers of the militia, and its report shall be forwarded by the governor of the State or Territory direct to the Secretary of War, who shall direct what disposition, by sale or otherwise, shall be made of them; and, if sold, the proceeds of such sale shall be covered into the Treasury of the United States."



## TITLE XVII.

## ARMS, ARMORIES, AND ARSENALS.

**SECT. 1662.**—Persons residing on lands ceded to the United States for navy yards, forts and arsenals, with State jurisdiction reserved only to serve civil and criminal process thereon, are not entitled to send their children to the schools of the town in which the lands are situated, or to a settlement or elective franchise there, by any length of residence, nor are they liable there for State, County, and town taxes. Justices's Opinion, 1 Met. (Mass.) 580.

22 St. 471, 23 St. 434, and 25 St. 489, provide for fortifications, works of defence, and their armament. 22 St. 474 authorizes the President to appoint a board of officers to report upon the best location for the government foundry or other method of manufacturing heavy ordnance. St. May 1, 1888, ch. 211 (25 St. 107), establishes an ordnance arsenal at Columbia, Tenn. St. March 3, 1879, ch. 183, (20 St. 410), provides —

“That upon the request of the head of any department, the Secretary of War be, and he hereby is, authorized and directed to issue arms and ammunition whenever they may be required for the protection of the public money and property, and they may be delivered to any officer of the department designated by the head of such department, to be accounted for to the Secretary of War, and to be returned when the necessity for their use has expired. Arms and ammunition heretofore furnished to any department by the War Department, for which the War Department has not been reimbursed, may be receipted for under the provisions of this act.”

**SECT. 1663.**—Each clerk at the Springfield Armory now receives an annual salary of \$1650. 18 St. 282. 22 St. 299, ch. 395, fixes the compensation of the master armorer there. St. April 17, 1888 (25 St. 85), appropriates \$75,000, to be expended under the direction of the Secretary of War, for the erection of a fire-proof carpenters' and stocking shop at the Springfield armory. St. June 20, 1878, ch. 359 (20 St. 223), provides —

“That the Secretary of War is hereby authorized to cause the machine built for testing iron and steel to be set up and applied to the testing of iron and steel for all persons who may desire to use it, upon the payment of a suitable fee for each test; the table of fees to be approved by the Secretary of War, and to be so adjusted from time to time as to defray the actual cost of the tests as near as may be.”

St. June 30, 1882, ch. 254 (22 St. 122; see also Id. 460; 23 St. 112, 502), provides as to the testing machine at the Watertown Arsenal —

“That in making tests for private citizens the officer in charge may require payment in advance, and may use the funds so received in making such private tests, making full report thereof to the Chief of Ordnance; and the Chief of Ordnance shall give attention to such programme of tests as may be submitted by the American Society of Civil Engineers, and the record of such tests shall be furnished said society to be by them published at their own expense. SEC. 3. That traders and laundrymen at depots for recruits in the Army be, and hereby are, authorized to furnish such recruits, on credit, with laundry work, and such articles as may be necessary for their cleanliness and comfort, at a total cost not to exceed seven dollars in value per man. That muster and pay rolls be made out showing the amounts the recruits respectively owe to the traders and laundrymen, and signed by them before leaving the depot, and that the traders and laundrymen be paid on such rolls, the amount paid for each recruit to be noted accordingly on the muster and descriptive rolls, in order that it may be withheld, after he joins his company, by the paymaster, at the first subsequent payment, under such rules and regulations as may be adopted by the War Department: *Provided*, That this provision shall apply only to recruits on their enlistment, and the credit shall only be allowed on the written order of the regular recruiting officer at said station.”



St. Sept. 22, 1888, ch. 1027 (25 St. 487), contains the proviso—

*“ Provided, That not more than \$60,000 of the money appropriated for the Ordnance Department in all its branches shall be applied to the payment of civilian clerks in said Department: Provided further, That the cost to the Ordnance Department of all ordnance and ordnance stores issued to the States, Territories, and District of Columbia, under the act of February 12, 1887, shall be credited to the appropriation for ‘manufacture of arms at national armories,’ which appropriation for 1889 and thereafter shall be available until exhausted.”*

SECT. 1666. — St. March 3, 1875, ch. 174, provides for the sale of the Arsenal at Detroit, Michigan.

SECTS. 1667, 1670. — See note, § 1661. By 19 St. 214, 410; 20 St. 61, 248, 252, the Secretary of State is authorized to issue arms to the Territories and the States bordering thereon. 24 St. 432 authorizes the Secretary of War to credit the Territory of Dakota with certain sums for ordnance and ordnance stores issued to that Territory.

SECT. 1673. — By St. March 3, 1875, ch. 133 (18 St. 452), no money is thereafter to be expended at the national armories in perfecting patentable inventions in the manufacture of arms by Army officers otherwise compensated for their services to the United States.



## TITLE XVIII.

## DIPLOMATIC AND CONSULAR OFFICERS.

## CHAPTER I.

## DIPLOMATIC OFFICERS.

SECT. 1674. — As to suits by or against foreign ambassadors, their servants, and consuls, see notes, §§ 563, cl. 17, 687, 711, cl. 8. The word "consul" denotes either a particular grade in the consular service or any consular officer. *Dainese v. United States*, 15 Ct. Cl. 64. The phrase "ambassadors and other public ministers," in the Constitution, comprehends all officers having a diplomatic function. 7 A. G. Op. 186. A vice-consul is not a deputy, but an acting consul. *Re Herres*, 33 F. R. 165, 167. As to the offence of falsely assuming or pretending to be an officer of the United States, see note, § 1786. The President has authority to appoint a diplomatic officer without a previous act establishing the office. 7 A. G. Op. 186; *Mahoney v. United States*, 3 Ct. Cl. 152, 161; 10 Wall. 62; *Savage v. United States*, 1 Ct. Cl. 170. The salary of a diplomatic office, established by law, cannot be restricted by the President or Secretary of State. *Foote v. United States*, 23 Ct. Cl. 443.

SECT. 1675. — Amended by St. March 3, 1875, ch. 153 (18 St. 483), to read as follows :

"SEC. 1675. Ambassadors and envoys extraordinary and ministers plenipotentiary shall be entitled to compensation at the rates following, per annum, namely : Those to France, Germany, Great Britain, and Russia, each \$17500. Those to Austria, Brazil, China, Italy, Japan, Mexico, and Spain, each \$12000. Those to all other countries, unless where a different compensation is prescribed by law, each \$10000. And, unless when otherwise provided by law, ministers resident and commissioners shall be entitled to compensation at the rate of 75 per centum, *chargés d'affaires* at rate of 50 per centum, and secretaries of legation at the rate 15 per centum, of the amounts allowed to ambassadors, envoys extraordinary, and ministers plenipotentiary to the said countries respectively; except that the secretary of the legation to Japan shall be entitled to compensation at the rate of \$2500 per annum. The second secretaries of the legations to France, Germany, and Great Britain shall be entitled to compensation at the rate of \$2000 each per annum."

23 St. 323 provides that "the minister resident and consul-general in Hayti shall also be accredited as *chargé d'affaires* to Santo Domingo." 22 St. 301, ch. 399, inserts, after the words "Liberia, \$4000," the following: "*Chargé d'affaires* and consul-general at Teheran, Persia, \$5000." 22 St. 424, appropriating \$5000 for the extension of diplomatic relations in Eastern Asia, did not restrict the compensation of an envoy extraordinary to that amount. *Foote v. United States*, *supra*. The recent act of July 11, 1888, ch. 614 (25 St. 247), further provides specifically for —

"envoys extraordinary and ministers plenipotentiary to France, Germany, Great Britain, and Russia, at \$17500 each. Envoys extraordinary and ministers plenipotentiary to Austria, Brazil, China, Italy, Japan, Spain, and Mexico, at \$12000 each. Envoys extraordinary and ministers plenipotentiary to Chili and Peru, at \$10000 each. Envoy extraordinary and minister plenipotentiary to Costa Rica, Guatemala, Honduras, Nicaragua, and San Salvador (to reside at such place in either of said states as the President may direct), \$10000. Envoys extraordinary and ministers plenipotentiary to the Argentine Republic, the United States of Colombia, Turkey, Belgium, Netherlands, Sweden and Norway, and Venezuela, at \$7500 each. Minister resident in Hawaiian Islands, \$7500. Minister resident and Consul-General in Corea, \$7500. Minister resident and consul-general to Greece, Roumania, and Servia, \$6500. Ministers



resident and consuls-general in Bolivia, Denmark, Hayti, Persia, Portugal, Siam, and Switzerland, at \$5000 each (and the minister resident and consul-general in Hayti shall also be accredited as chargé d'affaires to San Domingo). Minister resident at Uruguay and Paraguay, \$7500. Minister resident and consul-general to Liberia, \$4000. Agent and consul-general at Cairo, \$5000. Chargés d'affaires ad interim and diplomatic officers abroad, \$20,000.

"Secretaries of the legations in Berlin, China, Japan, London, Paris, and St. Petersburg, at \$2625 each. Second secretaries of the legations at Berlin, London, and Paris at \$2000 each. Second secretaries of the legations in China and Japan, who shall be American students of the language of the court and country to which they are appointed, respectively, and shall be allowed, and required, under the direction of the Secretary of State, to devote their time to the acquisition of such language, at \$1800 each. Secretary of legation and consul-general at Bogota, \$2000. Secretary of legation in Central American States and consul-general to Guatemala, \$2000. Secretaries of the legations in Austria, Brazil, Italy, Mexico, Spain, and Turkey, at \$1800 each. Secretaries of the legations in Chili, Peru, Argentine Republic, and Venezuela, at \$1500 each. Secretary of Legation at Corea, \$1500.

"Interpreter to the legation in Turkey, \$3000; interpreter to the legation in China, \$3000; interpreter to the legation in Japan, \$2500; interpreter to the legation and consulate-general in Persia, \$1000; interpreter to the legation and consulate-general in Corea, \$1000; interpreter to the legation and consulate-general in Bangkok, Siam, \$500. But no person drawing the salary of interpreter as above provided shall be allowed any part of the salary appropriated for any secretary of legation or other officer. Clerk at the legation in Spain, \$1200.

"For the purpose of enabling the President to provide, at the public expense, all such stationery, blanks, record and other books, seals, presses, flags, and signs as he shall think necessary for the several legations in the transaction of their business, and also for rent, postage, telegrams, furniture, messenger service, clerk-hire, compensation of cavasses, guards, dragomans, janitors, and porters, including compensation of interpreter, guards, and Arabic clerk at the consulate at Tangier, and the compensation of dispatch agents at London, New York, and San Francisco, and for travelling and miscellaneous expenses of legations, and for printing in the department of State, \$105,000."

As to Portugal, see *Francis v. United States*, 22 Ct. Cl. 403. An appropriation act which transfers a consulate from the class in which it had previously stood to a lower class with a smaller salary, operates to repeal previous legislation placing the consulate in the grade from which it was removed. *Mathews v. United States*, 123 U. S. 182; *Mahoney v. United States*, 10 Wall. 62. But a statute which fixes the annual salary at a sum named, without limitation as to time, is not abrogated or suspended by later enactments simply appropriating a less amount. *United States v. Langston*, 118 U. S. 389. A minister or other diplomatic officer is entitled to receive his salary in the money of the United States, or in its actual market equivalent. The supposed value of the foreign coin in the market or in the mints of the United States does not furnish a standard. *Clay's Case*, 8 Ct. Cl. 209, 212.

SECT. 1676. — Amended by 18 St. 483, ch. 153, to read as follows: —

"The agent and consul-general at Cairo shall be entitled to compensation at the rate of \$3500 per annum."

The title of this office was changed from agent and consul-general at Alexandria to the above title, Jan. 8, 1874, by 18 St. 285.

SECTS. 1680, 1681. — Repealed by 23 St. 323, which appropriates \$2625 for salary of each of the secretaries of legation in China and Japan, and \$5000 for salary of chargé d'affaires to Paraguay and Uruguay. Cf. the above 18 St. 483, ch. 153. 18 St. 374, ch. 130, authorizes the Secretary of State to rent, furnish, and keep suitable buildings, with grounds appurtenant, at Peking, for the use of the legation in China, at an annual cost not exceeding \$5000. Cf. 23 St. 324. St. Feb. 25, 1885, ch. 150 (23 St. 323, 329), provides —

"And hereafter no secretary or second secretary of any legation shall be entitled to or receive any compensation over and above his salary as such secretary for acting as chargé d'affaires during the temporary or other absence without leave of the minister to whose duties he may succeed. For salaries of second secretaries of the legations in Japan and China, who shall be American students of the language



of the court and country to which they are appointed, respectively, and shall be allowed and required, under the direction of the Secretary of State, to devote their time to the acquisition of such language, at \$1800 each, \$3600 [re-enacted in 24 St. 109; 25 St. 248]. For the salaries of interpreters to the legations in China, at \$3000, and in Japan and Turkey, at \$2500 each; in all, \$8000. But no person drawing the salary of interpreter as above provided shall be allowed any part of the salary appropriated for any secretary of legation or other officer [re-enacting 23 St. 228] . . . And hereafter no consul or consul general shall be entitled to or allowed any part of any salary appropriated for payment of a secretary or second secretary of legation or an interpreter."

SECT. 1682. — Amended by 18 St. 483, ch. 153, by adding at the end of the section —

"And he shall receive compensation at the rate of \$10,000 per annum."

SECT. 1683. — 23 St. 323 appropriates \$5000 for salary of agent to the States of the Congo Association, "said agent to be charged with introducing and extending the commerce of the United States in the Congo Valley, and for such purpose the further sum of \$5000, or so much thereof as may be necessary."

While from 1862 to 1882 the salary of the minister to Hayti remained fixed at \$7500, the appropriation acts of 1882-1885, inclusive, set apart only \$5000 for each year, but did not assume to repeal or suspend the law, or express that the sum appropriated should be payment in full, and the salary was held not reduced. *United States v. Langston*, 118 U. S. 389; 22 Ct. Cl. 10.

SECT. 1684. — Generalized from the cited act of 1810. 1 Com. D. 811. 20 St. 91, 267, appropriates \$5000 each for salary of *chargés d'affaires* to Portugal, Denmark, Paraguay and Uruguay, and Switzerland; and 20 St. 91 further provides that thereafter —

"*Chargés d'affaires ad interim* shall receive no additional pay beyond that which the law provides for the regular offices which they hold in their respective legations."

SECT. 1685. — The secretary of a legation who is left in charge of the affairs of a legation by a minister, during the temporary absence of the latter, is entitled to the benefit of this section. 9 A. G. Op. 425. In *Savage's Case*, 1 Ct. Cl. 170, it was held that a *chargé d'affaires* in a foreign country, acting and treated as such by the United States during their minister's absence, may recover the value of his services, although he had received no specific appointment.

SECT. 1687. — St. June 11, 1874, ch. 275, § 1 (18 St. 66) provides:—

"The Secretary of State is authorized to allow and pay to the secretary of legation and to the second secretary of legation and to the messenger of the legation in Paris, from the moneys collected at the legation for the transmission of consular invoices, an amount not to exceed in the aggregate \$600 in any one year, to be divided and distributed as the Secretary of State may direct, provided that the surplus receipts are sufficient for that purpose. . . . The bonds which consular officers who are not compensated by salaries are required by § 13 of the act of August 18, 1856 (now R. S. § 1697), to enter into, shall hereafter be made with sureties as the Secretary of State shall approve."

## CHAPTER II.

### CONSULAR OFFICERS.

THE constitutional grant of original jurisdiction to the United States Supreme Court of all cases affecting consuls does not prevent Congress from conferring original jurisdiction in such cases upon the subordinate courts of the Union. *Bors v. Preston*, 111 U. S. 252. A person who is consul here from a foreign Government is not presumably an alien. *Id.* As to consular reports, see note, § 1712.



SECT. 1690.—The offices and salaries here named are changed from time to time by the consular and other appropriation acts. See, *e. g.*, 24 St. 110; Sup. 33, 192, 201, 306, 331, 397. By 18 St. 66, ch. 275, § 1, certain consulates are divided into seven classes. 18 St. 486, ch. 157, discontinues Amoor River, in Russia, as a consulate, and establishes Vladivostock, in Russia, as a consulate of the fifth class. 19 St. 4, ch. 12, removes the consulate at Aix-la-Chapelle to Cologne, and that at Omoa and Truxillo to Utila in the Bay Islands. 20 St. 24, ch. 14, changes the name of the "Consulate at Omoa and Truxillo" to the "Consulate Ruatan and Truxillo." Under the act of July 1, 1882, the salary of the minister to Portugal, appointed thereafter, was \$5000, instead of \$7500, as under previous laws. *Francis v. United States*, 22 Ct. Cl. 403. During five years Congress failed to appropriate money for the payment of the salary of a consul at Turk's Island. The act of 1874 placed that consulate in class five, the salary being \$2000. The next appropriation was in 1882, and that act placed that consulate in class seven, and appropriated \$1000 for the salary. Thereafter the President made an appointment. The salary attached to the office was held to be \$1000. *Sawyer v. United States*, 22 Ct. Cl. 326. If Congress transfer a consulate from one class to another, it thereby changes the law which fixed the salary, and the consul is entitled to no more than the salary provided for the class to which the office has been transferred. *Mathews v. United States*, Id. 330; 123 U. S. 182. A consul is not personally liable upon a bill of exchange drawn by him on his government. *Jones v. Le Tombe*, 3 Dall. 384.

SECT. 1692.—See note, § 1675. St. Feb. 25, 1885, ch. 150 (23 St. 330; see, also, 25 St. 255), appropriates as follows:—

"For salaries of interpreters to be employed at consulates in China and Japan, \$12000: *Provided*, That not more than \$1200 shall be expended for interpreting at any one consulate or consulate general: *And provided further*, That no person otherwise receiving a salary in any capacity whatever from the United States shall be entitled to any part of the above sum. . . . For the purpose of paying for the keeping and feeding of prisoners in China, Japan, Siam, and Turkey, \$9000: *Provided*, That no more than 75 cents per day for the keeping and feeding of each prisoner, while actually confined, shall be allowed or paid for any such keeping and feeding: *And provided further*, That no allowance shall be made for the keeping or feeding of any prisoner who is able to pay or does pay the above sum of 75 cents per day; and the consular officer shall certify to the fact of inability in every case."

See, also, 23 St. 234; 24 St. 116; 18 St. 66, ch. 275, § 3.

23 St. 233 appropriates \$750 each for salaries of the interpreters to the consulates at Hankow, Amoy, Canton, and Hong-Kong:—

"*Provided*, That no person otherwise receiving a salary, in any capacity whatever, from the United States, shall be entitled to any part of the above sum."

SECT. 1693.—13 A. G. Op. 274, 293.

SECT. 1695.—Prior to the act of 1856 a vice-consul could not be legally appointed without the advice and consent of the Senate. *Dainese v. United States*, 15 Ct. Cl. 64. Neither a consul or vice-consul is invested with the office or entitled to its salary until he gives the bond required by law. Id.

SECT. 1697.—See notes, §§ 1383, 1687, 1695. A wilful or unjust refusal to approve an official bond does not take away the right to the office. *State v. Dahl*, 27 N. W. R. 343. A consul's bond speaks and takes effect from the date of its approval by the Secretary of State. 14 A. G. Op. 7. See *United States v. Le Baron*, 19 How. 73.

SECT. 1698.—Section 6 of St. 1792 was superseded by St. Aug. 18, 1856, § 13, so far as it related to consuls, but remained in force as to vice-consuls. The words "by virtue of his office," in the seventh line, were added by the Revision. 1 Com. D. 820. The sureties upon a vice-consul's bond are liable for the consul's salary paid to the vice-consul, when the same amount has been paid by the government to the consul, and it is not



shown to have been paid by the vice-consul to the consul. *United States v. Mitchell*, 26 F. R. 607.

SECT. 1699. — 18 St. 486 exempts the consuls at Vladivostock, in Russia, at Fayal, and at Auckland, from the prohibition to engage in business and trade.

The full reciprocity which, by the general rule of international law, prevails among Christian States, in exercising jurisdiction over each other's subjects or citizens in their respective territories, is not admitted between a Christian nation and a Mohammedan nation in the same circumstances; while in Christian countries consuls are little more than commercial agents, and are often allowed to engage in business, in Mohammedan countries they are clothed with diplomatic and even judicial powers, and are prohibited from entering into commercial transactions. Field, J., in *Mahoney v. United States*, 10 Wall. 62, 66.

SECT. 1700. — The revisers suggested that the inclusion of any officer in Schedule C, by subsequent legislation, should, *ipso facto*, exempt him from a previous order. 1 Com. D. 820.

SECT. 1702. — St. July 7, 1884, ch. 334 (23 St. 287) provides —

"Hereafter it shall not be lawful for any consular officer to appropriate to his own use or expend from the amount received from the fees of his office any sum in excess of the allowance of salary and fees directly authorized by law, and consular officers paid exclusively by fees and consuls paid in part by salary and in part by fees, shall only appropriate to their own use or expend such portion of the fees as is authorized by law."

SECT. 1703. — 7 A. G. Op. 714; 12 Id. 124, 410. A consular agent is, in law, the representative of the consul to whom he is subordinate. *Gould v. Staples*, 2 Haskell, 518; 9 F. R. 159.

St. June 11, 1874, ch. 275 (18 St. 66), provides, —

"SEC. 4. That the Secretary of State shall, as soon as practicable, establish and determine the maximum amount of time actually necessary to make the transit between each diplomatic and consular post and the city of Washington, and vice versa, and shall make the same public. He may also, from time to time, revise his decision in this respect; but in each case the decision is to be in like manner made public. And the allowance for time actually and necessarily occupied by each diplomatic and consular officer who may be entitled to such allowance shall in no case exceed that for the time thus established and determined, with the addition of the time usually occupied by the shortest and most direct mode of conveyance from Washington to the place of residence in the United States of such officer.

"SEC. 5. That from and after July 1 next, the annual salary of consular clerks who shall have remained continuously in service as such for the period of five years and upward shall be \$1200.

"SEC. 6. That any vice-consul who may be temporarily acting as consul during the absence of such consul may receive compensation notwithstanding that he is not a citizen of the United States."

SECT. 1704. — St. 1864 did not require these clerks to be confirmed by the Senate. 1 Com. D. 808. As to clerk-hire at certain consulates, see 18 St. 66, ch. 275, § 2; 20 St. 97, ch. 155; Id. 267, ch. 68; 21 St. 339, ch. 78; 22 St. 133. By 18 St. 66, ch. 275, § 5, consular clerks remaining continuously in service for five years receive \$1200 salary. St. July 11, 1888, ch. 614 (25 St. 254), provides, —

"For an additional allowance for clerks at consulates, to be expended under the direction of the Secretary of State at consulates not herein provided for in respect to clerk-hire, no greater portion of this sum than \$400 to be allowed to any one consulate in any one fiscal year, \$20000: *Provided*, That the total sum expended in one year shall not exceed amount appropriated: *And provided further*, That out of the amount hereby appropriated the Secretary of State may make such allowance as may to him seem proper to any interpreter for clerical services, in addition to his pay as interpreter."

SECT. 1707. — The consul's advice does not justify the master of a vessel in a foreign port in an unlawful act. *Wilson v. The Mary, Gilpin*, 31.

"Copies of such acts," &c. — The execution and acknowledgment of a will before a consul in a foreign country do not dispense with its probate in the proper court in the United



States, and until this is done the Federal courts possess no jurisdiction over the subject-matter. "It is one thing to possess proofs which may be sufficient to establish that a testamentary instrument had been executed in a foreign country, under circumstances which ought to give it legal effect here; and quite a different thing to ascertain what is the proper tribunal here by which those proofs may be examined, for the purpose of pronouncing judicial sentence thereon." *Armstrong v. Lear*, 12 Wheat. 169, 176.

SECT. 1709. — A foreign consul cannot take the control of the estate from an administrator appointed in a State here, in which the deceased was not domiciled but where he left property. *Thompson's Succession*, 9 La. Ann. 96. An American consul abroad is not authorized to pay a claim for a wrongful act committed by the deceased, which is not reduced to judgment for damages. *Sturgis v. Slacum*, 18 Pick. 36.

SECT. 1712. — The appropriation act, 23 St. 324, provides that —

"No part of such reports discussing partisan political, religious, or moral questions shall be published."

St. June 4, 1878, ch. 155 (20 St. 91), requires every consular officer to furnish to the Secretary of the Treasury, or to such customs officers as he may direct, the prices current of all articles of merchandise usually exported to the United States from the port or place in which he is stationed, not impairing § 1712. By St. Jan. 27, 1879, ch. 28 (20 St. 273), —

"it shall be the duty of consuls to make to the Secretary of State a quarterly statement of exports from, and imports to, the different places to which they are accredited, giving, as near as may be, the market price of the various articles of exports and imports, the duty and port charges, if any, on articles imported and exported, together with such general information as they may be able to obtain as to how, where, and through what channels a market may be opened for American products and manufactures. In addition to the duties now imposed by law, it shall be the duty of consuls and commercial agents of the United States, annually, to procure and transmit to the Department of State, as far as practicable, information respecting the rate of wages paid for skilled and unskilled labor within their respective jurisdictions."

St. June 18, 1888, ch. 393 (25 St. 186), adds, at the end of § 1712, —

"And they shall also procure and transmit to the Department of State, for the use of the Agricultural Department, monthly reports relative to the character, condition, and prospective yields of the agricultural and horticultural industries and other fruiteries of the country in which they are respectively stationed; and the Commissioner of Agriculture is hereby required and directed to embody the information thus obtained, or so much thereof as he may deem material and important, in his monthly bulletin of crop reports."

SECT. 1713. — The same act (25 St. 186) changes "stationed," in the last line of this section, to "situated," and adds thereafter, —

"And he shall also furnish to the Secretary of the Treasury, at least once in twelve months, the prices current of all articles of merchandise, including those of the farm, the garden, and the orchard, that are imported through the port or place in which he is stationed. And he shall also report as to the character of agricultural implements in use, and whether they are imported to or manufactured in that country; as to the character and extent of agricultural and horticultural pursuits there. That part of the information thus obtained which pertains to agriculture shall be transmitted by the Secretary of the Treasury, as soon as the same shall have been received by him, to the Commissioner of Agriculture, who shall include the same, or so much thereof as he may deem material and important, in his annual reports, stating the said prices in dollars and cents, and rendering tables of foreign weights and measures into their American equivalents."

SECT. 1714. — This declaratory provision is generalized from the cited act of 1792. 1 Com. D. 827.

SECT. 1717. — See note, § 1750.

SECT. 1718. — By St. Jan. 27, 1879, ch. 28 (20 St. 267), —



"the President is requested to revise the tariff of consular fees and prescribe such rates as will make them conform, as nearly as may be, to the fees charged by other commercial nations for similar services."

St. June 26, 1884, ch. 121, § 12 (23 St. 56), provides, —

"SEC. 12. — That on and after July 1, 1884, no fees named in the tariff of consular fees prescribed by order of the President shall be charged or collected by consular officers for the official services to American vessels and seamen. Consular officers shall furnish the master of every such vessel with an itemized statement of such services performed on account of said vessel, with the fee so prescribed for each service, and make a detailed report to the Secretary of the Treasury of such services and fees, under such regulations as the Secretary of State may prescribe; and the Secretary of the Treasury shall allow consular officers who are paid in whole or in part by fees such compensation for said services as they would have received prior to the passage of this act: *Provided*, That such services, in the opinion of the Secretary of the Treasury have been necessarily rendered; and a sum sufficient for the payment of such compensation, when thus adjusted by the Secretary of the Treasury, is hereby appropriated out of any money in the Treasury not otherwise appropriated."

The last sentence of § 1718 should be construed with what precedes it, and with other parts of the act of which it was originally a portion. It refers to the demands and wages of which cognizance had been given to consuls. It gives them no new jurisdiction, but simply provides a means of enforcing that they already had. They can retain the papers to compel the payment of wages in certain cases, and also consular fees; but they do not possess a general power of deciding upon all manner of disputed claims and demands against American vessels. 9 A. G. Op. 384.

SECT. 1720. — 11 A. G. Op. 72.

SECT. 1723. — Fees which a consul receives when acting under State authority, and independently of the general government, such as for taking affidavits, acknowledgments, and authentications for individuals, are his private property, for which he is not required to account to the United States. *United States v. Badeau*, 33 F. R. 572; 31 Id. 697. The words "by law," in the third line of this section, were added by the Revision. 1 Com. D. 815.

SECT. 1732. — The last thirteen words of this section were here substituted for "paid to the Secretary of the Treasury in the mode provided for by said act," in the cited statute. 1 Com. D. 818.

SECT. 1733. — The last fifteen words of this section were substituted for "and paid into the Treasury of the United States," in the cited act. Id.

SECT. 1734. — The cited provision was deemed to supersede § 32 of St. 1856 (11 St. 64), which was omitted from the Revision. Id.

SECT. 1735. — In a suit upon the bond, the plaintiff has the burden to prove failure to discharge official duties. *United States v. Bell, Gilpin*, 41. Where a consul-general of Egypt is charged with wrongfully issuing a writ of attachment against one citizen of the United States and in favor of another, neither of whom was a resident within the Turkish dominion, it was held necessary for the defendant to show that he was authorized to do so by the laws of Turkey, or by its usages in its intercourse with other Christian nations. *Dainese v. Hale*, 91 U. S. 13, 21.

SECT. 1736. — A consul's action under Rev. Stats. § 4580 *et seq.*, is reviewable only by a competent court, and not by the Treasury Department upon the examination of his accounts. 16 A. G. Op. 268.

SECT. 1738. — Under this provision, a retiring minister cannot install a consul in charge of the legation, nor can the consul receive the pay provided by law for a *chargé d'affaires*. *Otterbourg v. United States*, 5 Ct. Cl. 430; *The Anne*, 3 Wheat. 435; *The Bello Corrunes*, 6 Wheat. 152. But a consul represents the citizens or subjects of his nation when they are not otherwise represented. *Gernon v. Cochran*, Bee Adm. 209; *Robson v. The Huntress*, 2 Wall. Jr. 59; *The Adolph*, 1 Curtis, 87; 7 A. G. Op. 342.



## CHAPTER III.

## PROVISIONS COMMON TO DIPLOMATIC AND CONSULAR OFFICERS.

SECT. 1740. — An officer who was at home at the time of his recall and who had received his salary up to that time, is not entitled to be paid for such time as would be necessarily required in returning from his mission. 9 A. G. Op. 261. There can be no allowance under this section for constructive travel. Hence, a minister who was abroad when he was recalled, and who has not returned home, is not entitled to be paid for the time it will require him to reach home. Id.

*"If he has resigned or been recalled therefrom for any malfeasance in his office."* — The words "malfeasance in his office" qualify the word "resigned" as well as the word "recalled." The officers named in this section are relieved from their duties by a resignation or a recall. If they terminate their official characters in either of these ways, but without official guilt or delinquency, they may obtain full pay to the time they reach their residences; otherwise if they are recalled because of malfeasance, or if they resign merely to avoid a recall. 9 A. G. Op. 89.

SECT. 1741. — St. June 17, 1874, ch. 294 (18 St. 77), provides —

"That no ambassador, envoy extraordinary, minister plenipotentiary, minister resident, commissioner to any foreign country, chargé d'affaires, secretary of legation, assistant secretary of legation, interpreter to any legation in any foreign country, consul-general, consul, commercial agent, consular pupils, or consular agent, shall be absent from his post or the performance of his duties for a longer period than ten days at any one time, without the permission previously obtained of the President. And no compensation shall be allowed for the time of any such absence in any case except in cases of sickness; nor shall any diplomatic or consular officer correspond in regard to the public affairs of any foreign Government with any private person, newspaper, or other periodical, or otherwise than with the proper officers of the United States; nor without the consent of the Secretary of State previously obtained, recommend any person at home or abroad for any employment of trust or profit under the Government of the country in which he is located; nor ask or accept, for himself or any other person, any present, emolument, pecuniary favor, office, or title of any kind from any such Government."

The right of a diplomatic officer of the class named in the act of 1874, who temporarily absented himself for not more than ten days, to compensation is not affected by that act. 14 A. G. Op. 534.

SECT. 1742. — See note, § 1703. This section appears not to be limited to a continuous term of absence longer than sixty days; but applies to an excess over a limited aggregate of absence at one or more times during any one year, that aggregate being sixty days. 12 A. G. Op. 410.

SECT. 1743. — The government is bound to provide a way to make the salary and expenses of a minister abroad equal to the amount allowed by law. If he is directed to draw on London therefor, and there is a loss on the sale of his bills, such loss must be made good. 4 A. G. Op. 506; 2 Id. 504.

SECT. 1744. — See note, § 1703.

SECT. 1745. — See note, § 1718.

SECT. 1747. — Under the acts of August 18, 1856, and March 30, 1868, a consul was authorized to retain \$1000 out of the aggregate of moneys annually received by him from consular agencies or vice-consulates, but all funds so received by him in excess of that amount were payable into the Treasury. 12 A. G. Op. 527.

SECT. 1750. — See notes, §§ 863, 866, 1723; *Bischoffsheim v. Baltzer*, 20 Blatch. 229; 10 F. R. 1. Under an agreement of parties that an answer in chancery shall be sworn to before some person thereto authorized by the law of France, the answer cannot be sworn



to before the American consul. *Herman v. Herman*, 4 Wash. 555. An American consul abroad has been held to be a "magistrate" under a statute providing for the acknowledgment of deeds. *Scanlan v. Wright*, 13 Pick. 523. The genuineness of a consul's seal or signature need not be proved by evidence *aliunde*. *St. John v. Croel*, 5 Hill (N. Y.), 573. A consul's certificate under his consular seal is not evidence of any fact unless it is expressly or impliedly made so by statute. *Levy v. Burley*, 2 Sumner, 355; as, e. g., of the correction of a translation not sworn to, or an alleged authentication of a foreign law. *Church v. Hubbard*, 2 Cranch, 187; *Catlett v. Pacific Ins. Co.*, 1 Paine, 594; *United States v. Mitchell*, 2 Wash. 478; *Foster v. Davis*, 1 Litt. (Ky.) 71. An American consul is not required to certify to the official character and acts of a foreign notary public, and the making of such a certificate is not performing a notarial act. 12 A. G. Op. 1. Upon the clauses relating to perjury and forgery, see *United States v. Craig*, 28 F. R. 801; *People v. Tyler*, 7 Mich. 224.

SECT. 1751. — See note, § 1741.



## TITLE XIX.

## PROVISIONS APPLICABLE TO SEVERAL CLASSES OF OFFICERS.

**SECT. 1753.**—All government officers are mere agents with delegated powers, and do not bind their principal when acting beyond those powers. *United States v. Maxwell Land Grant Co.*, 21 F. R. 19. A public officer is presumed to act in his official capacity and not to intend binding himself personally when dealing with subjects fairly within the scope of his authority. *Parks v. Ross*, 11 How. 362. Whether he so acts is a question of law for the court. *United States v. Buchanan*, 8 How. 83; *Cofield v. McClelland*, 16 Wall. 331. See, also, 13 A. G. Op. 516.

St. Jan. 16, 1883, ch. 27 (22 St. 403), "An act to regulate and improve the civil service of the United States," provides—

"That the President is authorized to appoint, by and with the advice and consent of the Senate, three persons, not more than two of whom shall be adherents of the same party, as Civil Service Commissioners, and said three commissioners shall constitute the United States Civil Service Commission. Said commissioners shall hold no other official place under the United States. The President may remove any commissioner; and any vacancy in the position of commissioner shall be so filled by the President, by and with the advice and consent of the Senate, as to conform to said conditions for the first selection of commissioners. The commissioners shall each receive a salary of \$3500 a year. And each of said commissioners shall be paid his necessary travelling expenses incurred in the discharge of his duty as a commissioner.

"**SEC. 2.** That it shall be the duty of said commissioners: **FIRST.** To aid the President, as he may request, in preparing suitable rules for carrying this act into effect, and when said rules shall have been promulgated it shall be the duty of all officers of the United States in the departments and offices to which any such rules may relate to aid, in all proper ways, in carrying said rules, and any modifications thereof, into effect. **SECOND.** And, among other things, said rules shall provide and declare, as nearly as the conditions of good administration will warrant, as follows: First, for open, competitive examinations for testing the fitness of applicants for the public service now classified or to be classified hereunder. Such examinations shall be practical in their character, and so far as may be shall relate to those matters which will fairly test the relative capacity and fitness of the persons examined to discharge the duties of the service into which they seek to be appointed. Second, that all the offices, places, and employments so arranged or to be arranged in classes shall be filled by selections according to grade from among those graded highest as the results of such competitive examinations. Third, appointments to the public service aforesaid in the departments at Washington shall be apportioned among the several States and Territories and the District of Columbia upon the basis of population as ascertained at the last preceding census. Every application for an examination shall contain, among other things, a statement, under oath, setting forth his or her actual bona fide residence at the time of making the application, as well as how long he or she has been a resident of such place. Fourth, that there shall be a period of probation before any absolute appointment or employment aforesaid. Fifth, that no person in the public service is for that reason under any obligations to contribute to any political fund, or to render any political service, and that he will not be removed or otherwise prejudiced for refusing to do so. Sixth, that no person in said service has any right to use his official authority or influence to coerce the political action of any person or body. Seventh, there shall be non-competitive examinations in all proper cases before the commission, when competent persons do not compete, after notice has been given of the existence of the vacancy, under such rules as may be prescribed by the commissioners as to the manner of giving notice. Eighth, that notice shall be given in writing by the appointing power to said commission of the persons selected for appointment or employment from among those who have been examined, of the place of residence of such persons, of the rejection of any such persons after probation, of transfers, resignations, and removals, and of the date thereof, and a record of the same shall be kept by said commission. And any necessary exceptions from said eight fundamental provisions of the rules shall be set forth in connection with such rules, and the reasons therefor shall be stated in the annual reports of the commission. **THIRD.** Said commission shall, subject to the rules that may be made by the President, make regulations for, and have control of,



such examinations, and, through its members or the examiners, it shall supervise and preserve the records of the same; and said commission shall keep minutes of its own proceedings. **FOURTH.** Said commission may make investigations concerning the facts, and may report upon all matters touching the enforcement and effects of said rules and regulations and concerning the action of any examiner or board of examiners hereinafter provided for, and its own subordinates, and those in the public service, in respect to the execution of this act. **FIFTH.** Said commission shall make an annual report to the President, for transmission to Congress, showing its own action, the rules and regulations and the exceptions thereto in force, the practical effects thereof, and any suggestions it may approve for the more effectual accomplishment of the purposes of this act.

"**SEC. 3.** That said commission is authorized to employ a chief examiner, a part of whose duty it shall be, under its direction, to act with the examining boards, so far as practicable, whether at Washington, or elsewhere, and to secure accuracy, uniformity, and justice in all their proceedings, which shall be at all times open to him. The chief examiner shall be entitled to receive a salary at the rate of \$3000 a year, and he shall be paid his necessary travelling expenses incurred in the discharge of his duty. The commission shall have a secretary, to be appointed by the President, who shall receive a salary of \$1600 per annum. It may, when necessary, employ a stenographer, and a messenger, who shall be paid, when employed, the former at the rate of \$1600 a year, and the latter at the rate of \$600 a year. The commission shall, at Washington, and in one or more places in each State and Territory where examinations are to take place, designate and select a suitable number of persons, not less than three, in the official service of the United States, residing in said State or Territory, after consulting the head of the department or office in which such persons serve, to be members of boards of examiners, and may at any time substitute any other person in said service living in such State or Territory in the place of any one so selected. Such boards of examiners shall be so located as to make it reasonably convenient and inexpensive for applicants to attend before them; and where there are persons to be examined in any State or Territory, examinations shall be held therein at least twice in each year. It shall be the duty of the collector, postmaster, and other officers of the United States, at any place outside of the District of Columbia where examinations are directed by the President or by said board to be held, to allow the reasonable use of the public buildings for holding such examinations, and in all proper ways to facilitate the same.

"**SEC. 4.** That it shall be the duty of the Secretary of the Interior to cause suitable and convenient rooms and accommodations to be assigned or provided, and to be furnished, heated and lighted, at the city of Washington, for carrying on the work of said commission and said examinations, and to cause the necessary stationery and other articles to be supplied, and the necessary printing to be done for said commission.

"**SEC. 5.** That any said commissioner, examiner, copyist, or messenger, or any person in the public service who shall wilfully and corruptly, by himself or in co-operation with one or more other persons, defeat, deceive, or obstruct any person in respect of his or her right of examination according to any such rules or regulations, or who shall wilfully, corruptly, and falsely mark, grade, estimate, or report upon the examination or proper standing of any person examined hereunder, or aid in so doing, or who shall wilfully and corruptly make any false representations concerning the same or concerning the person examined, or who shall wilfully and corruptly furnish to any person any special or secret information for the purpose of either improving or injuring the prospects or chances of any person so examined, or to be examined, being appointed, employed, or promoted, shall for each such offence be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than \$100, nor more than \$1000, or by imprisonment not less than 10 days, nor more than one year, or by both such fine and imprisonment.

"**SEC. 6.** That within 60 days after the passage of this act it shall be the duty of the Secretary of the Treasury, in as near conformity as may be to the classification of certain clerks now existing under § 163 of the Revised Statutes, to arrange in classes the several clerks and persons employed by the collector, naval officer, surveyor, and appraisers, or either of them, or being in the public service, at their respective offices in each customs district where the whole number of said clerks and persons shall be altogether as many as fifty. And thereafter, from time to time, on the direction of the President, said Secretary shall make the like classification or arrangement of clerks and persons employed, in connection with any said office or offices, in any other customs district. And, upon like request, and for the purposes of this act, said Secretary shall arrange in one or more of said classes, or of existing classes, any other clerks, agents, or persons employed under his department in any said district not now classified; and every such arrangement and classification upon being made shall be reported to the President.

"**Second.** Within said 60 days it shall be the duty of the Postmaster-General, in general conformity to said § 163, to separately arrange in classes the several clerks and persons employed, or in the public service, at each post-office, or under any postmaster of the United States, where the whole number of said



clerks and persons shall together amount to as many as fifty. And thereafter, from time to time, on the direction of the President, it shall be the duty of the Postmaster-General to arrange in like classes the clerks and persons so employed in the postal service in connection with any other post-office; and every such arrangement and classification upon being made shall be reported to the President.

"Third. That from time to time said Secretary, the Postmaster-General, and each of the heads of departments mentioned in § 158 of the Revised Statutes, and each head of an office shall, on the direction of the President, and for facilitating the execution of this act, respectively revise any then existing classification or arrangement of those in their respective departments and offices, and shall, for the purposes of the examination herein provided for, include in one or more of such classes, so far as practicable, subordinate places, clerks, and officers in the public service pertaining to their respective departments not before classified for examination.

"SEC. 7. That after the expiration of six months from the passage of this act no officer or clerk shall be appointed, and no person shall be employed to enter or be promoted in either of the said classes now existing, or that may be arranged hereunder pursuant to said rules, until he has passed an examination, or is shown to be specially exempted from such examination in conformity herewith. But nothing herein contained shall be construed to take from those honorably discharged from the military or naval service any preference conferred by § 1754 of the Revised Statutes, nor to take from the President any authority not inconsistent with this act conferred by § 1753 of said statutes; nor shall any officer not in the executive branch of the government, or any person merely employed as a laborer or workman, be required to be classified hereunder; nor, unless by direction of the Senate, shall any person who has been nominated for confirmation by the Senate be required to be classified or to pass an examination.

"SEC. 8. No person habitually using intoxicating beverages to excess shall be appointed to, or retained in, any office, appointment, or employment to which the provisions of this act are applicable.

"SEC. 9. That whenever there are already two or more members of a family in the public service in the grades covered by this act, no other member of such family shall be eligible to appointment to any of said grades.

"SEC. 10. That no recommendation of any person who shall apply for office or place under the provisions of this act which may be given by any Senator or member of the House of Representatives, except as to the character or residence of the applicant, shall be received or considered by any person concerned in making any examination or appointment under this act.

"SEC. 11. That no Senator, or Representative, or Territorial Delegate of the Congress, or Senator, Representative, or Delegate elect, or any officer or employee of either of said houses, and no executive, judicial, military, or naval officer of the United States, and no clerk or employee of any department, branch or bureau of the executive, judicial, or military or naval service of the United States, shall, directly or indirectly, solicit or receive, or be in any manner concerned in soliciting or receiving, any assessment, subscription, or contribution for any political purpose whatever, from any officer, clerk, or employee of the United States, or any department, branch, or bureau thereof, or from any person receiving any salary or compensation from moneys derived from the Treasury of the United States.

"SEC. 12. That no person shall, in any room or building occupied in the discharge of official duties by any officer or employee of the United States mentioned in this act, or in any navy-yard, fort, or arsenal, solicit in any manner whatever, or receive any contribution of money or any other thing of value for any political purpose whatever.

"SEC. 13. No officer or employee of the United States mentioned in this act shall discharge, or promote, or degrade, or in any manner change the official rank or compensation of any other officer or employee, or promise or threaten so to do, for giving, or withholding or neglecting to make any contribution of money or other valuable thing for any political purpose.

"SEC. 14. That no officer, clerk, or other person in the service of the United States shall, directly or indirectly, give or hand over to any officer, clerk, or person in the service of the United States, or to any Senator or Member of the House of Representatives, or Territorial Delegate, any money or other valuable thing on account of or to be applied to the promotion of any political object whatever.

"SEC. 15. That any person who shall be guilty of violating any provision of the four foregoing sections shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be punished by a fine not exceeding \$5000, or by imprisonment for a term not exceeding three years, or by such fine and imprisonment both, in the discretion of the court."

SECT. 1754. — St. Aug. 15, 1876, ch. 287, § 3 (19 St. 169), provides —

"That whenever, in the judgment of the head of any department, the duties assigned to a clerk of one class can be as well performed by a clerk of a lower class or by a female clerk, it shall be lawful for him to diminish the number of clerks of the higher grade and increase the number of the clerks of the



lower grade within the limit of the total appropriation for such clerical service: *Provided*, That in making any reduction of force in any of the executive departments, the head of such department shall retain those persons who may be equally qualified who have been honorably discharged from the military or naval service of the United States, and the widows and orphans of deceased soldiers and sailors."

SECT. 1756. — The language of the original act was, after "profit," in the second line, "under the government of the United States, either in the civil, military, or naval departments of the public service," and the words, in the third line, "and the persons embraced by the section following" were here added. The original act was regarded as superseding the former laws prescribing an oath of office, whether general or applicable to departmental officers in the narrow sense of the term only. 1 Com. D. 849. This section was repealed by St. May 13, 1884, ch. 46 (23 St. 22), which provides —

"hereafter the oath to be taken by any person elected or appointed to any office of honor or profit either in the civil, military, or naval service, except the President of the United States, shall be as prescribed in § 1757 of the Revised Statutes. But this repeal shall not affect the oaths prescribed by existing statutes in relation to the performance of duties in special or particular sub-ordinate offices and employments.

"SEC. 3. That the provisions of this act shall in no manner affect any right, duty, claim, obligation, or penalty now existing or already incurred; and all and every such right, duty, claim, obligation, and penalty shall be heard, tried, and determined, and effect shall be given thereto, in the same manner as if this act had not been passed."

Exclusion from ordinary vocations for past conduct is punishment therefor, and if the oath or act treats that as punishable which was not so when the act was committed, or adds a new punishment, it is void as an *ex post facto* law. *Ex parte Garland*, 4 Wall. 333. Clerks in the executive departments are officers within the meaning of this section. 12 A. G. Op. 521. Attorneys and counsellors are not officers of the United States. *Id.* So an alderman of a city or night-watchman in a post-office building, though holding a place of trust and profit, does not occupy an "office of honor and profit." *Worthy v. Barrett*, 63 N. C. 199; *Eliason v. Coleman*, 86 Id. 235; *Doyle v. Raleigh*, 89 Id. 133; *Ellison v. Raleigh*, *Id.* 125. The clerk of a supervisor of internal revenue is not an officer within § 1756. *Hedrick v. United States*, 16 Ct. Cl. 88. The oath must be taken before an officer authorized to administer oaths by the laws of the United States, and a foreign consul residing in Mexico has not such authority. *Otterbourg's Case*, 5 Ct. Cl. 430.

SECT. 1757. — *Mouat v. United States*, 22 Ct. Cl. 293; 124 U. S. 303.

SECT. 1758. — See notes, §§ 28, 52, 2617.

SECT. 1759. — This is a substitute for a clause of the act cited. 1 Com. D. 851.

SECTS. 1760, 1761. — See St. 1882, stated in note, § 170.

SECT. 1762. — The original act contained the words "of the United States" after "officer" in the tenth line.

SECTS. 1763, 1765. — See notes, §§ 843, 1222, 1259, 1756. The cited act of 1852 was deemed to supersede St. Sept. 30, 1850, ch. 90, § 1 (9 St. 523, 542). 1 Com. D. 853. That act read: "No person who holds an office under the government of the United States, whose salary or annual compensation amounts," &c. In *Converse v. United States*, 21 How. 463, Taney, C. J., says: "The just and fair inference from these acts of Congress, taken together, is, that no discretion is left to the head of a department to allow an officer who has a fixed compensation any credit beyond his salary, unless the service he has performed is required by existing laws, and the remuneration for them fixed by law." But a collector who has been selected by the Treasury Department to buy supplies for the lighthouse service throughout the United States, and to make disbursements, is entitled to the compensation fixed by law for this service, in so far as it was outside of his district and beyond the limits to which his duties as an officer extended. *Id.* See, also, *United States v. Shoemaker*, 7 Wall. 338. "The evil intended to be guarded against by §§ 1763, 1765, was not so much plurality of offices as it was additional pay or compensation to an officer



holding but one office for performing additional duties, or the duties properly belonging to another. If he actually holds two commissions, and does the duties of two distinct offices, he may receive the salary which has been appropriated to each office." 15 A. G. Op. 71, 308, 536; 16 Id. 8; 12 Id. 459; *Converse v. United States*, 21 How. 463; *Talbot's Case*, 10 Ct. Cl. 426. Exceptions to § 1765 are made in favor of the reporter of the Court of Claims by 22 St. 255, 563; 23 St. 193, 425; 24 St. 208, 286; of any competent person employed by the Attorney-General to prepare a digest of the Attorney-General's Opinions, by 22 St. 269.

These sections do not prohibit the allowance of extra compensation to the officer for the performance of duties not imposed upon him by a Federal office, or distinct from its functions (*United States v. Brindle*, 110 U. S. 688; *United States v. Brown*, 9 How. 487; *Converse v. United States*, 21 Id. 463; *United States v. Stowe*, 19 F. R. 807; *Stansbury's Case*, 8 Wall. 33; 1 Ct. Cl. 123; *Wilson's Case*, 1 Id. 206; *Jackson's Case*, 8 Id. 354; *Meigs v. United States*, 19 Id. 497; 15 A. G. Op. 536, 609); or the payment of salaries for two distinct offices, the duties of which are not incompatible, to one who is appointed to and fully invested with each. 16 A. G. Op. 7; 4 Id. 128; 10 Id. 131; 12 Id. 859; *United States v. Evans*, 4 Mackey, 281; *United States v. Shoemaker*, 7 Wall. 338; *Upton's Case*, 19 Ct. Cl. 46; *Collin's Case*, 15 Id. 22; *Landram's Case*, 16 Id. 74; *Hedrick's Case*, Id. 88; 15 A. G. Op. 608; 16 Id. 566; 9 Id. 123, 260, 496; 8 Id. 325; 10 Id. 435, 446; *Re Conrad*, 15 F. R. 641; *United States v. Duval*, Gilpin, 356; *United States v. White*, Taney, 152; *Davenport v. Mayor*, 67 N. Y. 456. Compare *Talbot's Case*, 10 Ct. Cl. 426. They relate only to Federal officers and clerks, and do not extend to those of the District of Columbia. *Donovan v. United States*, 21 Ct. Cl. 120. If the law requires an official to do that which involves expenditures without provision for payment, he is entitled to have the amount allowed him, whether rejected or allowed by the officers of the Treasury. *United States v. Flanders*, 112 U. S. 88. The general rule that the acceptance of one office vacates another does not apply when the offices are held under different sovereignties; but one retaining a Federal office, who is elected to a State office, may be expelled from the latter by a State court. *Foltz v. Kerlin*, 105 Ind. 221. A judicial officer may be elected, before the expiration of his term, to an office not judicial, the term of which does not begin until after the first expires. *Vogel v. State*, 107 Ind. 374; *Smith v. Moore*, 90 Ind. 294. The word "office" (used in § 1763) does not usually include a member of Congress, as it is used in the statutes regulating the administrative affairs of the government, and certainly does not apply to a member elect who has not taken the oath of office. 14 A. G. Op. 409. A clerk in the office of the President, who is also clerk of a committee of Congress, and performs the duties of both positions, is entitled to compensation appropriated for each. *United States v. Saunders*, 120 U. S. 126; 21 Ct. Cl. 408.

SECT. 1764. — See note, § 843. The last five words of this section were here added to protect a few cases like that of the Supreme Court reporter, in which extra services and compensation are allowed. 1 Com. D. 853. The word "clerk," as used in § 1764, is limited to departmental clerks. *Landram v. United States*, 16 Ct. Cl. 74. A clerk in the War Department, who performed extra services in 1865 and 1866, was prohibited by § 1764 from receiving pay therefor out of money appropriated by St. 1872, ch. 172, "to enable the Secretary of War to pay for additional clerical services" theretofore employed by him. 14 A. G. Op. 101. An assistant treasurer of the United States, who receives and sells internal revenue stamps by direction of the Secretary of the Treasury, is not entitled to a commission or extra compensation therefor. *Folger v. United States*, 13 Ct. Cl. 86. The provisions of § 1764 do not apply to the clerk of a supervisor of internal revenue. *Hedrick v. United States*, 16 Ct. Cl. 88. And officers who are entitled to receive fees for their services can receive only such fees as are specifically prescribed by law. *Strong v.*



United States, 34 F. R. 18; *McKinstry v. United States*, Id. 213; *Landram v. United States*, 16 Ct. Cl. 85. See *Smith v. Waterbury*, 54 Conn. 174. In *Stansbury v. United States*, 8 Wall. 33, it was held that the act of Aug. 23, 1842 (5 St. 510), was not repealed by the act of Aug. 26, 1842 (5 St. 525), and that an agreement on the part of the Secretary of the Interior to pay a clerk, who retains his place and draws his salary as a clerk in the Interior Department, for services rendered to the government abroad, was void.

St. June 20, 1874, ch. 328 (18 St. 85), making appropriations for the legislative, executive, and judicial expenses of the government, provides, by par. 26, 28, of § 1 and § 3, —

“And hereafter it shall be unlawful to allow or pay to any of the persons designated in this act any additional compensation from any source whatever, or to retain, detail, or employ in any branch of the War Department in the city of Washington any persons other than those herein authorized except in the Signal-Office and the Engineer Corps, and except such commissioned officers as the Secretary of War may, from time to time, assign to special duties: *Provided*, That . . . no new enlistments shall be made into the general service, and nothing in this act shall be so construed as to increase the aggregate force now employed in any office of the War Department; and it shall be the duty of the Secretary of War to reduce the number of temporary clerks and others authorized by this act as fast as the wants of the public service will permit.

“SEC. 3. That no civil officer of the government shall hereafter receive any compensation or perquisites, directly or indirectly, from the Treasury or property of the United States, beyond his salary or compensation allowed by law: *Provided*, That this shall not be construed to prevent the employment and payment by the Department of Justice of district attorneys as now allowed by law for the performance of services not covered by their salaries or fees.”

Neither § 3 of this act of 1874 nor Rev. Stats., § 1763–1765, prohibits a deputy collector of internal revenue from receiving his salary as such because he holds besides the office of inspector of tobacco and cigars. *Hartson v. United States*, 21 Ct. Cl. 451. See note, § 1765. A compensation from fees to an amount prescribed by an officer vested with authority, not to exceed a sum stated per day, is a compensation allowed by law within § 3 of St. 1874. *Hedrick v. United States*, 16 Ct. Cl. 88.

SECTS. 1765, 1766. — St. 1828, after “liable,” in the third line of § 1766, contained the clause: “*Provided*, That nothing herein contained shall be construed to extend to balances arising solely from the depreciation of Treasury notes received by such person, to be expended in the public service;” and after “forthwith,” in the sixth line, read, “to the agent of the Treasury Department the balance due, and it shall be the duty of the said agent, within sixty days thereafter, to order suit,” &c.

A salary is fixed when it is at a stipulated rate for a defined period of time. A pay or emolument is fixed when the amount of it is agreed upon and the service for which it is to be given is defined. A salary, pay, or emolument, is fixed by law when the amount is named in a statute; and by regulation when it is named in a general order, promulgated under provisions of law, and applicable to a class or classes of persons. *Hedrick v. United States*, 16 Ct. Cl. 88. If Congress makes a special appropriation to pay for extra services rendered by an officer, the same is authorized by law. 5 A. G. Op. 61. But the last clause of § 1765 is later in date than this ruling. If an officer renders, with the consent of his superior, service for another department of government which has no control over him, and such service is within the lawful discretion of the department which employs him, this section does not prohibit him from receiving compensation therefor in addition to that he is otherwise entitled to. *Collier v. United States*, 22 Ct. Cl. 125. See 16 A. G. Op. 565. But a special agent of the post-office department, who receives a fixed compensation, cannot be allowed anything beyond his actual expenses for services rendered as a deputy marshal. 15 A. G. Op. 71. The Attorney-General is not prohibited from agreeing with postmasters, who reside beyond the reach of process, to pay them their travelling expenses as witnesses in going to the place of trial to testify on behalf of the government. *Douglass*



*v. United States*, 21 Ct. Cl. 462. Sect. 1765 does not extend to an executive clerk who is, at the same time, clerk of a standing committee of the House of Representatives. Each position is authorized by law and has a salary provided for it. Hence the pay of one is not additional to that of the other. *Saunders v. United States*, 21 Ct. Cl. 408; 120 U. S. 126. This section does not preclude a deputy collector of internal revenue from receiving his salary as such, although he is also an inspector of tobacco and cigars, the fees due him in the latter capacity being paid by the persons for whom he renders services. *Hartson v. United States*, 21 Ct. Cl. 451; *Landram v. United States*, 16 Id. 74. A gauger who acts as the clerk of a supervisor of internal revenue is not precluded from obtaining the compensation provided for such clerks, as he is not an officer. *Hedrick v. United States*, 16 Ct. Cl. 88. A retired Army officer, who has been duly appointed to a civil office under the government, may draw his pay as a retired officer and also the salary fixed by law for the civil office he holds. 15 A. G. Op. 306. This section applies to an officer who may perform, under an *ad interim* authority, the duties of another office in which there is a vacancy. 12 A. G. Op. 459. The President has no authority to allow extra compensation to the officers at West Point. 4 A. G. Op. 138. Collectors of customs, who act as superintendents of light-houses, are entitled to the compensation allowed them for performing such last-mentioned duty, the statute providing therefor. Id. 249. See Id. 522. It is not competent for the Secretary of War to employ and pay officers in the revenue service for disbursing moneys appropriated for topographical purposes. Id. 401. This section does not prohibit the minister resident at the Hawaiian Islands, who is allowed an annual salary, from receiving in addition thereto extra compensation for his services in supervising and taking testimony to be used in the Court of Commissioners of Alabama claims under the provisions of the act which established that court. Where the service is one required by law, but not of any particular official, and compensation therefor is fixed and appropriated, any officer, properly authorized, who performs the service, is entitled to the compensation. 15 A. G. Op. 608. The rejection of a claim by the Treasury Department forms no objection to the admission of it as evidence of set-off before the jury. *United States v. Macdaniel*, 7 Pet. 1; *United States v. Ripley*, Id. 18; *United States v. Fillebrown*, Id. 28; *United States v. Ringgold*, 8 Id. 150; *Gratiot v. United States*, 15 Id. 336; *Milnor v. Metz*, 16 Id. 221; *Gratiot v. United States*, 4 How. 80; *United States v. Buchanan*, 8 Id. 83; *Brown v. United States*, 9 Id. 487; *Watkins v. United States*, 9 Wall. 759. The presumption is that every person engaged in the public service has received the compensation allowed by law, until the contrary is made to appear. *United States v. Ripley*, 7 Pet. 18. For a statement of rules which should govern in cases of claims for extra compensation, see Id.; *United States v. Fillebrown*, Id. 28. The word "compensation," as used in an earlier statute, did not prohibit the allowance of the travelling expenses of an officer who performed duties not connected with his office. 4 A. G. Op. 372.

SECT. 1766. — See notes, §§ 236, 1065. Persons "in arrears," are only such as, having previous transactions of a pecuniary nature with the government, are found, upon the settlement of those transactions, to be in arrears to it. It is inapplicable to the sureties or principals in custom-house bonds. 3 A. G. Op. 52; 1 Id. 617; 4 Id. 33, 36. Neither this section nor Rev. Stats. §§ 300, 307, 308, in relation to the payment of warrants after three years from issuance, form a part of the contract with the sureties of a Federal officer in arrears. *United States v. Potter*, 7 Rep. 675. This section applies only to cases in which the party who claims compensation is liable to the United States. If the government has paid for service rendered it in good faith, through a mistake of law, it cannot claim the right to withhold money still due the party. *Hedrick v. United States*, 16 Ct. Cl. 88; *Arthur v. United States*, Id. 422. A naval officer in the service of the government is not deprived of his right to the rations allowed by law, or the amount in money for which they may be commuted, although he is in arrears to the United States. 2 A. G. Op. 420, 593.



SECTS. 1767, 1772. — Repealed by St. March 3, 1887, ch. 353 (24 St. 500), which provided that such repeal "shall not affect any officer heretofore suspended under the provisions of said sections, or any designation, nomination, or appointment theretofore made by virtue of the provisions thereof." The repealed sections were construed in *Re Yancey*, 28 F. R. 447; *Re Marshalship*, 20 Id. 380; *Barbour's Case*, 17 Ct. Cl. 149; *Fraser v. United States*, 16 Id. 507; *Howard's Case*, 22 Id. 305; *Farden's Case*, 13 Id. 347; *Embry's Case*, 12 Id. 455; 14 A. G. Op. 247, 563; 15 Id. 62, 207, 375, 377, 380, 396, 398, 401, 406; 16 Id. 266, 288, 522, 531, 538; 12 Id. 443, 455, 468, 469; 13 Id. 207, 221, 300, 308; 12 Id. 457, 468; *Batesville Institute v. Kauffmann*, 18 Wall. 151; *Hall v. Wisconsin*, 103 U. S. 5; *Edwards v. United States*, Id. 471; *Blake v. United States*, 103 Id. 227; 14 Ct. Cl. 463; *Allen v. McKeen*, 1 Sumner, 276; *Re Farrow*, 4 Woods, 491; 3 F. R. 112; *Re Conrad*, 15 Id. 641; *Justices' Opinion*, 72 Maine, 376.

SECT. 1769. — See notes, §§ 793, 4778. The vacancies were such as might happen to exist during the recess of the Senate, including a temporary adjournment from July to November. *Re Farrow*, 3 F. R. 112; *Gould v. United States*, 19 Ct. Cl. 595; 16 A. G. Op. 522; 12 Id. 449; 15 Id. 207, 406. The phrase "shall remain in abeyance" did not operate upon the office until the expiration of the next session of the Senate. 16 A. G. Op. 522; 15 Id. 399, 401.

SECT. 1775. — The words "the Assistant Secretaries of the Treasury" were here substituted for "his assistants" in the original act.

SECT. 1777. — See note, § 386. The words "of the United States," in the first line, were here added.

SECT. 1778. — The original provision contained also the word "affirmations" after "oaths" in the second line. As to fees, see note, § 847; *Strong v. United States*, 34 F. R. 21. The seal of a commissioner is recognized by this statute. *Frost v. Holland*, 75 Maine, 112. The authority of a notary appointed by a State is limited territorially to the State; but if the officer is of a class having generally authority to administer oaths, Rev. Stats. § 5396 makes it sufficient to name the officer and aver that he is authorized, without setting out his special authority or commission. *United States v. Rhodes*, 30 F. R. 432.

St. June 22, 1874, ch. 390, § 20 (18 St. 178), authorized notary publics to take proof of debts against a bankrupt's estate. By St. Aug. 15, 1876, ch. 304 (19 St. 206), —

"notaries public of the several States, Territories, and the District of Columbia be, and they are hereby, authorized to take depositions, and do all other acts in relation to taking testimony to be used in the courts of the United States, take acknowledgments and affidavits, in the same manner and with the same effect as commissioners of the United States circuit court may now lawfully take or do."

Under St. 1876, the notary's signature and authority need not be attested by his official seal. *The E. W. Gorgas*, 10 Ben. 460; *Re Donnelly*, 5 F. R. 786; *United States v. Smith*, 17 Id. 511; *United States v. Neale*, 14 Id. 769; *United States v. Baer*, 18 Blatch. 494; *United States v. Rhodes*, 30 F. R. 432.

SECT. 1779. — The original act read: "If any collector of customs, supervising or local inspector of steamboats, or other officer, shall neglect or refuse . . . he shall," &c.

SECTS. 1781, 1782. — The Revision made the following changes in § 1781: "every" substituted for "any" in the first line; "or agent" there added; "such" inserted before "contract" in the sixth and tenth lines; and in the sixteenth line it omits "of trust or profit." Sect. 1782 began in the original act: "No member of the Senate or House of Representatives shall, after his election and during his continuance in office, nor shall any head of a department, head of a bureau, clerk, or any other officer of the government receive," &c. The words "or delegate" were added in the first line of § 1782, in accordance with a bill introduced in the House Jan. 15, 1872, so as to include delegates from the Territories and the District of Columbia to Congress. H. R. 1028; 1 Com. D. 859.



Sects. 1781, 1782 make it illegal for an officer of the United States to have such connection with a government contract as an agent, attorney, or solicitor, assumes when he procures or aids to procure such a contract for another, or when he prosecutes for another against the government any claim founded upon a government contract. But they do not prohibit executive officers of the government, including pension agents, from contracting directly with the government as principals in matters separate from their offices and the performance of their official duties, or being connected with or interested in such contracts after they are procured. 14 A. G. Op. 482. See *Id.* 133.

St. Aug. 15, 1876, ch. 287, § 6, which was held to be constitutional in *Ex parte Curtis*, 106 U. S. 371; 11 Abb. N. C. 1, provides —

“That all executive officers or employees of the United States not appointed by the President, with the advice and consent of the Senate, are prohibited from requesting, giving to, or receiving from, any other officer or employee of the Government, any money or property or other thing of value for political purposes; and any such officer or employee, who shall offend against the provisions of this section shall be at once discharged from the service of the United States; and he shall also be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in a sum not exceeding \$500.”

SECT. 1784. — The words “or employé” in the first line were here added, the original act beginning, “No officer or clerk.”

SECT. 1785. — *United States v. Williams*, 3 F. R. 489. 22 St. 490, § 2492, repeats this provision in the same words except that the words “not less than \$100 and,” and the words “not less than one year nor” are there omitted.

SECT. 1786. — *Re Yancey*, 28 F. R. 451. St. April 18, 1884, ch. 26 (23 St. 11), provides —

“That every person who, with intent to defraud either the United States or any person, falsely assumes or pretends to be an officer or employee acting under the authority of the United States, or any Department, or any officer of the Government thereof, and who shall take upon himself to act as such, or who shall in such pretended character demand or obtain from any person or from the United States, or any Department, or any officer of the Government thereof, any money, paper, document, or other valuable thing, shall be deemed guilty of felony, and shall, on conviction thereof, be punished by a fine of not more than \$1000, or imprisonment not longer than three years, or both said punishments, in the discretion of the court.”

SECT. 1787. — This relates only to voluntary assistance to the Rebellion, not to aid given by compulsion, a well-grounded fear of great bodily harm and the result of force. *United States v. Powell*, 65 N. C. 709. It applies to State officers, such as constables, but not to mere peace officers like justices of the peace. *Id.*

SECTS. 1788, 1789. — These provisions are to be strictly construed. They applied only, in the form in which they were originally enacted, to the purchase of such property as belongs to, or is in the ownership of, the United States, and not to the purchase of lands sold by the tax-commissioners for taxes under the direct-tax law. 14 A. G. Op. 352.



## TITLE XX.

## FLAG AND SEAL.

SECT. 1794. — See note, § 3830, as to sealing postmaster's commissions, and *St. March* 3, 1875, ch. 131, § 14 (18 St. 402; see note, § 437), as to sealing commissions in the Department of the Interior. The President's "signature is a warrant for affixing the great seal to the commission; and the great seal is only to be affixed to an instrument which is complete. It attests, by an act supposed to be of public notoriety, the verity of the presidential signature. It is never to be affixed till the commission is signed, because the signature, which gives force and effect to the commission, is conclusive evidence that the appointment is made." *Marbury v. Madison*, 1 Cranch, 137, 158; *United States v. Le Baron*, 19 How. 73; 4 Wall. 642; 4 A. G. Op. 217; 12 Id. 304. It seems that a seal of a new and unacknowledged government does not prove itself. *United States v. Palmer*, 3 Wheat. 610.



## TITLE XXI.

## SEAT OF GOVERNMENT, INCLUDING THE PUBLIC BUILDINGS.

SECT. 1795. — Congress exercises direct, exclusive, and absolute legislative authority over the District of Columbia, and has no power, under the Constitution, to delegate general legislative authority to its local government. *Roach v. Van Riswick*, 4 MacArthur, 171; 15 A. G. Op. 56; *Stoutenburgh v. Hennick*, 129 U. S. 141. Its police regulations which relate exclusively to the internal trade of the States, can have effect only in such places as the District of Columbia, where the legislative authority of Congress excludes territorially all State legislation. *United States v. Dewitt*, 9 Wall. 41. As to the right of eminent domain, see note, § 355. The act of June 11, 1878, is an organic act disposing of the whole matter of a government for the District of Columbia. *Eckloff v. District of Columbia*, 4 Mackey, 572. The ownership of the streets in the city of Washington is vested in the United States in fee simple. *Potomac Steamboat Co. v. Upper Steamboat Co.*, MacArthur & M., 285; *District of Columbia v. B. & P. R. Co.*, 114 U. S. 453.

SECT. 1797. — See note, § 223. 18 St. 14, ch. 22, places telegraphs connecting the Capitol with the various departments in Washington under the supervision of the officer in charge of the public buildings and grounds. See also 18 St. 20, ch. 50. St. Aug. 15, 1876, ch. 287 (19 St. 147), provides —

“That the Architect of the Capitol shall have the care and superintendence of the Capitol including lighting, and shall submit through the Secretary of the Interior estimates thereof: *And provided further*, That all the duties relative to the Capitol building heretofore performed by the Commissioner of public buildings and grounds, shall hereafter be performed by the Architect of the Capitol, whose office shall be in the Capitol building.”

The appropriation act of 1867, transferring the charge of public buildings to the chief engineer of the Army, did not surrender to the War Department the control of Congress over the buildings. *Ashfield's Case*, 9 Ct. Cl. 331. In general, the custody of a public building is by implication vested in the officer who has it in his official possession, and services so rendered form part of the duties of his office. *Gray's Case*, 23 Ct. Cl. 323.

SECT. 1798. — See note, § 414.

SECT. 1802. — As to the increase of the water supply and the extension of the aqueduct, see 21 St. 458, ch. 134; 22 St. 169; 23 St. 72, 457; 24 St. 137, 265, 580; 25 St. 328.

SECT. 1813. — St. July 9, 1886, ch. 757 (24 St. 131), provides —

“That overseers or inspectors temporarily required in connection with sewer, street, or road work, or the construction or repair of buildings, done under contracts authorized by appropriations, shall be paid out of the sums appropriated for the work, and for the time actually engaged thereon; and the Commissioners of the District, in their annual report to Congress, shall report the number of such overseers and inspectors, and their work, and the sums paid to each, and out of what appropriation.”

SECT. 1816. — See note, § 1797. By St. March 3, 1879, ch. 182 (20 St. 377), disbursements for the Capitol extension and improvement of the grounds are to be made by the disbursing clerk of the Interior Department. 22 St. 2, ch. 7, provides for the removal of bathrooms in the Capitol and the enlargement of the restaurant reserved for members of Congress. St. March 3, 1877, ch. 105 (19 St. 344; see also 20 St. 178, 221), places the ventilation and heating of the House of Representatives under the direction of the Architect of the Capitol, who, by 21 St. 385, controls also the electrician and electrical machinery. The appropriation act of July 11, 1888, ch. 615 (25 St. 258), provides that —



“all engineers and others who are engaged in heating and ventilating the Senate wing of the Capitol shall be subject to the orders and in all respects under the direction of the Architect of the Capitol, subject to the approval of the Senate Committee on Rules.”

SECT. 1819. — St. March 3, 1875, ch. 130 (18 St. 374), extends the duties of the metropolitan police in the District of Columbia to all public squares or places. St. July 1, 1882, ch. 258 (22 St. 126), regulates the use of the Capitol grounds.

SECT. 1821. — See note, § 52; *Bradshaw v. United States*, 14 Ct. Cl. 78. By St. April 29, 1876, ch. 86 (19 St. 41), the Capitol police are to protect the Capitol grounds and terraces from use as playgrounds or other injury to the public property, turf, and grass.

The Capitol police are not employes of the Senate and House. *Allabach v. United States*, 19 Ct. Cl. 556. An appointment as a member of the Capitol police is held subject to the will of the appointing power, which may remove at its pleasure, and both the appointment and removal may be made informally. A member who remained absent from duty, and gave no notice that he intended to return thereto, and whose name is stricken from the pay-rolls, must be regarded as having been removed, although he was afterward restored to duty. *Thwing v. United States*, 16 Ct. Cl. 13.

SECT. 1822. — This section, construed in connection with § 1821, and the course of legislation for fifty years, is subject to the limitation that both the number and the rate of compensation of the Capitol police may be varied by and must depend upon the action of Congress from year to year in making appropriations. *Bradshaw v. United States*, 14 Ct. Cl. 78. See, e. g., 20 St. 178, ch. 329.

SECT. 1823. — 18 St. 85, 345, provides —

“That whenever a member of the Capitol police or watch force is suspended from duty for cause, said policeman or watchman shall receive no compensation for the time of such suspension if he shall not be reinstated.”

SECT. 1826. — The provision for additional police force was repealed by 19 St. 143, ch. 287.

SECT. 1827. — St. June 20, 1878, ch. 359 (20 St. 220), provides —

“That hereafter only such trees, shrubs, and plants shall be propagated at the greenhouses and nursery as are suitable for planting in the public reservations, to which purpose only the said productions of the greenhouses and nursery shall be applied.”

SECT. 1833. — St. March 3, 1883, ch. 128 (22 St. 552), provides that —

“it shall be the duty of the heads of the several executive departments to submit to Congress each year, in the annual estimates of appropriations, a statement of the number of buildings rented by their respective departments, the purposes for which rented, and the annual rental of each.”

SECT. 1835. — See notes, §§ 1764, 1765.

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## TITLE XXII.

### THE STATES.

SECT. 1838. — This section appears to contemplate that it is possible under existing law that land may be purchased for the government without the consent of the State thereto being previously given. 15 A. G. Op. 212. See note, § 355.



## TITLE XXIII.

## THE TERRITORIES.

## CHAPTER I.

## PROVISIONS COMMON TO ALL THE TERRITORIES.

22 St. 111, ch. 241, authorizes the Secretary of the Treasury to examine and report to Congress the amount of all claims of certain States and the Territories of Washington and Idaho for money expended and indebtedness assumed by them in repelling invasions and suppressing Indian hostilities, &c. St. Aug. 4, 1886, ch. 893 (24 St. 217), provides —

“That whenever the Secretary of the Treasury and the Secretary of War, in adjusting the claims of the States of Texas, Colorado, Oregon, Nebraska, California, Kansas, and Nevada, and the Territories of Washington and Idaho, and Nevada when a Territory, arising under acts of Congress approved July 27, 1861, and June 27, 1882 (12 St. 276 and 22 St. 111), shall find that any original paper relating to the claims of said States, as provided for in said acts, shall have been lost, destroyed, or missing, upon proof thereof a copy of such paper may be certified by the proper officers of such State or Territory under their seals of office, or, if such copy cannot be furnished, any other competent secondary evidence of the contents of such paper when filed with the Secretary of the Treasury or Secretary of War, shall be received by them in lieu of such lost original papers, and used in evidence in the adjustment of their said claims in all respects as said original. All provisions of this section applicable to States shall be equally applicable to the Territories.

“SEC. 2. The Secretary of War is hereby authorized to detail three Army officers to assist him in examining and reporting upon the claims of the States and Territory named in the acts of June 27, 1882, ch. 241, of the laws of the Forty-seventh Congress, and such officers, before entering upon said duties, shall take and subscribe an oath that they will carefully examine said claims, and that they will, to the best of their ability, make a just and impartial statement thereof as required by said act.”

Legislative power conferred upon a Territorial legislature by the organic act cannot be delegated. *Winters v. Hughes*, 3 Utah, 443. Nor can powers conferred upon the governor by such act be afterwards limited or restricted by such legislature. 16 A. G. Op. 27. A Territory is an inchoate State. *Ex parte Morgan*, 20 F. R. 298. Its organic law takes the place of a constitution, as the fundamental law of the local government. *National Bank v. Yankton County*, 101 U. S. 129; *Hill v. Territory*, 7 Pac. Rep. 163; 2 A. G. Op. 727. A territorial act, which is contrary to the United States Constitution or the organic act, is invalid without the disapproval of Congress and cannot be ratified by the territorial legislature. *People v. Clayton*, 11 Pac. Rep. 206; *Miners' Bank v. Iowa*, 12 How. 1; *Beall v. New Mexico*, 16 Wall. 535; *Re Attorney General*, 2 New Mexico, 49; *Nelson v. United States*, 30 F. R. 112; *Reynolds v. The People*, 1 Col. 179; *Ashby v. Hall*, 119 U. S. 526; *Treadway v. Schnauber*, 1 Dak. 236. Under the power of the general government to govern the Territories, Congress exercises the combined powers of the Federal and State governments, and may legislate directly for a Territory, although the organic act reserves no such power. *American Ins. Co. v. Canter*, 1 Pet. 511; *National Bank v. Yankton County*, 101 U. S. 129; *Freeborn v. Smith*, 2 Wall. 160; *United States v. Church*, 15 Pac. Rep. 473. It is within the police power of the Territories to license and regulate the liquor traffic.



*State v. Brown*, 16 Pac. Rep. 259. So they may regulate the exercise of the right of suffrage in such Territory, subject to the Federal constitution and the acts of Congress. *Hayward v. Bolton*, 17 Pac. Rep. 457; *Innis v. Bolton*, Id. 264. "The rights of a Territory in regard to the public lands within its limits cannot be held to be so extensive as those of a State. A Territory is not properly sovereign. It is an organization through and by means of which Congress for a time governs a particular portion of the country. Its rights are those which are set forth in the organic act. Its limits are liable to be altered and changed from time to time, as it may be convenient to either add to or diminish its boundaries. But it has the power of legislation, subject to the control of Congress, and when acting within the limits which Congress has fixed for it, it acts by the authority of Congress." 16 A. G. Op. 115. See *Nelson v. United States*, 30 F. R. 112. The title to every kind of property owned by a Territory passes to the State upon its admission into the Union, unless otherwise declared by Congress. *Brown v. Grant*, 116 U. S. 207.

SECT. 1839. — This provision did not appear in the act establishing Washington Territory. It first appears in 10 St. 277, organizing the Territories of Nebraska and Kansas, the United States having previously, by treaty with the Shawnee Indians, agreed not to include, without their consent, any of their lands within any State or Territory afterwards formed. *Utah R. Co. v. Fisher*, 3 Pac. Rep. 4. And when, in accordance with a treaty stipulation, an act of Congress admitting a State into the Union, or organizing a Territorial government, provides that the lands in possession of an Indian tribe shall not be a part of such State or Territory, the new government has no jurisdiction over them. *Langford v. Monteith*, 102 U. S. 145; *The Kansas Indians*, 5 Wall. 737; *State v. McKenney*, 2 Pac. Rep. 175; *Harkness v. Hyde*, 98 U. S. 476; *Ex parte Crow Dog*, 109 Id. 556; *Hunt v. Palao*, 4 How. 589.

SECT. 1840. — The organic acts of New Mexico, Utah, and Arizona contained no provision respecting the Indians, their rights, &c. 1 Com. D. 892.

SECT. 1841. — The last clause of § 1841 is merely directory, and does not empower the executive to remove officers at will. *Territory v. Ashenfelter*, 12 Pac. Rep. 896; *Field v. People*, 2 Scam. (Ill.) 91. By St. July 19, 1876, ch. 212 (19 St. 91), bills passed by the legislature of Arizona are to be approved and returned by the governor in ten days, otherwise to become laws; and if returned by him disapproved, they may be passed by a two-thirds vote on reconsideration. The pardoning power conferred upon a territorial governor by the organic act cannot be limited or restricted by territorial laws. 16 A. G. Op. 27. The act for Wyoming Territory provided "unless sooner removed by the advice and consent of the Senate."

"*The laws of the territory.*" — Except laws political in their character, which concerned the relations between the people and their sovereign, all the laws which were in force in Florida, while a province of Spain, remained in force until altered by the government of the United States. *American Ins. Co. v. Canter*, 1 Pet. 511.

SECT. 1842. — The veto power was first given to the governor of Washington in 1864 (13 St. 135), although the original act was St. 1853, ch. 90. The day on which a bill is presented is not to be considered in estimating the time allowed to the governor to approve or veto it. 9 A. G. Op. 131. The original acts for New Mexico, Colorado, Dakota, Montana, and Idaho, required the governor to return the bill, with his objections, in three days, while those for Washington and Wyoming required this to be done within five days; hence the difference in the text. 1 Com. D. 893, 898.

By St. July 12, 1876, ch. 212 (19 St. 91), bills passed by the legislature of Arizona are to be approved by the governor, or passed by a two-thirds vote after reconsideration: to become laws if not returned by the governor within ten days (Sundays excepted) after presentation, &c.

St. Feb. 18, 1875, ch. 80 (18 St. 316), adds at the end of this section, —



"*Provided*, That so much of this section as provides for making any bill passed by the legislative assembly of a Territory a law, without the approval of the governor, shall not apply to the Territories of Utah and Arizona."

SECT. 1843. — See note, § 1846.

SECT. 1844. — St. March 3, 1869, ch. 121, § 1 (15 St. 300), made the sessions of all the legislative assemblies biennial; the original acts for New Mexico, Utah, Colorado, Dakota, Arizona, and Wyoming, required the transmission here provided for to be made annually on or before Dec. 1, while those for Washington, Idaho, and Montana, had the requirement given in the text. 1 Com. D. 894. St. June 20, 1874, ch. 328, § 1 (18 St. 85), provides, —

"Hereafter it shall be the duty of the Secretary of each territory to furnish estimates in detail for the lawful expenses thereof, to be presented to the Secretary of the Treasury on or before October 1 of every year."

SECT. 1845. — St. May 1, 1876, ch. 88 (19 St. 43), provides, —

"Hereafter payment of salaries of all officers of the Territories of the United States appointed by the President shall commence only when the person appointed to any such office shall take the proper oath, and shall enter upon the duties of such office in such Territory; and said oath shall hereafter be administered in the Territory in which such office is held."

SECT. 1846. — The power of calling the legislature together in extra session was given to the governor in only three of the organic acts, viz.: those for Washington, Idaho, and Montana. 1 Com. D. 895. Unless authorized by an act of Congress, special sessions of a territorial legislature cannot be held. 13 A. G. Op. 408.

By 18 St. 133, ch. 388, no extraordinary session of a territorial legislature is to be called without the President's approval, the reasons therefor having been presented to him. St. June 19, 1878, ch. 329 (20 St. 193), provides —

"That from and after the adjournment of the next session of the several Territorial Legislatures the council of each of the Territories of the United States shall not exceed 12 members and the House of Representatives of each shall not exceed 24 members, and the members of each branch of the said several legislatures shall receive a compensation of \$4 per day each during the sessions provided by law, and shall receive such mileage as the law provides; and the President of the Council and the Speaker of the House of Representatives shall each receive \$6 per day for the same time. And the several Legislatures at their next sessions are directed to divide their respective Territories into as many council and representative districts as they desire, which districts shall be as nearly equal as practicable taking into consideration population, excepting 'Indians not taxed': *Provided*, the number of council districts shall not exceed 12, and the representative districts shall not exceed 24 in any one of said Territories, and all parts of R. S. §§ 1847, 1849, 1853, 1922, in conflict with the provisions herein are repealed. That the subordinate officers of each branch of said Territorial legislatures shall consist of one chief clerk, who shall receive a compensation of \$6 per day; one enrolling and engrossing clerk, at \$5 per day; sergeant-at-arms and doorkeeper, at \$5 per day; one messenger and watchman, at \$4 per day each; and one chaplain, at \$1.50 per day. Said sums shall be paid only during the sessions of said legislatures; and no greater number of officers or charges per diem shall be paid or allowed by the United States to any Territory. And R. S. § 1861 is hereby repealed, and this substituted in lieu thereof: *Provided*, that for the performance of all official duties imposed by the Territorial legislatures, and not provided for in the organic act, the secretaries of the Territories respectively shall be allowed such fees as may be fixed by the Territorial legislatures. And in no case shall the expenditure for public printing in any of the Territories exceed the sum of \$2500 for any one year."

The office of assistant chief clerk not being included in the enumeration of 1878, the omission is presumed intentional, and the number of officers and attachés cannot be increased by the Territorial legislature. *Stevenson v. Moody*, 12 Pac. Rep. 902. 23 St. 122, ch. 226, cures and confirms acts of the legislative assembly of Washington for 1883.

SECT. 1847. — See preceding note. St. March 3, 1885, ch. 343 (23 St. 408), provides —

"The legislature of Dakota may divide said Territory into as many council and representative districts as they desire, which districts shall be as nearly equal as practicable taking into consideration



population (except Indians not taxed): *Provided*, That the number of council districts shall not exceed 24, and the number of representative districts shall not exceed 48."

SECT. 1849. — See note, § 1846. The cited act of 1844 left the whole subject of apportionment to the discretion of each Territorial legislature; but the revisers' plan was adopted, of taking, for the primary apportionment by the governor, the basis fixed in the organic acts of a large majority of the Territories, that of population; the exception being the acts relating to Washington, Idaho, and Montana, which required the apportionment by the governor, and any subsequently ordered by the legislature, to be made according to the number of qualified voters. 1 Com. D. 896.

St. June 3, 1879, ch. 119 (21 St. 154; see also 24 St. 2, ch. 5, as to Wyoming), provides:

"SEC. 1. That the governor, and the speaker of the house of representatives and the president of the council during the last session of the legislatures, in the Territories of Montana, Idaho, and Wyoming, be, and they are hereby, authorized and empowered to act as a board of apportionment in their respective Territories; And when assembled at the capitals of their respective Territories, they, or a majority of them, shall reapportion the members of the council and house of representatives in their respective Territories upon the basis of the population as shown by the returns of the census for the year 1880, excluding Indians, and shall make such apportionment strictly in accordance with said census returns, allotting members of each house of the legislative assembly to the different sections of their respective Territories, pro rata, as nearly as practicable, according to the population, and to that end may apportion, when necessary, in joint council districts.

"SEC. 2. That the reapportionment so made by said boards, shall be forthwith certified to by the members, or a majority thereof, making the same, and filed in the office of the Secretary of the Territory; and within ten days thereafter the governor shall issue his proclamation for an election of such members of the Legislature so apportioned as aforesaid, specifying in such proclamation the apportionment so made to the different sections, and which election shall be held at the time and places as provided by law, and the returns to be canvassed as provided by the laws of said Territories respectively.

"SEC. 3. That the persons elected under such apportionment shall, when assembled at their respective capitals, at the time provided by law, and when duly qualified and organized, constitute the next legislative assembly in each of said Territories, and shall be empowered to alter or amend the reapportionment for members of the legislatures so made, and at any time thereafter reapportion their respective Territories in accordance with the population as the same may vary and change.

"SEC. 4. That the members constituting such boards of apportionment shall assemble at the capitals of their respective Territories and complete their work on or before the first Monday in September, 1880, and they shall be allowed the same compensation per diem and mileage as are allowed to the presiding officers of the legislatures in such Territories; which allowance shall be certified by the Secretary of the Territory to the proper officers of the United States Treasury Department, and the same shall be paid, out of any moneys in the Treasury Department not otherwise appropriated.

"SEC. 5. That this act shall take effect and be in force from and after its passage."

22 St. 1, ch. 3, extends 21 St. 154 to New Mexico, if apportionment is not at once made there according to 20 St. 175. By 23 St. 2, the legislative proceedings, records and laws of New Mexico, are to be printed in the English language. By 22 St. 236, certain officers of Montana are to constitute a board with power to organize new counties and reapportion the members of the council and house of representatives upon the basis of population, the next legislature to be elected in accordance therewith.

SECT. 1851. — See note, § 1891; *Forbes v. Driscoll*, 31 N. W. Rep. 636. St. July 30 1886, ch. 818 (24 St. 170), provides —

"That the legislatures of the Territories of the United States now or hereafter to be organized shall not pass local or special laws in any of the following enumerated cases, that is to say: granting divorces; changing the names of persons or places; laying out, opening, altering, and working roads or high-ways; vacating roads, town-plats, streets, alleys and public grounds; locating or changing county seats; regulating county and township affairs; regulating the practice in courts of justice; regulating the jurisdiction and duties of justices of the peace, police magistrates and constables; providing for changes of venue in civil and criminal cases; incorporating cities, towns, or villages, or changing or amending the charter of any town, city, or village; for the punishment of crimes or misdemeanors; for



the assessment and collection of taxes, for Territorial, county, township, or road purposes; summoning and impanelling grand or petit jurors; providing for the management of common schools; regulating the rate of interest on money; the opening and conducting of any election or designating the place of voting; the sale or mortgage of real estate belonging to minors or others under disability; the protection of game or fish; chartering or licensing ferries or toll bridges; remitting fines, penalties, or forfeitures; creating, increasing, or decreasing fees, percentage, or allowances of public officers during the term for which said officers are elected or appointed; changing the law of descent; granting to any corporation, association, or individual the right to lay down railroad tracks, or amending existing charters for such purpose; granting to any corporation, association, or individual any special or exclusive privilege, immunity, or franchise whatever; in all other cases where a general law can be made applicable, no special law shall be enacted in any of the Territories of the United States by the Territorial legislatures thereof.

"SEC. 2. That no Territory of the United States now or hereafter to be organized; or any political or municipal corporation or sub-division of any such Territory, shall hereafter make any subscription to the capital stock of any incorporated company, or company or association having corporate powers, or in any manner loan its credit to or use it for the benefit of any such company or association, or borrow any money for the use of any such company or association.

"SEC. 3. That no law of any Territorial legislature shall authorize any debt to be contracted by or on behalf of such Territory except in the following cases: To meet a casual deficit in the revenues, to pay the interest upon the Territorial debt, to suppress insurrections, or to provide for the public defence, except that in addition to any indebtedness created for such purposes, the legislature may authorize a loan for the erection of penal, charitable or educational institutions for such Territory, if the total indebtedness of the Territory is not thereby made to exceed one per centum upon the assessed value of the taxable property in such Territory as shown by the last general assessment for taxation. And nothing in this act shall be construed to prohibit the refunding of any existing indebtedness of such Territory or of any political or municipal corporation, county, or other sub-division therein.

"SEC. 4. That no political or municipal corporation, county, or other sub-division in any of the Territories of the United States shall ever become indebted in any manner or for any purpose to any amount in the aggregate, including existing indebtedness, exceeding four per centum on the value of the taxable property within such corporation, county, or sub-division, to be ascertained by the last assessment for Territorial and county taxes previous to the incurring of such indebtedness; and all bonds or obligations in excess of such amount given by such corporation shall be void: That nothing in this act contained shall be so construed as to affect the validity of any act of any Territorial legislature heretofore enacted, or of any obligations existing or contracted thereunder, nor to preclude the issuing of bonds already contracted for in pursuance of express provisions of law; nor to prevent any Territorial legislature from legalizing the acts of any county, municipal corporation, or subdivision of any Territory as to any bonds heretofore issued or contracted to be issued.

"SEC. 5. That § 1889 Rev. Stats. be amended to read as follows: 'The legislative assemblies of the several Territories shall not grant private charters or special privileges, but they may, by general incorporation acts, permit persons to associate themselves together as bodies corporate for mining, manufacturing, and other industrial pursuits, and for conducting the business of insurance, banks of discount and deposit (but not of issue) loan, trust, and guarantee associations, and for the construction or operation of railroads, wagon-roads, irrigating ditches, and the colonization and improvement of lands in connection therewith, or for colleges, seminaries, churches, libraries, or any other benevolent, charitable, or scientific association'[see similar provision in 23 St. 348].

"SEC. 6. That nothing in this act contained shall be construed to abridge the power of Congress to annul any law passed by a Territorial legislature, or to modify any existing law of Congress requiring in any case that the laws of any Territory shall be submitted to Congress.

"SEC. 7. That all acts or parts of acts hereafter passed by any Territorial legislature in conflict with the provisions of this act shall be null and void."

*"No law shall be passed interfering with the primary disposal of the soil."* — For this reason the statute of limitations cannot run against a mining claim until the patent thereto has been issued. *King v. Thomas*, 12 Pac. Rep. 865.

On § 4 of the above act, see *Davenport v. Kleinschmidt*, 13 Pac. Rep. 249.

St. July 19, 1888, ch. 679, § 2 (25 St. 336), provides that nothing in the above act of 1886 —

"shall be construed to prohibit the creation by Territorial legislatures of new counties and the location of the county seats thereof."



By St. Feb. 8, 1887, ch. 119, § 6 (24 St. 390), which act provides for the allotment of lands in severalty to Indians on the various reservations and extends the protection of the laws of the United States and the Territories over the Indians, no territory is to pass or enforce any law denying to any member of an Indian band or tribe, to whom allotments have been made within its jurisdiction, the equal protection of the law. By 22 St. 236, —

“Hereafter no expense for printing exceeding \$3750, including printing laws, journals, bills, and necessary printing of the same nature shall be incurred for any session of the legislature of any of the Territories.”

SECT. 1852. — 21 St. 312, ch. 7, changes “forty” to “sixty.”

SECT. 1853. — See note, § 1846.

SECT. 1855. — The legislative assembly of a Territory cannot appropriate money from its treasury to pay attachés not authorized by act of Congress. *Stevenson v. Moody*, 12 Pac. Rep. 902.

SECT. 1856. — St. April 16, 1880, ch. 56 (21 St. 74), repealing all laws and parts of laws in conflict therewith, provides: —

“SEC. 1. That when from any cause there shall be a vacancy in the office of justice of the peace in any of the Territories of the United States, it shall be lawful to fill such vacancy by appointment or election, in such manner as has been or may be provided by the governor and legislative assembly of such Territory: *Provided*, That such appointee, or person elected to fill such vacancy, shall hold office only until his successor shall be regularly elected and qualified as provided by law.”

St. Jan. 28, 1885, ch. 41 (23 St. 287), provides, —

“That justices of the peace in the Territory of Wyoming shall not have jurisdiction of any matter in controversy where the debt or sum claimed exceeds \$300.”

SECT. 1857. — A territorial act which divests the governor of the power confided to him by Congress to appoint certain territorial officers conflicts with this section and is void. *Taylor v. Stevenson*, 9 Pac. 642. A territorial legislature may declare vacant an office which it has created, even during the term of the incumbent. *People v. Van Gaskin*, 5 Mont. 352. An office which is recognized both by the organic law of a Territory and of the State created therefrom, remains the same, although dependent on varying provisions of law. *People v. Jobs*, 7 Col. 589. See also *Territory v. Clayton*, 18 Pac. Rep. 628; *Territory v. Scott*, 20 N. W. Rep. 415.

SECT. 1858. — This precludes the governor from filling, without the council's consent, any other kind of vacancy than the two classes here referred to, under the maxim “*expressio unius est exclusio alterius*.” *Re Attorney General*, 2 New Mex. 49.

SECT. 1860. — St. March 3, 1883, ch. 134 (22 St. 567), adds, at the end of the fourth clause, “except officers of the Army on the retired list.” See *Hill v. Territory*, 2 Wash. Ter. 147. There being some difference in the original territorial acts in respect to the qualifications of voters and of office-holding, those for Washington and Wyoming and the general act cited of 1867 were made the basis of this section. 1 Com. D. 901. Congress has power to abridge the rights of electors in the Territories, as by St. March 22, 1882, prohibiting bigamists, polygamists, &c., from voting. *Murphy v. Ramsey*, 114 U. S. 15.

SECT. 1861. — For repeal and substitute, see note, § 1846.

SECT. 1862. — The original acts for Washington, Idaho, and Montana further required the qualification of citizenship for a delegate. 1 Com. D. 902.

SECTS. 1864, 1865. — See note, § 1879. St. March 3, 1879, ch. 194 (20 St. 473), provided that thereafter the Supreme Court of Dakota should consist of a chief justice and three associate justices, and divided the Territory into four judicial districts. 23 St. 101 (July 4, 1884), provides that the Supreme Court of this Territory shall consist of a chief



justice and five associate justices, any five of whom shall constitute a quorum, and divides the Territory into six judicial districts. It further divided Washington Territory into four judicial districts, and provides :—

"SEC. 9. That hereafter the supreme court of the Territory of Washington shall consist of a chief justice and three associate justices, any three of whom shall constitute a quorum, but no justice shall act as a member of the supreme court in any action or proceeding brought to such court by writ of error, bill of exceptions, or appeal from a decision, judgment or decree rendered by him as judge of a district court."

By St. Aug. 9, 1888, ch. 823 (25 St. 398), the Supreme Court of Dakota consists of a chief justice and seven associate justices, any five of whom constitute a quorum, and the Territory is divided into eight judicial districts.

St. March 3, 1885, ch. 359 (23 St. 449), provides for the salary of the additional associate justice of the Supreme Court of Washington Territory at the rate of \$3000 per annum, and that —

"all suits or proceedings pending in the district courts of Dakota and Washington Territories at the time of the passage of the above act, and which would, if instituted after the passage of said act, be required to be brought in the new districts created and provided for in said act, may be transferred by consent of parties to said new district courts, and there disposed of in like manner and with like effect as if the same had been there instituted; and all writs and recognizances relating to such suits and proceedings so transferred shall be considered as belonging to the courts of the said new districts respectively in the same manner and with like effect as if they had issued or had been taken in reference thereto originally; and the counties of Skamania and Spokane, in said Washington Territory, shall constitute part of the fourth judicial district thereof until the legislature shall meet and otherwise provide."

St. July 10, 1886, ch. 758 (24 St. 138), provides, —

"That hereafter the supreme court of the Territory of Montana shall consist of a chief justice and three associate justices, three of whom shall constitute a quorum; they shall hold their offices for four years, and until their successors are appointed and qualified; they shall hold a term annually at the seat of government of said Territory: *Provided, however,* That no justice shall act as a member of the supreme court of said Territory of Montana in any action or proceeding brought to such court by writ of error, bill of exceptions, or appeal from a decision, judgment, or decree rendered by him as judge of a district court.

"SEC. 2. That said Territory shall be divided into four judicial districts, and a district court shall be held in each district of the Territory by one of the justices of the supreme court, at such time and place as may be prescribed by law.

"SEC. 3. That all offences committed before the passage of this act shall be prosecuted, tried, and determined in the same manner and with the same effect as if this act had not been passed."

24 St. 208, ch. 827, appropriated \$3000 for salary of one additional associate of the Supreme Court of Montana. By St. June 25, 1888, ch. 486 (25 St. 203), the Supreme Court of the Territory of Utah, and by St. Feb. 28, 1887, ch. 274 (24 St. 428), the Supreme Court of the Territory of New Mexico, are each to consist of a chief justice and three associate justices, any three of whom constitute a quorum.

The territorial courts are not "courts of the United States." *Clinton v. Englebrecht*, 13 Wall. 434; *American Ins. Co. v. Canter*, 1 Pet. 511, 545; *Benner v. Porter*, 9 How. 235; *United States v. Guthrie*, 17 Id. 308; *United States v. Hailey*, 3 Pac. Rep. 263; 5 A. G. Op. 288. But such courts, sitting to hear and determine causes arising under the United States Constitution and laws, have the same jurisdiction as United States circuit and district courts. *N. Pacific R. Co. v. Carland*, 5 Mont. 146. Of the United States Supreme Court rules, only the ninety-second applies to territorial courts. *Huntington v. Moore*, 1 New Mex. 489. In 3 A. G. Op. 409, a territorial judge, being not a constitutional but a legislative officer, was regarded as not liable to impeachment. Neither territorial judges nor the district judge of Alaska were removable under § 1768. Their courts are not courts of the United States. *Howard v. United States*, 22 Ct. Cl. 305; *McAllister v. United States*, Id. 318. Territorial judges are subject to removal or suspension like other civil officers, a commission for a term of years giving no better legal right.



to an office than if it was at the pleasure of the appointing power. *Howard v. United States, supra*. The acts of Congress, giving district courts general jurisdiction in all amounts, preclude a territorial legislature from giving to justices of the peace exclusive jurisdiction in any sum. *Hepworth v. Gardner*, 11 Pac. Rep. 566, 667.

SECTS. 1866, 1869. — See note, §§ 702, 1856; *Lalande v. McDonald*, 13 Pac. Rep. 348; *Ducheneau v. House*, 10 Id. 838; *Kerr v. Woolley*, 3 Utah, 456; *St. Croix Lumber Co. v. Pennington*, 11 N. W. Rep. 497. As to appeals to the United States Supreme Court, see notes, § 702. The grant, in § 1868, "of chancery as well as common-law jurisdiction" includes almost every matter, whether of civil or criminal cognizance, which can be litigated in a court of justice, and authorizes the issuance of a writ of prohibition, either as an original writ, or in aid of appellate powers. *Yearian v. Speirs*, 10 Pac. Rep. 609; 11 Id. 618; *Browning v. Browning*, 9 Id. 679; *Donovan v. Territory*, 2 Id. 533. And under this clause legal and equitable relief may be demanded in the same suit, if the territorial acts so permit and the organic act does not prevent. *Hornbuckle v. Toombs*, 18 Wall. 648; *Davis v. Bilsland*, Id. 659; *Hershfield v. Griffith*, Id. 657; *Basey v. Gallagher*, 20 Wall. 670; *Gutierrez v. Pino*, 1 New Mex. 392; *Schultz v. Keeler*, 13 Pac. Rep. 481. Chancery jurisdiction being thus granted by Congress to the territorial courts, a territorial legislature cannot abolish the distinction between suits at law and in equity. *Stevens v. Baker*, 1 Wash. Ter. 315.

SECT. 1873. — See note, § 1864.

SECT. 1874. — See note, § 1910.

SECT. 1875. — The original act for Wyoming (15 St. 181) provided "unless sooner removed by the President with the consent of the Senate." By St. June 23, 1874, ch. 469, §§ 1, 2 (18 St. 253), the marshal of Utah is required, in person or by deputy, to attend all sessions of the supreme and district courts therein, and to serve and execute process and writs; and the United States attorney, in person or by an assistant, is to attend all the courts of record and act as prosecuting officer; and the territorial legislature may provide for the election of a prosecuting attorney in any county.

SECT. 1876. — *Ex parte Hibbs*, 26 F. R. 426. See preceding note.

SECT. 1877. — There is no statutory requirement that judges, district-attorneys, and marshals of Territories shall reside at any particular place in the Territories. 9 A. G. Op. 23.

SECT. 1878. — See note, § 1845.

SECT. 1879. — St. March 3, 1877, ch. 102 (19 St. 309), appropriating \$2600 in full compensation for the salary of each justice of Wyoming, suspended this provision, as to that Territory, for the time covered by the act. *United States v. Fisher*, 109 U. S. 143; 15 Ct. Cl. 323. As an act of 1879 authorized the appointment of an additional judge of the Supreme Court of Dakota, but did not establish his salary, and contemporaneous appropriation acts indicated that he should receive the reduced compensation provided for other judges of the same court, it was held that he could not recover the salary established by this section. *Kidder v. United States*, 20 Ct. Cl. 46.

SECT. 1881. — See note, § 1883.

SECT. 1882. — See note, § 554.

SECT. 1883. — See note, § 823, as to St. June 23, 1874, ch. 469, which, by § 7, extends the fees act of 1853 to Utah, and provides that the district attorney of Utah shall not by fees and salary together receive more than \$3500 per year. This section is founded on the act of 1853 (10 St. 161), amended by St. 1855 (10 St. 671), which was regarded as finally applicable alike to all the Territories, as well to those then existing as to those afterwards organized. 1 Com. D. 910.

SECT. 1884. — The cited act of 1852 was retained as existing law, being regarded as not affected by 9 St. 611; 10 St. 10, § 2; 10 St. 98. 1 Com. D. 912.

SECT. 1885. — 24 St. 2 legalizes the election of the ninth territorial legislative assembly



of Wyoming. As to the territorial legislature for New Mexico for 1882 and 1884, see 23 St. 2.

SECT. 1886. — Sect. 8 of the anti-polygamy act of March 3, 1887, ch. 397 (24 St. 636), provides: —

“SEC. 8. That the marshal of said Territory of Utah, and his deputies, shall possess and may exercise all the powers in executing the laws of the United States or of said Territory, possessed and exercised by sheriffs, constables, and their deputies as peace officers; and each of them shall cause all offenders against the law, in his view, to enter into recognizance to keep the peace and to appear at the next term of the court having jurisdiction of the case, and to commit to jail in case of failure to give such recognizance. They shall quell and suppress assaults and batteries, riots, routs, affrays, and insurrections.”

SECT. 1887. — See note, § 1846. The cited act of 1872, though designed especially for Montana, was regarded as in full accord with St. March 2, 1867, and is here made applicable to all the Territories. 1 Com. D. 913.

SECT. 1888. — *Stevenson v. Moody*, 12 Pac. Rep. 902.

SECT. 1889. — Amended, see note, § 1851, and 23 St. 348. St. June 8, 1878, ch. 168 (20 St. 101), provided that; this section —

“shall not be construed as prohibiting the legislative assemblies of the several Territories of the United States from creating towns, cities, or other municipal corporations, and providing for the government of the same, and conferring upon them the corporate powers and privileges, necessary to their local administration, by either general or special acts; and that all general and special acts of such legislative assemblies heretofore passed creating and providing for the government of towns, cities, or other municipal corporations, and conferring such rights, powers, and privileges upon the same, as were necessary to their local administration, be, and the same are hereby, ratified and confirmed and declared to be valid, any law to the contrary notwithstanding, subject, however, to amendment or repeal hereafter by such Territorial assemblies. But nothing herein shall have the effect to create any private right, except that of holding and executing municipal offices, or to divest any such right, or to make valid or invalid any contract or obligation heretofore made by or on behalf of any such town, city or other municipal corporation, or to authorize any such corporation to incur hereafter any debt or obligation other than such as shall be necessary to the administration of its internal affairs.”

24 St. 107 (June 30, 1886) legalizes all general laws previously enacted by the legislative assembly of Dakota for the incorporation of insurance companies and all insurance companies incorporated thereunder. 20 St. 280, ch. 41, declared void an act of New Mexico, incorporating the Jesuit Fathers, as in violation of this section. This provision appears not to prevent a territorial legislature naming or changing the name of a corporation (*Wells v. Oregon R. Co.*, 15 F. R. 567; *Southern Pacific R. Co. v. Orton*, 6 Sawyer, 185; *Newby v. Oregon Central R. Co.*, Deady, 616); on granting “privileges,” not “special,” in a general act for the incorporation of companies. *Territory v. Stokes*, 2 New Mex. 172. The express business is an “industrial pursuit” under this section, which does not preclude an express company, incorporated by special act in Colorado, and also doing a banking business, from doing business in Washington Territory. *Wells v. Northern Pacific R. Co.*, 23 F. R. 469. In *State v. N. O. N. Co.*, 11 Martin, 38, 309, it was held that the Orleans territorial legislature could grant a charter binding on the future State of Louisiana. Cf. *Williams v. Michigan Bank*, 7 Wend. 539. A mercantile corporation may be incorporated under the Montana law of 1872, which provides for the formation of corporations for carrying on any branch of business “designed to aid in the industrial or productive interests of the country, and the development thereof.” *Carver Mercantile Co. v. Hulme*, 19 Pac. Rep. 213.

SECT. 1890. — St. March 3, 1887, ch. 397, § 13 (24 St. 637), making it the duty of the Attorney-General to institute and prosecute proceedings to forfeit and escheat to the United States the property of corporations obtained or held in violation of this and other provisions, contains the proviso —



"That no building, or the grounds appurtenant thereto, which is held and occupied exclusively for purposes of the worship of God, or parsonage connected therewith, or burial ground shall be forfeited."

St. March 3, 1887, ch. 340 (24 St. 476), provides —

"That it shall be unlawful for any person or persons not citizens of the United States, or who have not lawfully declared their intention to become such citizens, or for any corporation not created by or under the laws of the United States or of some State or Territory of the United States, to hereafter acquire, hold, or own real estate so hereafter acquired, or any interest therein, in any of the Territories of the United States or in the District of Columbia, except such as may be acquired by inheritance or in good faith in the ordinary course of justice in the collection of debts heretofore created: *Provided*, That the prohibition of this section shall not apply to cases in which the right to hold or dispose of lands in the United States is secured by existing treaties to the citizens or subjects of foreign countries, which rights, so far as they may exist by force of any such treaty shall continue to exist so long as such treaties are in force, and no longer.

"SEC. 2. That no corporation or association more than twenty per centum of the stock of which is or may be owned by any person or persons, corporation or corporations, association or associations, not citizens of the United States, shall hereafter acquire or hold or own any real estate hereafter acquired in any of the Territories of the United States or of the District of Columbia.

"SEC. 3. That no corporation other than those organized for the construction or operation of railways, canals, or turnpikes shall acquire, hold, or own more than five thousand acres of land in any of the Territories of the United States; and no railroad, canal, or turnpike corporation shall hereafter acquire, hold, or own lands in any Territory, other than as may be necessary for the proper operation of its railroad, canal, or turnpike, except such lands as may have been granted to it by act of Congress. But the prohibition of this section shall not affect the title to any lands now lawfully held by any such corporation.

"SEC. 4. That all property acquired, held, or owned in violation of the provisions of this act shall be forfeited to the United States, and it shall be the duty of the Attorney-General to enforce every such forfeiture by bill in equity or other proper process. And in any suit or proceeding that may be commenced to enforce the provisions of this act, it shall be the duty of the court to determine the very right of the matter without regard to matters of form, joinder of parties, multifariousness, or other matters not affecting the substantial rights either of the United States or of the parties concerned in any such proceeding arising out of the matters in this act mentioned."

St. March 9, 1888, ch. 30 (25 St. 45), so amends the act of 1887 —

"that the same shall not apply to or operate in the District of Columbia, so far as relates to the ownership of legations, or the ownership of residences by representatives of foreign Governments, or attaches thereof."

The fact that an alien owns stock in a corporation which has acquired title to real estate does not affect the corporation's title to the real estate. *Princeton Mining Co. v. Nat. Bank*, 19 Pac. Rep. 210.

SECT. 1891. — This provision is common to all the organic acts except that for Washington Territory. 1 Com. D. 914. See note, § 1851. The section does not apply to the District of Columbia. *Cissel v. McDonald*, 16 Blatch. 150. As to the Oregon act of Aug. 14, 1848, see *Stark v. Starrs*, 6 Wall. 402. The territories are as much a part of the United States as are the States. There is but one banking system for all. *Silver Bow County v. Davis*, 12 Pac. Rep. 690. Jurisdiction is a rightful subject of territorial legislation. *Yearian v. Speirs*, 10 Pac. Rep. 612; *Ferris v. Higley*, 20 Wall. 375; *Territory v. Blomberg*, 11 Pac. Rep. 671. A territorial legislature cannot grant a divorce. *Re Higbee*, 5 Pac. Rep. 693. It may, however, create new offences, new subjects for judicial investigation, new means of enforcing the authority of courts and officers, and may provide for issuing writs of prohibition to arrest the exercise of ministerial functions. *Ducheneau v. House*, 10 Pac. Rep. 838. A territorial law conflicting with this section is invalid without the disapproval of Congress, and the territorial legislature cannot ratify the law and thus make it valid. *People v. Clayton*, 11 Pac. Rep. 206; *Phelps v. The City of Panama*, 1 Wash. Ter. 518.

SECT. 1892. — See note, § 1936; *Ex parte Hibbs*, 26 F. R. 426. St. June 20, 1874,



ch. 332, § 2 (18 St. 112), strikes out Montana, Idaho, and Wyoming in the last clause of this section, and revives the cited act of 1871, so far as it gives the care and control of the penitentiaries in those Territories to the United States Marshal. St. June 16, 1880, ch. 235 (21 St. 259), provides —

“That the legislative assemblies of the several Territories of the United States may make such provision for the care and custody of such persons as may be convicted of crime under the laws of such Territory as they shall deem proper, and for that purpose may authorize and contract for the care and custody of such convicts in any other Territory or State, and provide that such person or persons may be sentenced to confinement accordingly in such other Territory or State, and all existing legislative enactments of any of the Territories for that purpose are hereby legalized: *Provided*, That the expense of keeping such prisoners shall be borne by the respective Territories, and no part thereof shall be borne by the United States.”

## CHAPTER II.

### OF PROVISIONS CONCERNING PARTICULAR ORGANIZED TERRITORIES.

**SECT. 1896.** — As to the laws and courts established as part of the provisional government of New Mexico upon its conquest by General Kearney, see *Leitensdorfer v. Webb*, 1 New Mex. 34; *Ward v. Broadwell*, Id. 75; *Aubry v. Nangle*, Id. 115. See note, § 1849. Under St. 1850 the Territory had the right to enact laws against crime, and an indictment for murder was held properly found in the name of the Territory under the territorial law. *Territory v. Yarberry*, 2 New Mex. 391.

**SECT. 1899.** — Colorado was proclaimed a state by the President August 1, 1876. 19 St. 665.

**SECT. 1900.** — St. March 28, 1882, ch. 52 (22 St. 35), provides —

“That the northern boundary of the State of Nebraska shall be, and hereby is, subject to the provisions hereinafter contained, extended so as to include all that portion of the Territory of Dakota lying south of the forty-third parallel of north latitude and east of the Keyapaha River and west of the main channel of the Missouri River; and when the Indian title to the lands thus described shall be extinguished, the jurisdiction over said lands shall be, and hereby is, ceded to the State of Nebraska, and subject to all the conditions and limitations provided in the act of Congress admitting Nebraska into the Union, and the northern boundary of the State shall be extended to said forty-third parallel as fully and effectually as if said lands had been included in the boundaries of said State at the time of its admission to the Union; reserving to the United States the original right of soil in said lands and of disposing of the same: *Provided*, That this act, so far as jurisdiction is concerned, shall not take effect until the President shall, by proclamation, declare that the Indian title to said lands has been extinguished, nor shall it take effect until the State of Nebraska shall have assented to the provisions of this act; and if the State of Nebraska shall not by an act of its legislature consent to the provisions of this act within two years next after the passage hereof, this act shall cease and be of no effect.”

**SECT. 1902.** — St. May 14, 1888, ch. 251 (25 St. 147), creates and organizes Lotah County in Idaho.

**SECT. 1903.** — See note, § 2353. St. April 15, 1874, ch. 96 (18 St. 28), sets apart certain land in Montana as an Indian reservation.

**SECT. 1905.** — *Davidson v. Carson*, 1 Wash. Ter. 307.

**SECTS. 1907–1909.** — See notes, §§ 629, 702, 1864, 1875; *Rupert v. Alturas Co.*, 2 Pac. Rep. 720. St. June 23, 1874, ch. 469, § 3 (18 St. 253), provides, as to Utah, —

“SEC. 3. That there shall be held in each year two terms of the supreme court of said Territory, and four terms of each district court, at such times as the governor of the Territory may by proclamation fix. The district courts shall have exclusive original jurisdiction in all suits of proceedings in chancery, and in all actions at law in which the sum or value of the thing in controversy, shall be three hundred



dollars or upward, and in all controversies where the title, possession, or boundaries of land, or mines or mining claims shall be in dispute, whatever their value, except in actions for forcible entry, or forcible and unlawful detainer; and they shall have jurisdiction in suits for divorce. Probate courts, in their respective counties shall have jurisdiction in the settlement of the estates of decedents, and in matters of guardianship and other like matters; but otherwise they shall have no civil, chancery, or criminal jurisdiction whatever; they shall have jurisdiction of suits of divorce for statutory causes concurrently with the district courts; but any defendant in a suit for divorce commenced in a probate court shall be entitled after appearance and before plea or answer, to have said suit removed to the district court having jurisdiction when said suit shall proceed in like manner as if originally commenced in said district court, &c."

SECT. 1908 is to be so construed as not to exclude district courts in Arizona Territory. *Ex parte* Lothrop, 118 U. S. 113, 117, holding valid the Arizona act of March 12, 1883, which established the county court of Cochise county. SECT. 1907 prevents the territorial legislatures from conferring judicial powers on boards of county commissioners. *Spencer v. Sully County*, 33 N. W. Rep. 97. In *Ferris v. Higley*, 20 Wall. 375, it was held, in respect to a Territory where the judicial power was vested in the courts named in § 1907, that the territorial legislature could not vest the probate courts with the powers of courts of general jurisdiction civil and criminal. A territorial court is not authorized to appoint an attorney for the Territory who shall hold office as such. But in cases of necessity, in the absence of any attorney duly appointed, it may appoint an attorney *pro hac vice*. 6 A. G. Op. 80. Under § 1909 an appeal lies from the order and judgment of a district court refusing to issue a writ of *habeas corpus*, which, as to the appeal, is held to be equivalent to a refusal to discharge the petitioner on a hearing on return of the writ. *Ex parte* Snow, 120 U. S. 281; *Snow v. United States*, 118 Id. 346; 9 Pac. Rep. 501, 686, 697; *Kurtz v. Moffitt*, 115 U. S. 497. That section applies to a suit in which the United States is the plaintiff, unless brought to enforce a revenue law. *United States v. Railroad Co.*, 105 U. S. 263. It can be availed of only when the amount exceeds \$5000 (to which figure the sum was increased by 23 St. 443, cited in note, § 702), or upon writs of *habeas corpus* involving the question of personal freedom. *Id.*; *Potts v. Chumaseero*, 92 U. S. 358; *Zeckendorf v. Johnson*, 123 Id. 617; *Talkington v. Dumbleton*, Id. 745; *Ex parte* Kenyon, 5 Dillon, 385.

SECT. 1910. — A territorial court is not a court of the United States within the Constitution, Art. III. § 1. *Howard v. United States*, 22 Ct. Cl. 305. The district courts are not circuit or district courts of the United States, but are courts of the Territory, invested, for some purposes, with the powers of courts of the United States. *United States v. Beebe*, 2 Dak. 292; *United States v. Bisel*, 19 Pac. Rep. 251. Congress has the power to change the districts or create new ones, but it cannot, by such change, divest the court of the jurisdiction which the territorial legislature has prescribed for territorial causes. *Murphy v. Murphy*, 25 N. W. Rep. 806. See also 18 St. 253, § 3, stated in note § 1907.

SECT. 1911. — See preceding note, and note § 702. Amended by 19 St. 62, by inserting "and laws" after "Constitution" in the eleventh line. "Final decisions" is here equivalent to "final judgments and decrees" and does not enlarge the scope of the court's jurisdiction; so that if a territorial supreme court dismisses a writ of error to a district court because of failure to docket the cause in time, mandamus and not a writ of error is the proper remedy. *Harrington v. Holler*, 111 U. S. 796; *Snow v. United States*, 118 U. S. 349, 352; *Farnsworth v. Montana*, 129 Id. 110. Under 10 St. 172, the district courts of Washington were held in The City of Panama, 101 U. S. 453, to have jurisdiction in admiralty cases.

SECT. 1914. — See note, § 1864.

SECT. 1915. — The cited act of 1856 was in terms applicable to all the territories, although each then existing, or since organized, had, either in its organic act or by some subsequent legislation, a different provision made for itself, except New Mexico and Arizona. 1 Com. D. 922.

SECT. 1916. — See note, § 1907.



SECT. 1917. — St. Aug. 16, 1856, limiting the times and places of holding district courts in this Territory, did not affect jurisdiction, but simply designated the times and places for the exercise of jurisdiction. *Leschi v. Washington Territory*, 1 Wash. Ter. 13.

SECT. 1922. — See notes, §§ 1846, 1849. As to Wyoming, see 24 St. 2, ch. 5. St. June 12, 1884, ch. 80 (23 St. 41), provides, —

“That the legislature of the Territory of Dakota shall hereafter consist of 24 members of the council and 48 members of the House of Representatives, and that there shall be elected at the next general election in said Territory two members of the Council and four members of the House of Representatives in each of the 12 legislative districts provided for in chapter 7 of the Territorial statutes of 1883 of said Territory.”

SECT. 1923. — See note, § 1846.

SECT. 1924. — See note, § 1887.

SECT. 1925. — The legislature of Wyoming has no power to direct that persons convicted under its laws shall be imprisoned at any place beyond its boundaries. 16 A. G. Op. 678.

SECTS. 1926, 1927. — St. Jan. 19, 1883, ch. 33 (22 St. 407), strikes out “Washington,” “Idaho,” and “Montana” from § 1926, and inserts these words in § 1927 after “Colorado.” By 23 St. 287, the amount is limited to \$300 in Wyoming.

SECT. 1928. — This does not warrant proceedings against lands in El Paso, Texas, under 12 St. 589: *United States v. Hart*, 6 Wall. 770.

SECT. 1930. — The act of July 14, 1870, amending St. May 4, 1870, brought back the manner of using the writs to what was provided in St. 1863. 1 Com. D. 927.

SECT. 1932. — These courts cannot entertain a petition involving the construction of a will, and no appeal lies from their attempted exercise of such authority, the jurisdiction belonging only to the supreme and district courts. *Chadwick v. Chadwick*, 13 Pac. Rep. 385.

SECTS. 1936, 1937. — See note, § 1892. 18 St. 112, ch. 332, § 1, strikes out Montana, Idaho, and Wyoming from these sections.

SECT. 1939. — See note, § 1849.

SECT. 1944. — *Territory v. Scott*, 20 N. W. Rep. 401.

SECT. 1946. — *Ferry v. Street*, 11 Pac. Rep. 572. Under St. Feb. 25, 1885 (23 St. 321), forbidding the enclosure of any public land by one who has not claim or color of title thereto, sections 16 and 36 of each township in Montana form part of the public lands, though reserved from the public domain by this section. *United States v. Bisel*, 19 Pac. Rep. 251.

## CHAPTER III.

### PROVISIONS RELATING TO THE UNORGANIZED TERRITORY OF ALASKA.

SECT. 1955. — See note, § 2127; *United States v. Stephens*, 12 F. R. 52. St. May 17, 1884, ch. 53 (23 St. 24), provides that Alaska (ceded by treaty with Russia of March 13, 1867) shall constitute a civil and judicial district, with the temporary seat of government at Sitka; for the appointment of a governor by the President; a district court with the civil and criminal jurisdiction of the United States District Courts; the appointment of four commissioners for the district with the jurisdiction and powers of United States Circuit Court Commissioners in any part of the district; declares the general laws of Oregon then in force to be the law in said district, and makes Alaska a land district, subject to the United States mining laws and regulations. Sects. 13, 14 provide: —

“SEC. 13. That the Secretary of the Interior shall make needful and proper provision for the education of the children of school age in the Territory of Alaska, without reference to race, until such time



as permanent provision shall be made for the same, and the sum of \$25,000, or so much thereof as may be necessary is hereby appropriated for this purpose.

"SEC. 14. That the provisions of ch. 3, title 23, of the Revised Statutes of the United States, relating to the unorganized Territory of Alaska, shall remain in full force except as herein specially otherwise provided; and the importation, manufacture and sale of intoxicating liquors in said district except for medicinal, mechanical, and scientific purposes is hereby prohibited under the penalties which are provided in § 1955 of the Revised Statutes for the wrongful importation of distilled spirits. And the President of the United States shall make such regulations as are necessary to carry out the provisions of this section."

Under § 14 of this act, the fact that the sale of intoxicating liquor in Alaska was not made for mechanical, medicinal, or scientific purposes must be shown as a defence, if at all, but need not be alleged in the indictment. *Nelson v. United States*, 30 F. R. 112, holding also that it is competent for Congress to prohibit such sales. Jurors to serve in the district court of Alaska are selected as provided in § 2 of St. 1879 (*ante*, § 800), and have the qualifications prescribed by the law of Oregon. *Kie v. United States*, 27 F. R. 351. The provision which makes Oregon laws applicable does not operate retrospectively. *Re Can-ah-conqua*, 29 F. R. 687.

Congress had the power to authorize the President to regulate or prohibit the introduction of distilled spirits into the district of Alaska as prescribed by § 1955. The phrase "district of Alaska," as used in this section, includes that portion of the sea along its coasts, which lies inside of a line drawn from the promontory of Point Hope to the Cape of Prince of Wales; and distilled spirits are imported into the district of Alaska when brought from an American port outside of said district into the waters within the above headlands, and there unladen or disposed of, or with the intention there to unlade or dispose of them. *The Louisa Simpson*, 2 Sawyer, 57. Alaska having been acquired by the United States after the enactment of the amendment of March 15, 1864 (13 St. 29) to § 20 of St. June 30, 1834 (4 St. 729), which amendment made the disposing of spirituous liquors to Indians a crime, it is doubtful whether it was extended over that Territory, *propria vigore*, upon its acquisition, and § 1955 having provided for the subject of the introduction and use of distilled spirits in Alaska, by implication, Congress thereby excluded such amendment therefrom. But the act of July 20, 1868 (15 St. 125), which imposed a tax on distilled spirits, being a general act and passed since the acquisition of Alaska, is in force there. *United States v. Seveloff*, Id. 311. St. March 3, 1873, extending to Alaska only two sections of St. 1834, makes that territory "Indian country" only with respect to the prohibited liquor traffic. *Re Sah Quah*, 31 F. R. 327; *United States v. Stephens*, 8 Sawyer, 116. Congress has the sole power of making laws for Alaska. *United States v. Nelson*, 29 F. R. 202; *Nelson v. United States*, 30 Id. 112; 12 Sawyer, 285; *Murphy v. Ramsey*, 115 U. S. 15, 44.

SECT. 1956. — *United States v. Mosely*, 8 F. R. 688. This section is not violated if the animals named are not actually killed, preparation therefor and intention being insufficient. *The Ocean Spray*, 4 Sawyer, 105. See note, § 1973.

SECT. 1960. — St. March 24, 1874, ch. 64 (18 St. 24), amends the cited act of 1870 by authorizing the Secretary of the Treasury —

"to designate the months in which fur-seals may be taken for their skins on the islands of Saint Paul and Saint George in Alaska, and in the waters adjacent thereto, and the number to be taken on or about each island respectively."

SECT. 1972. — The specified sections embrace the whole of St. 1870, ch. 189, which by § 8 provided that "Congress may at any time hereafter alter, amend, or repeal this act."

SECTS. 1973, 1974. — St. March 3, 1875, ch. 130, § 1 (18 St. 375), appropriates —

"For salaries and travelling expenses of agents at seal fisheries in Alaska: one agent at \$3650 per annum; one assistant agent at \$2920 per annum; two assistant agents at \$2190 each per annum; and



for necessary travelling expenses of agents going to and returning from Alaska, at \$600 each per annum. And hereafter no payment whatever shall be made for this purpose from indefinite appropriations."

19 St. 102 ch. 246, which discontinued these two assistant agents after Oct. 1, 1876, abolished and did not merely suspend these offices, so that the incumbents could not prolong their existence by continuing to perform their duties. *Beaman v. United States*, 19 Ct. Cl. 5. But the government was bound to pay their expenses in returning from Alaska. *Id.*

St. March 2, 1889, ch. 415 (25 St. 1009), provides —

"That the erection of dams, barricades, or other obstructions in any of the rivers of Alaska, with the purpose or result of preventing or impeding the ascent of salmon or other anadromous species to their spawning grounds, is hereby declared to be unlawful, and the Secretary of the Treasury is hereby authorized and directed to establish such regulations and surveillance as may be necessary to insure that this prohibition is strictly enforced and to otherwise protect the salmon fisheries of Alaska; and every person who shall be found guilty of a violation of the provisions of this section shall be fined not less than \$250 for each day of the continuance of such obstruction.

"SEC. 2. That the Commissioner of Fish and Fisheries is hereby empowered and directed to institute an investigation into the habits, abundance, and distribution of the salmon of Alaska, as well as the present conditions and methods of the fisheries, with a view of recommending to Congress such additional legislation as may be necessary to prevent the impairment or exhaustion of these valuable fisheries, and placing them under regular and permanent conditions of production.

"SEC. 3. That Rev. Stats. § 1956 is hereby declared to include and apply to all the dominion of the United States in the waters of Behring Sea; and it shall be the duty of the President, at a timely season in each year, to issue his proclamation and cause the same to be published for one month in at least one newspaper if any such there be published at each United States port of entry on the Pacific coast, warning all persons against entering said waters for the purpose of violating the provisions of said section; and he shall also cause one or more vessels of the United States to diligently cruise said waters and arrest all persons, and seize all vessels found to be, or to have been, engaged in any violation of the laws of the United States therein."



## TITLE XXIV.

## CIVIL RIGHTS.

SECT. 1977. — See note, §§ 641, 690, 5510. This provision is within the power of Congress. *United States v. Rhodes*, 1 Abb. (U. S.) 28; *United States v. Cruikshank*, 1 Woods, 581; *Le Grand v. United States*, 12 F. R. 581; *Re Parrott*, 1 Id. 481; 6 Sawyer, 349. This statute and the Fourteenth Amendment to the Constitution are not confined to the protection of citizens, but apply to all persons within the territorial jurisdiction, including the Territories, without regard to any differences of race, color, or nationality, and are violated by a municipal ordinance or its administration prohibiting a lawful business like a public laundry, or regulating it by making arbitrary and unjust distinctions, founded merely on differences of race. *Murphy v. Ramsey*, 114 U. S. 15, 44; *Yick Wo v. Hopkins*, 118 Id. 356; 9 Pac. Rep. 139; *Re Parrott*, *supra*; *Re Hoover*, 30 F. R. 54; *Stockton Laundry Case*, 26 Id. 611; *Sharon v. Hill*, Id. 337; *Re Lee Tong*, 9 Sawyer, 333; *Ah Kow v. Nunan*, 5 Sawyer, 552; *Chapman v. Tong Long*, 4 Id. 28; *Re Tie Loy*, 11 Sawyer, 472; *Re Wo Lee*, Id. 429. Section 1977 was passed to carry out the provisions of the Fourteenth Amendment, and was not intended to include persons, like Indians, not referred to in the Constitution. *State v. M'Kenney*, 2 Pac. Rep. 186; *Elk v. Wilkins*, 112 U. S. 94. But those provisions extend to Chinese subjects permanently or temporarily here. *Yick Wo v. Hopkins*, *supra*. The last words of this section after "citizens" were primarily intended, it seems, for the protection of natural persons. *San Mateo County v. S. P. R. Co.*, 13 F. R. 151, 722; 8 Sawyer, 238. See *Santa Clara County v. S. P. R. Co.*, 118 U. S. 394; 18 F. R. 385.

These amendments and statutes place the colored race, in respect of civil rights, upon an equality with the whites. *Virginia v. Rives*, 100 U. S. 318; *Live Stock Association v. Crescent City Co.*, 1 Abb. U. S. 388; *Strauder v. West Virginia*, 100 U. S. 303; 11 W. Va. 745, 805. They have been held e. g. to avoid the following acts: A statute prohibiting the summoning of colored persons on juries (*Com'th v. Johnson*, 78 Ky. 509; *Bush v. Kentucky*, 107 U. S. 110; *Green v. State*, 73 Ala. 26; *Neal v. Delaware*, 103 U. S. 370); a State statute prohibiting aliens incapable of becoming State electors from fishing in its waters (*Re Ah Chong*, 6 Sawyer, 451; 2 F. R. 733); a State statute forbidding its corporations to employ Chinese (*Re Parrott*, 6 Sawyer, 349; *Baker v. Portland*, 5 Id. 566; 8 Oregon, 356); a State law providing that taxes for public schools levied on white persons shall be used for white schools and those on colored people used for negro schools, the former schools being thereby of better quality (*Claybrook v. Owensboro*, 16 F. R. 297; 23 Id. 634; *People v. Gallagher*, 93 N. Y. 438; 11 Abb. N. Cas. 187; *United States v. Buntin*, 10 F. R. 730; *Bertonneau v. Directors*, 3 Woods, 177); State laws which impose a heavier punishment upon a special class of persons entitled to the equal protection of the laws (*Pace v. Alabama*, 106 U. S. 583; *Ah Kow v. Nunan*, 5 Sawyer, 552; *Re Ah Fong*, 3 Id. 144; *United States v. Jackson*, Id. 59); or which impose unequal exactions of any kind, including unequal taxation. *San Mateo County v. S. P. R. Co.*, 13 F. R. 722. A white man has been held not entitled to complain of the statutory exclusion of negroes from the grand jury finding an indictment against him. *Com'th v. Wright*, 79 Ky. 22; *Haggard v. Com'th*, Id. 366.



They have been held not to invalidate the following: A jury law denying to Mongolians the right to serve as jurors (*State v. Ah Chew*, 16 Nev. 50; 40 Am. Rep. 488); assignment of colored female passengers to a different sleeping cabin on a night steamboat, the accommodations in the cabins being equal in quality and convenience (*The Sue*, 22 F. R. 843; *Logwood v. M. & C. R. Co.*, 23 Id. 318; *Murphy v. W. & A. R. Co.*, Id. 637; *Railroad Co. v. Brown*, 17 Wall. 445); a State law prohibiting the marriage of a white person and a negro (*Ex parte Kinney*, 3 Hughes 9; *Francois v. State*, 9 Tex. App. 144; 3 Woods, 367; *Ex parte Hobbs*, 1 Woods, 537); or providing a greater punishment for offences like adultery when existing between persons of different races (*Pace v. Alabama*, 106 U. S. 583; 69 Ala. 231; *Green v. State*, 58 Ala. 190; *Plunkard v. State*, 67 Md. 364); or excluding Chinese from testifying in the State courts (*People v. Brady*, 40 Cal. 198); or making graduation at a medical college a necessary qualification for the practice of medicine and surgery, and relaxing the standard in favor of practitioners when the law took effect (*Fox v. Territory*, 2 Wash. Ter. 297); or forbidding the disinterment or removal of corpses from the place of burial (*Re Wong Yung Quy*, 6 Sawyer, 442; 2 F. R. 624); a city ordinance prohibiting, during certain hours, a particular business, which requires continuous fires, in a place where danger from fire is unusually great. *Soon Hing v. Crowley*, 113 U. S. 703; *Barbier v. Connolly*, Id. 27.

Both the Fourth and Fifth Amendments relate to the personal security of the citizen, and under them a statute, like § 5 of St. June 22, 1874, ch. 391, which makes the non-production of private books and papers a confession of the allegations expected to be proved thereby, is void. *Boyd v. United States*, 116 U. S. 616; 24 F. R. 692.

21 St. 199, ch. 223, § 4, subjects the Ute Indians patenting allotments to § 1977.

Sections 1, 2 of the Civil Rights Act of March 1, 1875, ch. 114 (18 St. 335; see notes *ante*, §§ 629, 691, 800), guaranteeing, under penalties, to all persons equal rights in inns, public conveyances, theatres, and other places of public amusement, are unconstitutional, as applied to the States, being unauthorized by the Thirteenth and Fourteenth Amendments, and not corrective of any constitutional wrong committed by the States. Civil Rights Cases, 109 U. S. 3; *State v. Rash*, 1 Houst. C. C. (Del.) 271; *United States v. Washington*, 4 Woods, 351; 20 F. R. 630; *Bowlin v. Lyon*, 67 Iowa, 536; *United States v. Taylor*, 9 Biss. 472; *United States v. Rhodes*, 1 Abb. U. S. 28; *Re Turner*, Id. 84; Chase, 157; *Lewis v. Hitchcock*, 10 F. R. 4; *Cully v. B. & O. R. Co.*, 1 Hughes, 536; The Civil Right Bill, Id. 541. "The Fourteenth Amendment is a limitation upon the powers of the State and an enlargement of the powers of Congress. If the State has not by its laws or officers overstepped these limitations, no case arises for the exercise of the powers conferred on the Federal Congress." *United States v. Washington*, *supra*; *Lewis v. Hitchcock*, 10 F. R. 4; *United States v. Taylor*, 3 Id. 563; 9 Biss. 472; *Re Parrott*, 1 F. R. 521; *United States v. Newcomer*, 11 Phila. 519; *Smoot v. Kentucky C. R. Co.*, 13 F. R. 337; *United States v. Cruikshank*, 92 U. S. 542; 1 Woods, 316; *Virginia v. Rives*, 100 U. S. 313, 339; 2 Am. L. T. N. s. 198.

Section 4 of the act of 1875 is authorized by the Thirteenth and Fourteenth Amendments. *Ex parte Virginia*, 100 U. S. 339; *Re County Judges*, 3 Hughes, 576. See pp. 141, 142, 232 *ante*.

SECT. 1978.—The cited act of 1866 was a remedial, not a penal, statute. *United States v. Rhodes*, 1 Abb. U. S. 28. It was a constitutional provision, intended to protect against legal disabilities and impediments, and not against private infringements of rights. Id.; *Re Turner*, *supra*; *State v. Dubuclet*, 5 Rep. 201.

SECT. 1979.—See notes, §§ 629, cl. 16, 1977.

SECT. 1980.—See note, § 1977.

SECT. 1982.—*Blyew v. United States*, 13 Wall, 581.

SECT. 1986.—"*Services in each case.*" If a commissioner issues warrants, under Rev.



Stats. §§ 5512, 5513, upon affidavits which do not show an offence, he is not entitled to the fee allowed by this section. *Southworth v. United States*, 19 Ct. Cl. 278.

SECT. 1989. — The revisers recommended that the clause "or such person as he may empower for that purpose," which was added from St. 1870, be omitted, as being superfluous if merely authorizing the appointment of a person to carry into effect the President's decision, and of doubtful constitutional validity if authorizing the delegation of powers belonging to the President alone under the acts of Congress. 1 Com. D. 951.

SECT. 1990. — The practice of buying, selling, and holding slaves, prevailing among the Indian tribes of Alaska, is contrary to the Thirteenth Amendment and the Civil Rights Law. *Re Sah Quah*, 31 F. R. 327.



## TITLE XXV.

## CITIZENSHIP.

SECT. 1992. — See notes, § 2165, *et seq.* An alien naturalized under Federal laws is a citizen of the State in which he resides. *Gribble v. Pioneer Press Co.*, 5 McCrary, 73; 15 F. R. 689. *Prima facie* an alien's original status continues. *Hauenstein v. Lynham*, 100 U. S. 483. And a foreign subject remains such until naturalization is complete according to our laws. *Lanz v. Randall*, 4 Dillon, 425; *Maloy v. Duden*, 25 F. R. 673; *Baird v. Byrne*, 3 Wall. Jr. 1. Every citizen owes first allegiance to the general government in preference to his State. *Planters' Bank v. St. John*, 1 Woods, 585; *United States v. Cruikshank*, 92 U. S. 542. The Fourteenth Amendment prohibits abridgment by the States of the privileges belonging to persons as United States citizens, but not such privileges as belong to them as citizens of States. *Ex parte Kinney*, 3 Hughes, 9. It does not make a resident in a State one of its citizens against his intention. *Sharon v. Hill*, 11 Sawyer, 291; 26 F. R. 337. The United States Constitution does not authorize Congress to enlarge or abridge the rights acquired by a foreigner by naturalization. *Osborn v. United States Bank*, 9 Wheat. 827; *United States v. Crosby*, 1 Hughes, 448. A citizen of one of the late insurgent States who, after the outbreak of hostilities, removed within the military lines of the United States, and acknowledged his allegiance to that government by obeying and submitting to its laws, continued a citizen of the United States, although he may have entertained a purpose of returning to his State when hostilities should cease, and have left his property or a portion of it in the insurgent States. His paramount allegiance is due to the United States, and it was not necessary for him to assume any new relation to the general government, but only to maintain the old one. *Planters' Bank v. St. John*, *supra*.

SECT. 1993. — See notes, §§ 2172, 4076. As to children born here, birth and allegiance go together, and the children are citizens; but the child of a member of an Indian tribe, born within the limits of the United States, is not born subject to the jurisdiction and is not a citizen. *McKay v. Campbell*, 2 Sawyer, 118; 10 A. G. Op. 328, 329; *Elk v. Wilkins*, 211 U. S. 94; *Crane v. Reeder*, 25 Mich. 303; *Schrimpf v. Settegast*, 38 Texas, 96; *Oldtown v. Bangor*, 58 Maine, 353; *West v. West*, 8 Paige, 433; *O'Connor v. State*, 9 Fla. 215. Thus a person born at Fort George (now Astoria), Oregon, of a father who was a British subject and of a mother who was a Chinook Indian, must be deemed either to follow the condition of his father and be considered a British subject, or that of his mother and be considered a Chinook Indian, but in either case he was not born a citizen of the United States. *McKay v. Campbell*, *supra*. A person born here of Chinese parents who reside here, not in an official capacity under the Emperor of China, is a citizen. *Re Wy Shing*, 36 F. R. 553; *Re Look Tin Sing*, 10 Sawyer, 353; 21 F. R. 905; *Tape v. Hurley*, 66 Cal. 473. As to illegitimate children, see *Guyer v. Smith*, 22 Md. 239. Persons born abroad of United States citizens, who have not renounced such citizenship, are citizens of this country under the doctrine of expatriation. *Ware v. Wisner*, 4 McCrary, 66; *Talbot v. Janson*, 3 Dall. 133. But children born abroad of persons once citizens of the United States, but who have become citizens or subjects of a foreign power, are not citizens of the United States. 14 A. G. Op. 295. A lady born in France, whose father was then an American citizen, who married in France a French citizen, and continued to reside there after his death, was regarded as a citizen of France, in 12 A. G. Op. 7.



SECT. 1994. — The naturalization act of 1802 (2 St. 153) only required that the person applying for its benefits should be a "free white person" and not an alien enemy. The phrase "who might herself be lawfully naturalized," simply limits the application of the law to free white women; by the act the wife's citizenship follows her husband's without application for naturalization on her part, or the usual qualifications, and it is immaterial whether the husband's citizenship existed at the passage of the act, or subsequently, or before or after the marriage (*Kelly v. Owen*, 7 Wall. 496; 15 A. G. Op. 116, 600; *Leonard v. Grant*, 6 Sawyer, 603; 5 F. R. 11; *United States v. Kellar*, 13 Id. 82; 11 Biss. 314); or whether she is of full age. *Renner v. Muller*, 44 N. Y. Sup. Ct. 535. The woman's citizenship is not lost by surviving her husband, but may be by marrying an alien. *Shanks v. Dupont*, 3 Pet. 242; 15 A. G. Op. 600; *Pequignot v. Detroit*, 16 F. R. 211. Her marriage to a naturalized citizen makes her a citizen, although she may have lived for years at a distance from him, and may never have come to this country until after his death. *Headman v. Rose*, 63 Ga. 458; *Luhrs v. Eimer*, 80 N. Y. 171; *Kane v. McCarthy*, 63 N. C. 299; *Burton v. Burton*, 26 How. Pr. 474; 14 A. G. Op. 402.

SECTS. 1996, 1998. — See note, § 216. These penalties only take effect upon conviction by a court-martial or other court of competent jurisdiction. *Kurtz v. Moffitt*, 115 U. S. 501; *Huber v. Reily*, 53 Penn. St. 112; *State v. Symonds*, 57 Maine, 148; *Severance v. Healey*, 50 N. H. 448; *Goetzeus v. Matthewson*, 61 N. Y. 420. By 22 St. 347, and 23 St. 119, certain soldiers are relieved from the charge of desertion during the late Civil War.

SECT. 1999. — This provision is applicable to citizens of this country as well as to those of other countries. If an American citizen emigrates to a foreign country, and, in the mode provided by its laws, formally renounces his American citizenship with a view to becoming a citizen or subject of such country, it is an act of expatriation as to this government. 14 A. G. Op. 295. In 9 A. G. Op. 359, Attorney-General Black gave an opinion that residence in a foreign country and an intent not to return are essential elements of expatriation, but are not sufficient to constitute it. They must be followed by naturalization therein. But in 14 A. G. Op. 295, Attorney-General Williams' opinion was that, in addition to domicile and intent to remain, such expressions or acts as amount to a renunciation of United States citizenship and a willingness to submit to or adopt the obligations of the country in which the person resides, such as accepting public employment, engaging in military service, &c., may be treated by this government as expatriation, without actual naturalization. Where a woman born in the United States, of parents who were citizens thereof, and who married a citizen of Spain residing in this country, but who never became a citizen thereof, and with him and his child, also born here, removed to Spain and resided there till her husband's death, it was held that both the woman and child remained citizens of the United States. 10 A. G. Op. 321. Expatriation is a fundamental right in this country, and a naturalized foreigner may resume his original citizenship under such conditions as are required by the government of his birth. *Charles Green's Son v. Salas*, 31 F. R. 106.



## TITLE XXVI.

## THE ELECTIVE FRANCHISE.

CONGRESS has not adopted the election and registration laws of any State. *Norton v. Brewster*, 23 F. R. 840. The Fifteenth Amendment, forbidding the denial or abridgment, by the Federal or State governments, of the right of suffrage on account of race, color, or previous condition of servitude, did not confer the right of suffrage, but annulled all existing provisions of State constitutions which limited this right to white persons. *United States v. Reese*, 92 U. S. 214; *Neal v. Delaware*, 103 Id. 370; *United States v. Amsden*, 10 Biss. 283; *United States v. Crosby*, 1 Hughes, 448. As to voting in Utah under the bigamy acts, see 22 St. 30; 24 St. 639; *Murphy v. Ramsey*, 114 U. S. 15.

SECT. 2004. — The right to vote in the States is a right derived from the States themselves and has not been granted or secured by the Federal Constitution; but the right of exemption from the prohibited discrimination in the exercise of the elective franchise is derived from the Constitution of the United States, and has been both secured and granted by it. *United States v. Cruikshank*, 92 U. S. 542. A State may, by its registration laws, direct the books to be closed ten days before a congressional election, although no provision is made for the registration or voting of persons becoming qualified after the books are closed. *Weil v. Calhoun*, 25 F. R. 865. Notwithstanding § 2004, the several States have the power to deny the right of suffrage to any citizens of the United States on account of age, sex, place of birth, vocation, want of property or intelligence, neglect of civic duties, crime, or other cause not specified in the amendment. *McKay v. Campbell*, 1 Sawyer, 374. Congress is confined to the enforcement of the Fifteenth Amendment, which gives it the power to determine the right to vote in the several States, by preventing the States from discriminating between citizens of the United States in the matter of the right to vote, on account of race, color, or previous condition of servitude. *McKay v. Campbell, supra*. The right of suffrage is not conferred by the Fifteenth Amendment to the Constitution; but it gives citizens of the United States the right of exemption from discrimination in the exercise of the elective franchise on account of their race, color, or previous condition of servitude, and invests Congress with the power to enforce that right by appropriate legislation. *United States v. Reese*, 92 U. S. 214. Congress has no power to legislate upon the subject of voting at State elections except under the Fifteenth Amendment, and such power can be exercised by providing a punishment only when the wrongful refusal to receive the vote of a qualified elector at such elections is because of his race, color, or previous condition of servitude. Sects. 3, 4 of St. May 31, 1870 (16 St. 140), are beyond the limit of the Fifteenth Amendment, and unauthorized, because they are not confined in their operation to unlawful discrimination on account of race, color, or previous condition of servitude. Congress has not provided by "appropriate legislation" for the punishment of an inspector of a municipal election for refusing to receive and count at such election the vote of a citizen of the United States of African descent, inasmuch as the sections above referred to are broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, and hence they cannot be limited by judicial construction so as to make them operate only on that which the Fifteenth Amendment gives Congress the right to prohibit and punish. *United States v. Reese, supra*. To bring a case within the operation of § 6 of the act of 1870 (16 St. 141), it must appear that the



right which the defendant intended to hinder or prevent was one granted or secured by the Constitution or laws of the United States. If it is not made so to appear, the alleged offence is not indictable under any act of Congress. Everything essential to the description of the substance of the offence must be charged positively and not inferentially. *United States v. Cruikshank*, 92 U. S. 542, 556. Where the plaintiff in an action for damages under § 2004 alleges in the same count or cause of action that the defendant prevented him from voting for several different officers; that he refused his vote; refused to swear him as to his qualifications, &c., the pleading is bad for duplicity, these different acts being distinct causes of action under the statute, requiring separate counts or statements; and the fact that the reason for the defendant's alleged refusal was on account of race, color, or previous condition of servitude of the plaintiff must be alleged in the complaint, because such fact must be proved by evidence on the trial in order to sustain the action. *McKay v. Campbell*, 2 Abb. U. S. 120.

SECTS. 2005, 2006. — *White v. Multnomah County*, 10 Pac. Rep. 489. These provisions, though originally contained in the repealed act of 1870, were re-enacted at the time of the Revision as part of this title, and refer to Federal and not State elections. *Brown v. Munford*, 16 F. R. 175; *United States v. Munford*, Id. 223; *Ex parte Siebold*, 100 U. S. 371. In a suit to recover a penalty under § 2005, the complaint must show that the complainant was a citizen of the United States, and in other respects qualified to vote at the time and place alleged; that the defendant refused or knowingly omitted to furnish the plaintiff an opportunity to become qualified to vote, in accordance with the provisions of the State law, and that such refusal or omission was on account of the plaintiff's race, color, or previous condition of servitude, it being necessary to prove these facts on the trial. *McKay v. Campbell*, 1 Sawyer, 374.

SECTS. 2007, 2009. — Sects. 3, 4 of St. 1870, were regarded in *United States v. Reese*, 92 U. S. 214, as unauthorized by the Fifteenth Amendment, upon which alone depends the power of Congress to legislate upon voting at State elections. *McKay v. Campbell*, 2 Abb. U. S. 120; 1 Sawyer, 374; *Le Grand v. United States*, 12 F. R. 581. "Threats or any unlawful means," in § 2009, does not include an erroneous decision by the election officer not wilfully or maliciously wrong. *Seeley v. Koox*, 2 Woods, 368. The declaration must aver that the plaintiff was prevented from voting by force, bribery, threats, intimidation, or other such unlawful means. Id. See note, § 629, cl. 12.

SECT. 2010. — An appeal lies to the United States Supreme Court from the final decree of the circuit court under this provision; but, until such appeal is taken, the former court has no power to issue a writ of prohibition. *Ex parte Warmouth*, 17 Wall. 64. The jurisdiction here conferred is limited to those actions in which the sole question of title to an office arises from the denial to citizens of the right to vote on account of their race, color, or previous condition of servitude. *Johnson v. Jumel*, 3 Woods, 69.

SECT. 2011. — See notes, §§ 828, cl. 18, 5515, 6007. "Registration" here relates to any list or schedule of voters, appearance on which constitutes a prerequisite to voting, unless there is a system of registration described by act of Congress as the only registration of voters under the law. *Re Supervisors*, 1 F. R. 1; *United States v. Davis*, 6 Id. 683; *United States v. Fisher*, 8 Id. 414. "Parish," as here used, is synonymous with "county;" and a petition for opening a circuit court for the appointment of supervisors of elections for part of a county or parish will be refused. *Re Supervisors*, 28 F. R. 840. This section and §§ 2012, 2016, 2017, 2021, 2222, are within the power of Congress to enact under the Constitution. *Ex parte Siebold*, 100 U. S. 371.

SECT. 2012. — See notes, §§ 2031, 5515. "Of different political parties." — The organization recognized by the last State convention of a party is considered its representative organization. *Re Supervisors*, 9 F. R. 14; 20 Blatch. 13. A requirement that officers shall belong to one of two political parties, or hold particular political opinions, has been



held void under State Constitutions. *Attorney-General v. Detroit*, 58 Mich. 213; *People v. Hoffman*, 5 N. East. Rep. 597.

It is within the power of Congress to vest in the circuit courts the appointment of supervisors of election. *Ex parte Siebold*, 100 U. S. 371; *Ex parte Clarke*, Id. 399; *United States v. Gale*, 109 Id. 65; *United States v. Goldman*, 3 Woods, 187.

SECT. 2013. — See note, § 583.

SECT. 2017. — *Re Davenport*, 18 Blatch. 340.

SECT. 2018. — The supervisor is entitled, under this section, to the possession of each ballot for such reasonable time as will enable him to examine it with care. *United States v. Clark*, 22 F. R. 387.

SECT. 2019. — *Weil v. Calhoun*, 25 F. R. 865.

SECT. 2020. — There is no Federal statute which makes a breach of the peace at the polls an offence against the United States. *Illinois v. Fletcher*, 22 F. R. 776.

SECT. 2021. — *United States v. Davis*, 6 F. R. 683. This section is constitutional, and the special deputy marshals may be appointed whether supervisors of elections have been appointed or not. *Re Deputy Marshals*, 22 F. R. 153.

SECT. 2022. — *United States v. Conway*, 18 Blatch. 566; 6 F. R. 50; *State v. Emerson*, 8 Id. 411. The duties of the deputy marshals are not those of supervisors of elections, but merely those of conservators of the peace at the polls. *United States v. Gitma*, 3 Hughes, 551. Their action as peace-officers is justified if the facts or appearances are sufficient to induce a reasonable probability that all the acts constituting the crime have been done. *Ex parte Morrill*, 35 F. R. 261.

SECT. 2026. — *Re Supervisors*, 9 F. R. 14; *Re Conrad*, 15 Id. 641. The chief supervisor has no power to administer oaths. *Muirhead v. United States*, 13 Ct. Cl. 251. It is not contemplated by this section that, as between the chief supervisor and his subordinates, the authenticity of his instructions to them should be established by a certified copy thereof. When instructions are delivered to a supervisor and it is signified to him, orally or in writing, what they are, he is bound to know that they are the orders of his superior, which it is his duty to observe and obey. *Muirhead v. United States*, 15 Ct. Cl. 116.

SECT. 2031. — See note, § 847. This section limits the compensation of a supervisor of elections, appointed under § 2012, to \$50, although the discharge of his duties may have required his time for more than ten days. *Williams v. United States*, 34 F. R. 25. He is entitled, for eighteen days' service, to the \$50, although the Attorney-General issued notice, after his appointment, to serve for only five days, and that payment would only be made for such service. *Scholfield v. United States*, 23 F. R. 576. See *Gayer v. United States*, 33 Id. 625; *Berry v. United States*, 35 Id. 269. He is not entitled to his *per diem* for the day when he receives his instructions, nor to more than one day after the election to make out and present his report. *Fulmer v. United States*, 23 Ct. Cl. 320.

St. Feb. 22, 1875 (18 St. 333) does not apply to the accounts of a chief supervisor. *Re Allen*, 19 F. R. 809; *contra, Re Conrad*, 15 Id. 641. He is not entitled to the fifteen cents per folio for a pamphlet of instructions printed by him and sent to his subordinates, filing one copy of which does not make the others copies of it. *Muirhead v. United States*, 15 Ct. Cl. 116. See § 2026. The proper fees of the chief supervisor are fully considered in *Gayer v. United States*, 33 F. R. 625. The words "any paper on file," do not apply to a pamphlet of instructions printed by the chief supervisor and sent to his subordinates. They must be regarded as original instructions given for convenience. A supervisor has no power to administer oaths. If the same person is both supervisor and court commissioner, and in the latter capacity administers oaths, he is not entitled as supervisor to a fee for affixing his seal thereto. *Muirhead v. United States*, 13 Ct. Cl. 251.



## TITLE XXVII.

## THE FREEDMEN.

SECT. 2032. — St. June 10, 1872, discontinued the Bureau of Refugees, Freedmen, and Abandoned Lands, from June 30, 1872, and greatly curtailed this Title. The Fourteenth Amendment set aside the doctrine of the Dred Scott Case, 19 How. 393, by which Africans brought to this country and sold as slaves, and their descendants, were not citizens or capable of becoming such, raised them from the condition of freedmen, and gave them the same rights of citizenship as the native-born. *Re Look Tin Sing*, 21 F. R. 909. Under the Thirteenth Amendment, abolishing slavery, Congressional legislation may operate upon the acts of individuals, whether sanctioned by State legislation or not, while, under the Fourteenth, such legislation can only be corrective as against the States. The Civil Rights Cases, 109 U. S. 3; *United States v. Harris*, 106 Id. 629; *Bartemeyer v. Iowa*, 18 Wall. 129; *Slaughter-House Cases*, 16 Id. 36; *United States v. Given*, 15 Int. Rev. Rec. 189. It not only abolishes African slavery, but also forbids slavery in general, or involuntary servitude, such as Mexican peonage or the Chinese coolie trade. *Slaughter-House Cases*, *supra*. See note, § 1990.

SECT. 2034. — 19 St. 244 inserts “of” before “War” in the last line. By 22 St. 3, ch. 13, charitable contributions, imported in good faith for the relief or aid of colored persons emigrating from their homes to other States, are admitted free of duty.

SECT. 2035. — 16 A. G. Op. 236, 239. 22 St. 420 authorizes the Commissioner of the Freedman’s Savings and Trust Company to examine and audit certain claims against the company and to pay certain dividends barred by St. Feb. 21, 1881.

SECT. 2037. — 16 A. G. Op. 630.



## TITLE XXVIII.

## INDIANS.

UPON the first taking possession of the eastern part of this country by the English settlers, the land was treated as if found uninhabited, and was claimed by right of discovery; the Indians were regarded as temporary and nomadic occupants with no title to the soil capable of conveyance without the consent of the nation claiming the territory. Hence a royal grant prevailed over a grant from an Indian or an Indian tribe. *Johnson v. McIntosh*, 8 Wheat. 543; *Mitchell v. United States*, 9 Pet. 756; *Clark v. Smith*, 13 Id. 201; *Holden v. Joy*, 17 Wall. 243; *United States v. Cook*, 19 Id. 591; *Leavenworth R. Co. v. United States*, 92 U. S. 733; *Jackson v. Ingraham*, 4 Johns. 163; *Jackson v. Wood*, 7 Id. 290; *Com. v. Roxbury*, 9 Gray, 478; *Lynn v. Nahant*, 113 Mass. 433; *Howard v. Moot*, 64 N. Y. 262; *Penobscot Tribe v. Veazie*, 58 Maine, 402; *Bell v. Gough*, 23 N. J. L. 624, 707; *Minter v. Shirley*, 45 Miss. 376; 1 Kent Com. 257; 3 Id. 379. An Indian nation within the United States, with which the government has made treaties, although a distinct political society, is not a "foreign State," entitled to proceed as such in the Federal courts against a State of the Union; it is a domestic dependent nation, standing to the Federal government in the relation of a ward to his guardian (*Id.*; *Cherokee Nation v. Georgia*, 5 Pet. 1; *Worcester v. Georgia*, 6 Id. 515; *The Kansas Indians*, 5 Wall. 737, 761; *New York v. Dibble*, 21 How. 370; *United States v. Holliday*, 3 Wall. 407); or of a provisional territorial government to the nation. *United States v. Coxe*, 18 How. 100; *United States v. Cisna*, 1 McLean, 254; *Langford v. Monteith*, 102 U. S. 147. But a State has no such power over Indians maintaining their tribal relations; they owe it no allegiance, and the State gives them no protection. *United States v. Kagama*, 118 U. S. 375. The members of such a nation occupying its territory within the limits of a State are not citizens of that State. *Blair v. Pathfinder*, 2 Yerger, 407; *United States v. Holliday*, 3 Wall. 407; *United States v. Shanks*, 15 Minn. 369; *Jackson v. Reynolds*, 14 Johns. 335; *Jackson v. Goodell*, 20 Id. 188, 693; *United States v. Osborn*, 6 Sawyer, 406; *Ex parte Reynolds*, 5 Dillon, 394; *Ex parte Kenyon*, Id. 385. A territory may tax railroad property within territorial and reservation limits in the absence of treaty restriction. *Utah Railway v. Fisher*, 116 U. S. 28. In suits between the United States and Indian tribes the law of guardian and ward does not prevail, but doubtful words are construed most strongly against the former. *Choctaw Nation v. United States*, 21 Ct. Cl. 59. In the absence of regulation, a reservation Indian is liable to suit upon a private contract made on a reservation with a white man (*Jones v. Eisler*, 3 Kan. 134); or he may bring a civil action, and has the rights of a person even against his agent. *Wiley v. Keokuk*, 6 Kan. 94; *Wiley v. Manatowah*, Id. 111. The citizenship of Indians is unaffected by the Fourteenth Amendment to the Constitution. An Indian cannot become a citizen without some act of the United States to that end. *Elk v. Wilkins*, 112 U. S. 94. With respect to lands in the general occupation of tribal Indians in Canada, the Provinces have succeeded to the title of the Crown, subject to a purely moral claim on the part of the Indians to be ousted only in a fair manner; the right to oust being in the Dominion acting along with the Province, but the ouster enuring in the matter of title solely to the benefit of the Province, the Dominion taking nothing thereby. *Regina v. St. Catharine's Milling Co.* 10 Ont. 196.



Statutory provisions applicable to single tribes, or to a few tribes only, were, as a general rule, omitted from the Revision, and remain unrepealed in the Statutes at Large. 1 Com. D. 983.

By St. June 15, 1880, ch. 223, § 7 (21 St. 199), the lands and affairs of the Ute Indians are made subject to the provisions of this title. See 25 St. 133, 229. By St. May 11, 1880, ch. 85, § 4, reservation Indians are not to be granted permission in writing or otherwise to enter, and are to be excluded from, the State of Texas. St. March 3, 1879, ch. 195, § 8 (20 St. 473), provides for enumeration of all Indians not taxed within the jurisdiction of the United States, and census statistics as to them. 22 St. 345 authorizes the auditing of certain unpaid claims against the Indian Bureau by the Treasury.

## CHAPTER I.

### OFFICERS OF INDIAN AFFAIRS; THEIR DUTIES AND COMPENSATION.

**SECT. 2039.**—This board, as originally constituted, appears to have been only a temporary organization, but St. 1871, incorporated in Rev. Stats., § 2107, appeared to treat it as permanent. 1 Com. D. 990.

**SECTS. 2041, 2042.**—In the third line of § 2041 the words "within the limits of" were here substituted for "in" in the original act. St. May 17, 1882, ch. 163, § 1 (22 St. 70), limits the powers of the Indian Commission to visiting and inspecting agencies and other branches of the Indian Service, and to inspecting goods purchased for such service, and the Commission is required to report their doings to the Secretary of the Interior.

**SECT. 2042.**—By 23 St. 417, a committee of five members of the House of Representatives of the 49th Congress is to investigate expenditure of appropriations for Indians.

**SECT. 2043.**—By St. March 3, 1875, ch. 132, § 1 (18 St. 420), the number of inspectors is limited to three. 24 St. 450 appropriates for five Indian inspectors.

**SECT. 2045.**—18 St. 420 also repeals the requirement that inspectors shall visit each agency twice each year.

By 22 St. 88, inspectors are entitled to have from the Indian Commissioner a printed compilation of the statutes prescribing their duties, and to be informed of new legislation relating thereto. The power of removal is not controlled by the tenure of office act; and an Indian agent may be suspended in the mode provided by this section, namely, by the Indian inspector, and a person designated by him may fill the office temporarily. 15 A. G. Op. 405, 406. See *Cherokee Nation v. S. K. R. Co.*, 33 F. R. 900, 913.

**SECT. 2046.**—A new substitute provision suggested by the revisers. 1 Com. D. 991.

**SECT. 2050.**—"Indian affairs" is here substituted for "the Indian Department" and in the seventh line "the Interior" for "War," thus changing the earlier provisions. 1 Com. D. 983, 990.

**SECT. 2052.**—A new substitute provision suggested by the revisers. 1 Com. D. 994. The annual appropriation bills have specified the number of Indian agents for which appropriation was made by them, and agents have been appointed under their provisions from year to year. See Sup. 325 n. By 20 St. 86, ch. 142, the Union agency in the Indian Territory was abolished. By St. 1882, ch. 163, § 6 (22 St. 88), and St. 1883, ch. 61, § 6 (22 St. 451), and St. 1884, ch. 180, § 6 (23 St. 97), the President may consolidate agencies, and with the consent of reservation Indians, may consolidate such tribes, and abolish agencies thereby rendered superfluous. The provision of § 2052, fixing the salary



of agents east of the Rocky Mountains, was superseded for the time being by acts of 1880 and 1881, and the only authority for appointing an agent at the Quapaw Agency in 1880 was under the appropriation act of that year, which established the salary at \$1200. *Dyer v. United States*, 20 Ct. Cl. 166. See *Mitchell v. United States*, 18 Ct. Cl. 281.

**SECT. 2053.** — See preceding note. This power is not controlled by the tenure of office act, 15 A. G. Op. 405, 406. Under this section the President has discretionary power to dispense with the services of any Indian agent, and may devolve the duties upon an agent appointed for another agency. *Id.* 405.

**SECT. 2055.** — 19 St. 240, ch. 69, adds "except as herein otherwise provided for." Sts. July 14, 1884, ch. 180, § 1 (23 St. 77), March 3, 1885, ch. 341, § 1 (23 St. 362), and May 15, 1886, ch. 333, § 1 (24 St. 30), repeal all provisions for the compensation of Indian agents in excess of that thereby provided. See also 18 St. 420, ch. 132, § 5. An agent's salary dates from his actual beginning of work for the government. *United States v. Roberts*, 10 F. R. 540. This section does not apply to an agent appointed under an appropriation act fixing his salary at a different sum. *Dyer v. United States*, 20 Ct. Cl. 166.

**SECT. 2056.** — 22 St. 87 adds at the end of this section —

"and until his successor is duly appointed and qualified."

**SECT. 2057.** — St. March 3, 1875, ch. 132, § 10 (18 St. 420), requires the security upon this bond to file with the Secretary of the Interior a sworn statement of his security, its value, and situation. The general clause in an Indian Agent's bond does not make him liable on the bond for acts outside of his business as such agent, nor is there any power to insert in such bond a special condition not relating to agency duties, such condition being therefore void. *United States v. Barnhart*, 17 F. R. 579.

**SECT. 2058.** — See notes, §§ 445, 468. St. June 22, 1874, ch. 389 (18 St. 173), in part, provides: —

"SEC. 3. That for the purpose of inducing Indians to labor and become self-supporting, it is hereby provided that in distributing the supplies to the Indians for whom the same are appropriated, the agent distributing the same shall require all able-bodied male Indians, between the ages of eighteen and forty-five, to perform service upon the reservation, for the benefit of themselves or of the tribe, at a reasonable rate, to be fixed by the agent in charge, and to an amount equal in value to the supplies to be delivered. And the allowances provided for such Indians shall be distributed to them only upon condition of the performance of such labor, under such rules and regulations as the agent may prescribe: *Provided*, That the Secretary of the Interior may, by written order, except any particular tribe from the operation of this provision where he deems it proper and expedient. . . .

"SEC. 4. Indian agents shall be required to state, under oath, upon rendering their quarterly accounts, that the number of employees claimed for were actually and bona fide employed at the agency and at the salary claimed; and that such agent does not, directly or indirectly, receive any part of the compensation claimed for any other employee, or any pecuniary benefit therefrom: *Provided*, That where there is no officer in the vicinity of an agency who is authorized to administer oaths, the Secretary of the Interior may direct such returns to be made under the certificate of the agent. . . .

"SEC. 6. *Provided*, That hereafter all bidders under any advertisement published by the Commissioner of Indian affairs for proposals for goods, supplies, transportation, and so forth, for and on account of the Indian service, whenever the value of the goods, supplies, and so forth, to be furnished, or the transportation to be performed, shall exceed the sum of five thousand dollars, shall accompany their bids with a certified check or draft payable to the order of the Commissioner of Indian Affairs, upon some United States depository or solvent national bank, which check or draft shall be five per centum on the amount of the goods, supplies, transportation and so forth, as aforesaid; And in case any such bidder, on being awarded a contract, shall fail to execute the same with good and sufficient sureties according to the terms on which such bid was made and accepted, such bidder shall forfeit the amount so deposited to the United States, and the same shall forthwith be paid into the Treasury of the United States; but if such contract shall be duly executed, as aforesaid, such draft or check so deposited shall be returned to the bidder.



"SEC. 10. That no agent or employee of the United States Government, or of any of the Departments thereof, while in the service of the Government, shall have any interest, directly or indirectly, contingent or absolute, near or remote, in any contract made, or under negotiation, with the Government, or with the Indians, for the purchase or transportation or delivery of goods or supplies for the Indians, or for the removal of the Indians; nor shall any such agent or employee collude with any person who may attempt to obtain any such contract for the purpose of enabling such person to obtain the same. The violation of any of the provisions of this section shall be a misdemeanor, and shall be punished by a fine of not less than \$500 nor more than \$5000, and by removal from office; and, in addition thereto, the court shall, in its discretion, have the power to punish by imprisonment of not more than six months."

St. March 3, 1875, ch. 132 (18 St. 420), in part provides, —

"SEC. 4. That hereafter, for the purpose of properly distributing the supplies appropriated for the Indian service, it is hereby made the duty of each agent in charge of Indians and having supplies to distribute, to make out, at the commencement of each fiscal year, rolls of the Indians entitled to supplies at the agency, with the names of the Indians and of the heads of families or lodges, with the number in each family or lodge, and to give out supplies to the heads of families, and not to the heads of tribes or bands, and not to give out supplies for a greater length of time than one week in advance.

"SEC. 5. That hereafter not more than \$6000 shall be paid in any one year for salaries or compensation of employees at any one agency, in addition to the salaries of the agent, and not more at any one agency than is absolutely necessary; And where Indians can perform the duties they shall be employed; and the number and kind of employees at each agency shall be prescribed by the Secretary of the Interior, and none others shall be employed. Indian agents shall be required to state, under oath, upon rendering their quarterly accounts, that the employees claimed for were actually and bona fide employed at such agency, and at the compensation as claimed, and that such service was necessary; and that such agent is not to receive, and has not received, directly or indirectly, any part of the compensation claimed for any other employee: *Provided*, That when there is no officer authorized to administer oaths within convenient distance of such agent, the Secretary of the Interior may direct such returns to be made upon certificate of the agent: *And provided further*, That in case it should be necessary, at any agencies, to have more employees than provided for in this section, the Secretary may, by written order, authorize the increase necessary; but in no case shall the amount expended at any agency exceed ten thousand dollars in any one year; and the provision of this section shall apply to the fiscal year ending June 13, 1875.

"SEC. 6. That hereafter, it shall be the duty of the Secretary of the Interior, and the officers charged by law with the distribution of supplies to the Indians, under appropriations made by law, to distribute them and pay them out to the Indians entitled to them, in such proper proportions as that the amount of appropriation made for the current year shall not be expended before the end of such current year, so as to prevent deficiencies; And no expenditure shall be made or liability incurred on the part of the Government on account of the Indian service for any fiscal year (unless in compliance with existing law) beyond the amount of money previously appropriated for said service during such year.

"SEC. 7. That hereafter no purchase of goods, supplies, or farming implements, or any other article whatsoever, the cost of which shall exceed one thousand dollars, shall be paid for from the money appropriated by this act, unless the same shall have been previously advertised and contracted for as heretofore provided by law; and no payment of any part of the money appropriated by this act, or heretofore appropriated, for the expenses of the Indian Department, shall be credited to any Government officer until the proper vouchers therefor shall first have been submitted to, examined, and authorized by the accounting officers of the Treasury. *And provided further*, That copies of all contracts made by the Commissioner of Indian Affairs, or any other officer of the Government, for the Indian service, shall be furnished to the Second Auditor of the Treasury before any payment shall be made thereon."

St. May 27, 1878, ch. 142, § 1 (20 St. 65, 86), and St. Feb. 17, 1879, ch. 87, § 1 (20 St. 315), exclude Indians, and St. May 11, 1880, ch. 85, § 1 (21 St. 131), excludes Indians and teachers, from computation as agency employes under the preceding limitations. St. March 3, 1875, ch. 132, § 10 (18 St. 420), requires each agent to keep a book of itemized expenditures with a record of all contracts and of receipts of money from all sources; such books to be always open to inspection, to remain at reservation offices and be transmitted to the agent's successor; and a transcript of every entry thereon to be forwarded quarterly to the Indian Commissioner. St. May 17, 1882, ch. 163, § 7 (22 St. 88), entitles Indian agents to have from the Indian Commissioner a printed compilation of the statutes prescribing their duties, and to be informed of new legislation relating thereto. St. July 4,



1884, ch. 180, § 9 (23 St. 98), requires each agent to submit with his annual report a census of the Indians in his charge, showing the number of males above 18 years old, of females above 14, of school children between 6 and 16, of schoolhouses at his agency, of schools in operation and the attendance at each, and the names of the teachers and salaries paid them. St. March 3, 1875, ch. 132, § 4 (18 St. 420), requires Indian Agents at the beginning of each year to make out rolls of Indians entitled to supplies. An Indian agent cannot obligate the United States by drawing a bill. The consideration is immaterial. *Jackson v. United States*, 1 Ct. Cl. 260 ; 2 Id. 401. An Indian agent cannot obligate the United States by issuing a voucher, for goods bought, to another than the vendor, although directed so to do by the vendor as part of the sale. Such direction is only an assignment, and may be withdrawn before payment. *Johnston v. United States*, 13 Ct. Cl. 217. The President may devolve the disbursement of Indian funds upon agents in his discretion. 15 A. G. Op. 66. An Indian agent and his sureties are not liable on his bond for the proceeds of property sold, not belonging to the United States, although partly accounted for as such, nor for salary received twice, but are so liable for money disbursed by them without or contrary to authority, although for service actually rendered. *United States v. Spinnott*, 26 F. R. 84, 89. Approval after the transaction is equivalent to precedently prescribing it. *Belt v. United States*, 15 Ct. Cl. 92. An officer of the Army who is appointed a temporary Indian agent is not entitled to a commission on the public money disbursed by him while acting in such capacity in addition to his regular salary as an Army officer and his travelling expenses. *Minis v. United States*, 15 Pet. 423.

SECT. 2059. — See note, § 2052. The President may discontinue any agency under this section, and if he does so the functions of the agent cease. He may also transfer the agency to another place. 15 A. G. Op. 405.

SECT. 2062. — 19 St. 240, ch. 69 (see note, § 1224), forbids so employing an Army officer if it separates him from his company, regiment, or corps, or otherwise interferes with the discharge of his military duties proper. The power conferred by § 2062 is not controlled by the Tenure of Office act. Under this section and § 1224, the President may assign a military officer to execute the duties of Indian agent, if this can be done without separating such officer from his company. 15 A. G. Op. 405, 406. Section 2062 is an exception to the general language of § 1222. Subject to the restrictions of § 1224, the President may require the military commandant in Alaska to discharge the duties of Indian agent there. 14 A. G. Op. 573.

SECT. 2063. — A similar provision in the Army act was held valid, and to exclude commissioners for disbursing public money in the case of such an officer. *Minis v. United States*, 15 Pet. 423.

SECT. 2067. — Five special agents are now allowed \$2000 per year each, and, when on duty, \$3 per day for travelling and incidental expenses, exclusive of cost of transportation and sleeping-car fare. 24 St. 30, 364, 451 ; 23 St. 77 ; 22 St. 434. The annual appropriation bills provide for their pay and expenses.

SECT. 2070. — Repealed by 22 St. 70, see notes, §§ 2074, 2077. As to the effect of acts appropriating less than \$400 per year for the salary of an interpreter employed elsewhere than in Oregon, Utah, and New Mexico, see *Mitchell v. United States*, 18 Ct. Cl. 281 ; 109 U. S. 146 ; *United States v. Langston*, 118 U. S. 392.

SECT. 2071. — By St. June 23, 1879, ch. 35, § 7 (21 St. 30), the Secretary of War may detail an Army officer of not higher rank than captain for special duty with reference to Indian education. By 23 St. 381, 24 St. 44, the Secretary of the Interior is required to report annually, on or before Dec. 1, how the general education fund for the preceding year has been spent, showing the number and kind of schoolhouses built, their cost, the cost of their repair, the name and pay of each teacher, the location of and average attendance at



each school; his first report to contain a like account of all expenditure heretofore made. The annual appropriation acts provide for the pay and expenses of a school superintendent, who is now allowed \$3 per day for travelling expenses when actually on duty in the field, exclusive of cost of transportation and sleeping-car fare. 24 St. 451; 25 St. 56, 219. By St. May 20, 1886, ch. 362, § 1 (24 St. 69), the hygienic effects of alcoholic drink and narcotics must be specially taught in all Indian schools to all pupils, in connection with physiology and hygiene, as thoroughly and in like manner as other like required branches; and the act provides for the removal of any officer of such school refusing or neglecting to comply therewith. St. May 17, 1882, ch. 163, § 1 (22 St. 70), authorizes the President to appoint an inspector of Indian schools, who is required to report a plan for the most economical and efficient carrying out of existing treaty stipulations for Indian education, with estimate of the cost; also a plan for educating all Indian youth for whom no provision now exists, with estimates of the saving from existing outlay for Indian support which such plan would effect. See, also, 22 St. 85, 24 St. 464. By 25 St. 239, § 10, the Bible may be taught to Indians in the native language. St. March 2, 1887, ch. 320 (24 St. 465), provides —

“That the entire cost of any boarding-school building to be built from the moneys appropriated hereby, including furniture, shall not exceed \$10000; and the entire cost of any day-school building to be so built shall not exceed \$600: *And provided further*, That the school year of the Indian schools herein appropriated for shall be held to include all usual and necessary vacations: *And provided further*, That the Secretary of the Interior shall report annually, on or before the first Monday of December of each year, in what manner and for what purposes the general education fund for the preceding fiscal year has been expended; and said report shall embrace the number and kind of school-houses erected, and their cost, as well as cost of repairs, names of every teacher employed, and compensation allowed, the location of each school, and the average attendance at each school: *Always provided*, That no part of the money appropriated by this act shall be expended in the transportation from or support of Indian pupils or children off their reservations, respectively, if removed without the free consent of their parents or those standing in that relation to them by their tribal laws respectively.”

St. June 29, 1888, ch. 503 (25 St. 235, 238), provides: —

“*Provided*, That the entire cost of any boarding-school building to be built from the moneys appropriated hereby, including furniture, shall not exceed \$10,000, and the entire cost of any day-school building to be so built shall not exceed \$600. . . .

“SEC. 8. That there shall be appointed by the President, by and with the advice and consent of the Senate, a person of knowledge and experience in the management, training, and practical education of children, to be superintendent of Indian schools, who shall, from time to time, and as often as the nature of his duties will permit, visit the schools where Indians are taught, in whole or in part, by appropriations from the United States Treasury, and shall, from time to time, report to the Secretary of the Interior, what, in his judgment, are the defects, if any, in any of them in system, in administration, or in means for the most effective advancement of the children in them toward civilization and self-support; and what changes are needed to remedy such defects as may exist; and shall, subject to the approval of the Secretary of the Interior, employ and discharge superintendents, teachers, and any other person connected with schools wholly supported by the Government, and with like approval make such rules and regulations for the conduct of such schools as in his judgment their good may require. The Secretary of the Interior shall cause to be detailed from the employees of his Department such assistants and shall furnish such facilities as shall be necessary to carry out the foregoing provisions respecting said Indian schools.”

SECT. 2073. — 19 St. 240, ch. 69, inserts “agents” after “such” in the second line of this section, and changes “immigration” in the fourth line to “emigration.”

SECT. 2074. — This does not prohibit persons in office from rendering services independent of and distinct from the duties of the office, and receiving pay therefor. *United States v. Stowe*, 19 F. R. 807. 23 St. 364; 24 St. 30, 450, and 25 St. 219, provide that no person employed by the United States and paid for any other service shall be paid for interpreting.

SECT. 2075. — “Indian affairs” is substituted here and in § 2073 for “the Indian Department” in the act cited in the margin.



SECT. 2076.—See notes, §§ 2067, 2074.

SECT. 2077.—See note, § 2058. 24 St. 30 allows one Indian school superintendent \$4 per day for travelling expenses when actually on duty in the field, exclusive of cost of transportation and sleeping-car fare.

SECT. 2078.—See note, § 2075. The last seventeen words of this section are a substitute provision. 1 Com. D. 1000.

## CHAPTER II.

### PERFORMANCE OF ENGAGEMENTS BETWEEN THE UNITED STATES AND INDIANS.

SECT. 2079.—United States *v.* Kagama, 118 U. S. 382; Choctaw Nation *v.* United States, 109 Id. 27; United States *v.* Berry, 4 F. R. 779; United States *v.* Osborn, 2 Id. 58; 16 A. G. Op. 555. A new provision taking the place of St. Feb. 27, 1851, ch. 14, § 3, and St. March 3, 1857, ch. 90, § 3. St. Aug. 9, 1888, ch. 818 (25 St. 392), provides:—

“That no white man, not otherwise a member of any tribe of Indians, who may hereafter marry an Indian woman, member of any Indian tribe in the United States, or any of its Territories except the five civilized tribes in the Indian Territory, shall by such marriage hereafter acquire any right to any tribal property, privilege, or interest whatever to which any member of such tribe is entitled.

“SEC. 2. That every Indian woman, member of any such tribe of Indians, who may hereafter be married to any citizen of the United States, is hereby declared to become by such marriage a citizen of the United States, with all the rights, privileges and immunities of any such citizen, being a married woman: *Provided*, That nothing in this act contained shall impair or in any way affect the right or title of such married woman to any tribal property or any interest therein.

“SEC. 3. That whenever the marriage of any white man with any Indian woman, a member of any such tribe of Indians, is required or offered to be proved in any judicial proceeding, evidence of the admission of such fact by the party against whom the proceeding is had, or evidence of general repute, or of cohabitation as married persons, or any other circumstantial or presumptive evidence from which the fact may be inferred, shall be competent.”

SECT. 2080.—The cited act contained the words “to be” after tribe in the third line.

SECT. 2081.—St. April 15, 1874, ch. 97 (18 St. 29), authorizes the Indian Commissioner, with the sanction of the President and Secretary of the Interior, in paying annuities, interest, or moneys accrued or accruing to the Seminoles under the treaty with the government of August 7, 1886, to lay out the money for their benefit in any manner or pay all or part into the Seminole treasury to be disposed of by the Seminole Council; provided \$5000 per annum goes to the tribal school fund, and that the tribe assents.

SECT. 2083.—See note, § 463. The words “Commissioner of Indian Affairs” in the sixth line were here substituted for “commissioners,” and “he” for “they” in the seventh line. St. June 22, 1874, ch. 389, § 6 (18 St. 173), requires bidders under the advertised proposals of the Indian Commissioner for supplies or transportation for the Indian service, if the bid exceeds \$5000, to accompany the bid with a certified check or draft on a United States depository or solvent national bank in favor of the Indian Commissioner for five per cent of the amount of the bid. If such bidder is awarded and executes the contract with proper sureties, the check is to be returned to him; and if he is awarded but fails to execute the contract with proper sureties, he shall forfeit the check, which shall be paid at once into the United States Treasury. See St. March 3, 1875, ch. 132, § 9 (18 St. 420), to the same effect. St. March 3, 1875, ch. 132, § 7 (18 St. 420), prohibits payment out of appropriations made by the act for purchases amounting to more than \$1000, unless the purchases have been duly advertised and contracted for, and prohibits credit to any government officer for payments of money so or heretofore appropriated on behalf of the Indian Department, until his vouchers shall have been passed by the accounting officers of the Treasury. It requires copies of all contracts for the Indian service to be furnished



to the second Auditor of the Treasury before any payment thereon. St. Aug. 15, 1876, ch. 289, § 2 (19 St. 176), requires that transportation of Indian supplies involving an outlay of more than \$1000 be advertised for, and let to the lowest bidder. Sect. 3 requires the preservation of all bids received in connection with the Indian service, with a detailed embodiment in the Indian Commissioner's annual report of all awards thereon, for services, supplies, and annuity goods. Sect. 6 requires the Indian Commissioner to advertise for all supplies, except that purchase may be made in open market for sixty days' supplies, and in exigencies up to the value of \$2000. 23 St. 383, § 3, raised this amount to \$3000. St. March 3, 1877, ch. 101, § 1 (19 St. 291), requires that wagon transportation be done by Indian labor when practicable; and when so done, authorizes the Indian Commissioner to hire a storehouse at any railroad when necessary, to employ a storekeeper therefor, and to advance to the Indians employed wagons and harness, the expenses to come out of the appropriation made by the act, but contracts involving more than \$2000 must be advertised and let to the lowest responsible bidder.

St. May 11, 1880, ch. 85, § 1 (21 St. 131), authorizes the Secretary to buy from Indian manual and training schools, in the manner customary among individuals, articles there manufactured and used in the Indian service, when this can be advantageously done, account thereof being kept in the Indian Bureaus and schools, and reports made from time to time. St. May 17, 1882, ch. 163, § 3 (22 St. 87), forbids purchase of supplies therein appropriated for exceeding a value of \$500, without at least three weeks' advertisement, with discretion in the Secretary in exigencies to buy in the open market to the amount of \$3000, the Secretary to officially record the facts constituting the exigency and report thereon to the next session of Congress. To the same effect St. March 1, 1883, ch. 61, § 3 (Id. 450.) Id., § 7, provides for the rejection of all bids, if to the government's interest, for re-advertisement, and necessary purchases in open market at not more than the lowest price bid and the market price, until fresh bids can be had. To the same effect are 23 St. 96, 97, 383; 24 St. 46; 25 St. 237; except that in the last acts the appropriation for ditch and irrigation work may be expended in open market at the Secretary's discretion, and purchases may be made from Indians in open market at the Secretary's discretion. By St. March 1, 1883, ch. 61, § 8 (22 St. 451), and St. July 4, 1884, ch. 180, § 8 (23 St. 97), the entire amount of any claim knowingly presented against the United States for Indian supplies, which contains any material misrepresentation of fact, is denied credit or payment; any credit or payment of such claim may be recharged or recovered back; the parties to the transaction are presumed to know the facts set forth in the claim; an account containing more than one voucher shall be falsified only to the extent of the false voucher; and other existing penalties are left unaffected. By St. March 3, 1875, ch. 132, § 6 (18 St. 420), the Secretary and all officers charged by law with the distribution of Indian supplies and appropriations must so distribute them as not to exhaust the appropriation of the current year before the end of the year, so as to prevent deficiencies, and no government liability shall be created for Indian service beyond the annual appropriation unless in compliance with existing law. An order from the Commissioner to a subordinate is a direction from the Secretary in the absence of anything showing the contrary. *United States v. Odeneal*, 10 F. R. 616. The United States is liable for goods sold and delivered at fair value. Approval of the proper officers after the transaction amounts to authorization. *Belt v. United States*, 15 Ct. Cl. 92.

SECT. 2084, 2085. — "Office of Indian Affairs" is here substituted for "Indian Department" in the acts cited, and the last three words of § 2084 are substituted for "the law for the purchase of other supplies" in the original act.

SECT. 2086. — Substituted for earlier acts cited, which were deemed obscure. 1 Com. D. 1003. See note, § 2058. The acts of June, 1834, and March, 1847, concerning the payment of annuities to Indians, are construed in 6 A. G. Op. 49.



St. March 3, 1887, ch. 320 (24 St. 467), provides —

“SEC. 7. That at any of the Indian reservations where there is now on hand Government property not required for the use and benefit of the Indians at said reservations, the Secretary of the Interior is hereby authorized to move such property to other Indian reservations where it may be required, or to sell it and apply the proceeds of the same in the purchase of such articles as may be needed for the use of the Indians for whom said property was purchased; and he shall make report of his action hereunder to the next session of Congress thereafter.”

SECT. 2089. — This section does not require the President to disburse Indian funds through a superintendent. 15 A. G. Op. 66.

SECT. 2091. — See note, § 2058, as to agents' accounts.

SECT. 2092. — In an action by the United States on an unsettled agent's account, the allowance or disallowance of items by the government accounting officers is immaterial. *United States v. Duval, Gilpin*, 356. The last four words of this section are substituted for “department” in the cited act.

SECT. 2093. — By St. Feb. 16, 1889, the President may authorize the Indians residing on reservations or allotments to cut and dispose of dead timber thereon. St. July 4, 1884, ch. 180, §§ 10, 11 (23 St. 98), provides: —

“SEC. 10. That no part of the expenses of the public lands service shall be deducted from the proceeds of Indian lands sold through the General Land Office, except as authorized by the treaty or agreement providing for the disposition of the lands.

“SEC. 11. That at any of the Indian reservations where there is now on hand Government property not required for the use and benefit of the Indians at said reservations the Secretary of the Interior is hereby authorized to move such property to other Indian reservations where it may be required, or to sell it and apply the proceeds of the same in the purchase of such articles as may be needed for the use of the Indians for whom said property was purchased; and he shall make report of his action hereunder to the next session of Congress thereafter.”

St. March 3, 1883, ch. 141 (22 St. 590), provides: —

“The proceeds of all pasturage and sales of timber, coal, or other product of any Indian reservation, except those of the five civilized tribes, and not the result of the labor of any member of such tribe, shall be covered into the Treasury for the benefit of such tribe under such regulations as the Secretary of the Interior shall prescribe; and the Secretary shall report his action in detail to Congress at its next session.”

SECTS. 2095–2097. — See note, § 3659.

SECT. 2095. — St. June 10, 1876, ch. 122 (19 St. 58), makes the Treasurer of the United States custodian of all stocks, bonds, or securities then held by the Secretary of the Interior, or thereafter purchased for the benefit of Indian tribes, and directs that subsequent purchases be made by him, leaving the Secretary of the Interior's powers and duties as to Indian affairs unaffected except as to the custody of such securities and the collection of interest thereon.

SECT. 2098. — “Incurred in Indian affairs” in the third line is substituted for “of the Indian Department” in the cited act.

SECT. 2100. — St. March 3, 1875, ch. 132, § 2 (18 St. 420), extends this section to cover supplies of any kind to be furnished to bands or portions of bands of Indians.

SECT. 2101. — This is founded upon a proviso in the cited provision, though differently expressed. 1 Com. D. 1007.

SECT. 2103. — St. April 29, 1874, ch. 135, § 1 (18 St. 35), forbids any one in United States employ or control to recognize, counsel, or aid any private contract with Indians not citizens of the United States, made prior to May 21, 1872, relative to Indian lands or demands against the United States, unless, when made, the contract was in writing, signed by the parties, fully known to them, has since been examined by the Secretary of the Interior and Indian Commissioner, these facts have been indorsed thereon by each of them, and



a copy thereof with any assignments recorded in the Indian Commissioner's office. Id., § 2, requires that statements severally personally sworn to by each person seeking support of such contract, be filed in the Commissioner's office and retained there as official papers, indorsed by the Secretary and Commissioner to this effect, showing (1) that the writing presented for record is original, was made and written when and for the purpose it purports; (2) the names of the real, original parties, and if negotiated by a representative on either side, the name and authority of such representative; (3) a detailed account of action had under the contract prior to filing and to be thereafter had, the time, place, real value of services or payment had in money, property, or credits to the date of filing; (4) whether the original contract has been submitted to any one connected with the Indian service, and if so, when, where, and to whom by name, or whether any such person was cognizant of the making, though not so submitted for approval. Id., § 3, empowers the Secretary or Indian Commissioner to require in writing any further facts or proofs necessary to determine the character of the agreement or assignment. Id., § 4, forbids any employé of the United States to recognize such contract, until the Secretary, upon the matters above provided for, considers it just, reasonable, not fraudulent or exorbitant, and the Secretary is required to enter on the original contract submitted to him his findings on these issues, reciting its submission according to this act. Id., § 5, requires the Secretary of the Interior to investigate all existing contracts within the purview of the act now on file anywhere within his control, and, with special notice to any interested, to subject them to the terms of this act: provided that the investigation of facts required by the act may be made by a commissioner appointed therefor by the President, the commissioner to report the facts to the Secretary of the Interior in writing.

An executory contract with individual Indians is null, but one with the tribe is subject to the approval of the President (6 A. G. Op. 49, 462), and a contract entered into after this act, though only a substitute for an earlier contract, is within this act if it has been acted upon and settled. 15 A. G. Op. 350. An Indian contract may be separable, and in such case approval of a separable part validates it *pro tanto* under this section. In other respects the approval must pursue the terms of the contract and not undertake to vary it, but relates to the date of the contract and validates it from that date. A contract for a fee not to exceed a rate per cent, is incapable of approval under par. 4. 15 A. G. Op. 585. The United States cannot regulate ordinary trade between citizens and Indians carried on off a reservation. *Hicks v. Ewhartollah*, 21 Ark. 106. This and the following sections apply only to contracts made in consideration of services to Indians, relative to their lands or claims on the United States, and oral authority of an Indian to receive and apply an annuity from the United States in discharge of an obligation not founded on such consideration is good. *Godfrey v. Scott*, 70 Ind. 259.

SECT. 2104. — See preceding note. As the approval of a contract under § 2103 operates by relation to the date of the contract, and has the same effect as if it had then been given, a claimant is not, under this section, confined to acts of service done subsequently to the day of approval, but may show acts done at any time after the date of the contract. 15 A. G. Op. 585.

SECT. 2105. — The last twenty words of the first sentence of this section are substituted for "subject to prosecution for misdemeanor in any court of the United States, and on conviction shall be fined not less than \$1000, and be imprisoned not less than six months" in the act cited in the margin. 1 Com. D. 1009.

SECT. 2106. — See note, § 2103.

SECT. 2107. — See note, § 2039. This section has no application to a claim for damages which the Board of Indian Commissioners is not authorized to settle. *Power v. United States*, 18 Ct. Cl. 263.



## CHAPTER III.

## GOVERNMENT AND PROTECTION OF INDIANS.

SECT. 2111. — The words "is liable to a penalty" in this section, and also in §§ 2112, 2113, 2116, 2117, 2118, 2133, 2134, 2135, 2141, 2148 are substituted for "shall forfeit and pay" in the act cited. 1 Com. D. 1012, 1015. The original act contained the words "residing within the United States or the territory thereof," after "who" in the first line of this section, which were omitted in the Revision. Id.

SECT. 2112. — The twenty-seven words following "letter" in the second line were here added at the revisers' suggestion. Id. 1013.

SECT. 2113. — The original act contained the words "residing or living among the Indians, or elsewhere within the territory of the United States" after "who" in the first line of this section, which were omitted in the Revision. Id.

SECT. 2114. — Sect. 1 of the cited act of 1830 was not repealed by the Revision; §§ 2, 3, 4, 5 of that act were repealed by St. March 3, 1839, § 2 (5 St. 328).

SECT. 2115. — 24 St. 388, 464, provides for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over Indians, &c. St. Feb. 8, 1887, ch. 119, § 7 (24 St. 390), provides: —

"SEC. 7. That in cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior be, and he is hereby, authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations; and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor."

SECT. 2116. — The first "or" in the seventh line is here added. 1 Com. D. 1015. It is the tribal right which is unassignable. Under a treaty vesting lands in Indians in severalty, but pending the actual severance, there may exist a tenancy in common not of the title but of the land by the Indians and the United States, which right of the Indians in the land is assignable. *Crews v. Burcham*, 1 Black, 352, explaining *Mann v. Wilson*, 23 How. 457. See *Pka-o-wah-ash-kum v. Sorin*, 8 F. R. 740. A lease of Indian tribal lands is not within this section. *United States v. Hunter*, 21 F. R. 615. Nor does this section apply to Indian lands held in severalty (*Quinney v. Denney*, 18 Wis. 485), but land held in severalty by an Indian minor is not alienable by his guardian (*Wiggin v. King*, 9 Pac. Rep. 140), and one who takes lands artificially improved by Indians, takes them with such appurtenances, and is not remitted to the natural condition of the land. *Lobdell v. Hall*, 3 Nev. 507. The United States courts cannot recognize a title to lands held under grants made to private individuals by Indian tribes or nations northwest of the Ohio River in 1773 and 1775. *Johanson v. M'Intosh*, 8 Wheat. 543.

St. July 4, 1884, ch. 180 (23 St. 96), provides: —

"That such Indians as may now be located on public lands, or as may, under the direction of the Secretary of the Interior, or otherwise, hereafter, so locate may avail themselves of the provisions of the homestead laws as fully and to the same extent as may now be done by citizens of the United States; and to aid such Indians in making selections of homesteads and the necessary proofs at the proper land offices, \$1000, or so much thereof as may be necessary, is hereby appropriated; but no fees or commissions shall be charged on account of said entries or proofs. All patents therefore shall be of the legal effect, and declare that the United States does and will hold the land thus entered for the period of twenty-five years, in trust for the sole use and benefit of the Indian by whom such entry shall have been



made, or, in case of his decease, of his widow and heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his widow and heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever."

SECT. 2117. — One who without consent of Indians drives cattle upon his own or government land near Indian lands, so that they may and naturally will go upon Indian lands, intending to have them, is within this section if his stock actually goes upon Indian lands, but not if it merely strays there. 16 A. G. Op. 569. A grazing lease is authorized by this section. *United States v. Hunter*, 4 Mackey, 531. "Cattle" in this section includes sheep. *United States v. Mattock*, 2 Sawyer, 148. The penalty prescribed may be recovered when cattle are driven and permitted to graze on the lands of any Indian or Indian tribe for a single day, no license having been obtained; and a person who is prohibited by natural obstructions from using a fixed and known trail across such lands, and makes a trail of his own from some point where he chose to enter them, without license, even to the nearest accessible point on the established trail, incurs the penalty. *United States v. Loving*, 34 F. R. 715. The words "drives or otherwise conveys" imply the active agency of some person in getting the cattle upon the reservation. 16 A. G. Op. 568.

SECT. 2118. — 14 A. G. Op. 568. This section applies only to lands of Indians in some state of pupilage, where the control of the United States over private rights in land has existed, and is not extinguished. *United States v. Joseph*, 94 U. S. 614. Going upon Indian land under a grazing lease and surveying and making boundaries thereunder is not within this section. *United States v. Hunter*, *supra*. An ordinary lease of such land is void. *Uhlig v. Garrison*, 2 Dak. 71. One who endeavors to oust an Indian from Indian lands is a trespasser, and an Indian having standing in court can maintain the action. *Fellows v. Blacksmith* (19 How. 366); or a State may remove the trespasser. *New York v. Dibble*, 21 How. 366. A State has no right to prescribe by law terms upon which persons may locate upon lands belonging to the Cherokee nation, because the whole intercourse between the United States and this nation is, by our Constitution and laws, vested in the government of the United States. *Worcester v. Georgia*, 6 Pet. 515. Lands allotted to the Cherokee Indians cannot be granted by a State. *Lattimer v. Poteet*, 14 Pet. 4. Lands reserved to Indians under a treaty, which vests in them the title, but which restricts them from conveying it without first obtaining the consent of the President of the United States, descend under the laws of the State, and are liable for the payment of debts. *Lowry v. Weaver*, 4 McLean, 82.

SECT. 2119. — The original act, which, after "shall" in the sixth line of this section, read "provide that such Indian shall be protected in the peaceful and quiet occupation and enjoyment of the lands so allotted to him," was changed to the present wording by the Revision. 1 Com. D. 1016.

SECT. 2120. — The words "if the Secretary of the Interior approves," in the twelfth line, are here substituted for the words "with the approval of the Secretary of the Interior," at the end of the cited provision. 1 Com. D. 1016.

SECT. 2121. — The original act contained the words (after "such" in the first line of this section) "dwelling-houses, churches, schoolhouses, workshops, and other," which were omitted in the Revision. 1 Com. D. 1016.

SECT. 2124. — Section 26 of St. June 30, 1834 (4 St. 735), was omitted from the Revision, as properly falling within the general provisions on Crimes. 1 Com. D. 1017.

SECT. 2124. — In an early case it was held that, while the imprisonment imposed under the original act must be imposed in criminal proceedings, money penalties must be enforced by action of debt (*Fowler v. United States*, 1 Wash. Ter. 525); and it is held that debt is the sole remedy for the violation of § 2148, in *United States v. Payne*, 22 F. R.



426; but *contra* in *United States v. Howard*, 9 Sawyer, 155; 17 F. R. 638, which holds that a penalty in the nature of a fine may be enforced by common-law methods, to which this section is at most cumulative.

## CHAPTER IV.

### GOVERNMENT OF INDIAN COUNTRY.

UPON the extinguishment of Indian rights the land ceases to be Indian country, and then a treaty or reservation is required to make it so. *Bates v. Clark*, 95 U. S. 204; *American Fur Co. v. United States*, 2 Pet. 358. Indian reservations, wherever situate, are Indian country. *United States v. Martin*, 14 F. R. 821,—a case which imports that there is no other. A reservation continues under reserve until the power to remove that character from it has been definitely exercised. *United States v. Payne*, 8 F. R. 883. Alaska is not Indian country (*United States v. Seveloff*, 2 Sawyer, 311, 318; *Kie v. United States*, 27 F. R. 351; *Waters v. Campbell*, 4 Sawyer, 121); but is within Indian Intercourse acts since 1873. 17 St. 350. *Re John A. Carr*, 3 Sawyer, 317. The act of 1873 made Alaska "Indian Country" only to the extent of the prohibited liquor traffic, and did not place the Alaska Indians on a general footing with other Indians in the United States. *Re Sah Quah*, 31 F. R. 327. Washington Territory is within the Indian Intercourse acts. *Fowler v. United States*, 1 Wash. Ter. 3. It rests with Congress to declare what is and what is not Indian country. *Kie v. United States*, *supra*; *United States v. Nelson*, 29 F. R. 202; *Pelcher v. United States*, 3 McCrary, 510; 43 Cases of Brandy, 4 Id. 616; *Cherokee Nation v. S. K. R. Co.*, 33 F. R. 900. St. March 1, 1889, establishes a United States court in the Indian Territory. See notes, §§ 2139, 2145.

SECT. 2127. — "Indian country" is substituted here, in § 2138, and in the second and third lines of § 2148, for "the Indian Territory" in the act cited. 1 Com. D. 1019.

St. March 3, 1883, ch. 141 (22 St. 590), provides that—

"the proceeds of all pasturage and sales of timber, coal, or other product of any Indian reservation, except those of the five civilized tribes, and not the result of the labor of any member of such tribe, shall be covered into the Treasury for the benefit of such tribe under such regulations as the Secretary of the Interior shall prescribe; and the Secretary shall report his action in detail to Congress at its next session."

SECT. 2128. — The revisers regarded § 5 of 4 St. 729 as superseded by the cited act of 1866 here incorporated. 1 Com. D. 1020. Without special grant of power from the United States, an Indian nation cannot tax Indian traders (1 A. G. Op. 645); nor can an Indian trader withdraw himself from the operation of a like provision of law by adoption into an Indian tribe. 2 A. G. Op. 402.

SECT. 2129. — St. Aug. 15, 1876, ch. 289, § 6 (see note, § 463), vests in the Indian Commissioner sole power to appoint Indian traders and regulate the kind, quantity and prices of goods to be sold to the Indians. Where the country occupied by any Indian tribe is within the territorial jurisdiction of the United States, but not within the limits of any State, Congress may, by law, punish any offence committed there, whether the offender is a white man or an Indian. *United States v. Rogers*, 4 How. 567. Under its power to regulate commerce with the Indians, Congress may prohibit all intercourse with them, except under a license from the general government; and this power does not necessarily cease on their being included within the limits of a State. Concurrent acts of the Federal and State governments are necessary to withdraw the Federal relation; but if no such acts are passed, and the Indians occupy a territory of very limited extent, surrounded by a white population, which must of necessity have daily intercourse with the Indians, and it becomes



impracticable to enforce the law, the Federal jurisdiction ceases. *United States v. Cisna*, 1 McLean, 254; *United States v. Holliday*, 3 Wall. 407. A trader at a military post in the Indian country cannot lawfully trade with the Indians unless he is licensed to do so. Military authorities are not authorized to grant such licenses. 16 A. G. Op. 403. A partner or agent of a licensed Indian trader, having a license to be upon the reservation, is not within the prohibition of this section. *Dunn v. Carter*, 30 Kansas, 294. This license is necessary only for trade carried on in Indian country. *United States v. Richard*, 1 Ariz. 31. The license is a personal, unassignable privilege. *United States v. Buffalo Robes*, 1 Mont. 489; *Gould v. Kendall*, 19 N. W. Rep. 483. A Territory cannot tax the stock in trade of a post trader on an Indian reservation, he being an agent of the Federal government in performing its treaty obligations with the Indians. *Fremont County v. Moore*, 19 Pac. Rep. 438.

SECT. 2131. — The superintendent has a discretion to revoke and cancel such licenses, the exercise of which the court will not review. *United States v. Sturgeon*, 6 Sawyer, 29.

SECT. 2132. — This section does not give the President authority to prohibit the introduction into Alaska of molasses, which is used there for manufacturing distilled spirits for sale among the natives, when in his judgment the public interest requires that he should do so. In this matter Alaska is not a country belonging to an Indian tribe. 16 A. G. Op. 141.

SECT. 2133. — St. July 31, 1882, ch. 360 (22 St. 179), excludes any but a full-blood Indian from Indian country as a trader, unless licensed, except among the Choctaws, Cherokees, Chickasaws, Creeks, or Seminoles belonging to the Union Agency in the Indian country, and prohibits the employment of a white person as clerk by an Indian trader, except among these enumerated Indians without a license from the Indian Commissioner. See note, § 2129. Scierter or intent is immaterial under this section. *United States v. Leathers*, 6 Sawyer, 17; *United States v. Sturgeon*, Id. 29. Nor can a trader relieve himself of a like provision by adoption into an Indian tribe. 2 A. G. Op. 402. Sect. 2133 does not extend to lands held by the United States for sale, not constituting an Indian reservation, although Indians reside thereon. *United States v. 48 Pounds of Tea*, 35 F. R. 403.

SECT. 2136. — Res. Aug. 5, 1876, No. 20 (19 St. 216), authorizes the President to prevent hostile Northwest Indians from having conveyed to them special metallic ammunition, and to declare the same contraband of war in such district as he may designate during hostilities.

SECT. 2138. — See note, § 2129. St. July 4, 1884, ch. 180 (23 St. 94), provides —

“That where Indians are in possession or control of cattle or their increase which have been purchased by the government such cattle shall not be sold to any person not a member of the tribe to which the owners of the cattle belong or to any citizen of the United States whether intermarried with the Indians or not except with the consent in writing of the agent of the tribe to which the owner or possessor of the cattle belongs. And all sales made in violation of this provision shall be void and the offending purchaser on conviction thereof shall be fined not less than \$500 and imprisoned not less than six months.”

SECT. 2139. — The original acts contained the words “appointed by the United States” after “agent,” in the fourth line; after “country,” in the last sentence, read, “if it be proved to be done by order of the War Department, or any officer duly authorized thereunto by the War Department;” and, in place of the last twenty-two words of the first sentence of this section, read, “on conviction thereof, before the proper district or circuit court of the United States, shall be imprisoned for a period not exceeding two years, and shall be fined not more than \$300.” 1 Com. D. 1022. 19 St. 240, ch. 69, strikes out the words “except an Indian in the Indian country” from lines two and three of this section. Alaska is in the Indian country so far as the laws regulating the sale of liquors are concerned. 14 A. G. Op. 327. All reservations west of the Mississippi River which are occupied by Indian tribes, and also all other districts which are so occupied, to which the



Indian title has not been extinguished, are Indian country, and remain (to a greater or less extent, as they lie within a State or Territory) subject to the provisions of this section. 16 A. G. Op. 290; *United States v. Le Bris*, 121 U. S. 278; *United States v. Martin*, 8 Sawyer, 473. Each member of the tribe is to be regarded as under the charge of the Indian agent having charge of the tribe. *United States v. Earl*, 9 Sawyer, 79. The War Department has discretionary power over the introduction of spirituous liquors or wines into Alaska, and may permit such articles to be taken there, whether they are or are not intended for the use of officers or troops in the service of the United States. 14 A. G. Op. 327, 401; 16 Id. 290.

The above act of 1884 (23 St. 94), further provides that —

“no part of Rev. Stats., §§ 2139, 2140, shall be a bar to the prosecution of any officer, soldier, sutler or storekeeper, attaché, or employee of the Army of the United States who shall barter, donate, or furnish in any manner whatsoever liquors, wines, beer, or any intoxicating beverage whatsoever to any Indian.”

SECT. 2140. — In the last line the words “and the preceding section” are here added. 1 Com. D. 1023.

SECT. 2141. — See note, § 2111. The words in the fifth line, “any distillery of ardent spirits,” are here substituted for “the same” in the act cited. Id.

The offence under § 2139 is not limited to acts done within the Indian country. *United States v. Holliday*, 3 Wall. 407; *United States v. 43 Gallons of Whiskey*, 93 U. S. 188; *United States v. Osborne*, 6 Sawyer, 406; *United States v. Earl*, 17 F. R. 78; *United States v. Flynn*, 1 Dillon, 451; *United States v. Tom*, 1 Oregon, 26; *United States v. Burdick*, 1 Dak. 142. St. March 30, 1802, described what was to be considered as the Indian country at that time, and also what it should be subsequently, as purchases might be made from time to time by the United States from the Indians. Carrying spirituous liquors into a Territory so purchased, even though it should be at the time exclusively inhabited by Indians, would not be an offence within the meaning of the provisions of the act so as to subject the goods of the trader, found in company with these liquors, to seizure and forfeiture. *American Fur Co. v. United States*, 2 Pet. 358. The United States Supreme Court follows the decision of the political departments of the government as to whether or not any particular class of Indians is still to be regarded as a tribe, or the tribal relation has ceased. *United States v. Holliday*, *supra*. A State has no power, either by constitutional or legislative enactment, to withdraw the Indians within its limits from the operation of the laws of Congress regulating trade with them; notwithstanding it may confer citizenship or the right of suffrage on such Indians. Id.; *United States v. Shaw-Mux*, *supra*. Sect. 2140 is constitutional. *United States v. 43 Gallons of Whiskey*, *supra*. An internal revenue license relieves from penalties imposed for want of one, and does not justify violations of law which do not depend on the want of one. S. C. 108 U. S. 491. Officers can only seize under § 2140 within Indian country, outside whereof such acts make them *tortfeasors*. *Bates v. Clark*, 95 U. S. 204. The scienter or intent is immaterial. *United States v. Osborne*, *United States v. Earl*, and *United States v. Flynn*, *supra*; *United States v. Leathers*, 6 Sawyer, 17. An Indian once in charge of the Indian bureau is within this section unless discharged by the United States. *United States v. Earl*, *supra*. Nor does notice that a superintendency is to be discontinued relieve an Indian from superintendence before the discontinuance is actual. *United States v. Wirt*, 3 Sawyer, 161. The bounds of a reservation are not controlled by monuments set by government officers without authority. *United States v. Leathers*, *supra*. An Indian, not within the exception, is liable under this section. *United States v. Shaw-Mux*, 2 Sawyer, 364. An order to ship, which is only an offer to buy, is not an attempt to commit the offence prohibited by § 2140. *United States v. Stephen*, 12 F. R. 53. The act herein prohibited may be a crime by local law as well, and so constitute two offences,



and be liable to two penalties. *Oregon v. Coleman*, 1 Oregon, 191. The team and harness by which the prohibited conveyance is effected are liable to seizure, but the justification of seizure must show that the conveyance was by white men or Indians. *Webb v. Nickerson*, 11 Oregon, 382. Spirits merely in transit through Indian country are not within § 2140. *United States v. Carr*, 2 Mont. 234.

SECT. 2142. — See note, § 2145. Alaska is not Indian country within this section. *United States v. Williams*, 2 F. R. 61. The words "punishable by" are substituted for "deemed guilty of a felony, and shall, on conviction, be punished by confinement and," in the act cited.

SECT. 2143. — See § 2145.

SECT. 2144. — After "States" the original act read, "punishing the crimes of forgery or of depredation," &c., as in the text, and was changed as here indicated in the Revision.

SECT. 2145. — St. March 3, 1885, ch. 341, § 9 (23 St. 385), provides —

"That immediately upon and after the date of the passage of this act all Indians, committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny within any Territory of the United States, and either within or without an Indian reservation, shall be subject therefor to the laws of such Territory relating to said crimes, and shall be tried therefor in the same courts and in the same manner and shall be subject to the same penalties as are all other persons charged with the commission of said crimes respectively; and the said courts are hereby given jurisdiction in all such cases; and all such Indians committing any of the above crimes against the person or property of another Indian or other person within the boundaries of any State of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States."

This statute is constitutional and exclusive of State jurisdiction. *United States v. Kagama*, 118 U. S. 375; *Ex parte Cross*, 30 N. W. Rep. 428. A white man adopted into an Indian tribe is not an "Indian." *United States v. Rogers*, 4 How. 567. By 24 St. 464, crimes against Indian police are to be tried in the United States district courts. By 24 St. 390, Indians selecting lands are to be preferred for police.

The following classes of cases may arise and not come within the statute of 1885: Cases not therein enumerated as criminal arising from acts of Indians on Indians upon a reservation. These involve no legal accountability. *United States v. Crow Dog*, 109 U. S. 556; *Nevada v. McKenney*, 182; *Ex parte Cross*, *supra*. But acts of Indians off a reservation are subject to local law and jurisdiction, except as the same are restricted by the statute. *United States v. Yellow Sun*, 1 Dillon, 271; *Re Wolf*, 27 F. R. 607, 610; *State v. Duxtater*, 47 Wis. 278, 298. Alaska not being Indian country, nor a State or Territory, probably is unaffected by the statute, and all persons there are subject to United States law and jurisdiction, the statutes of Oregon being used, in an auxiliary way only, to supply *lacunæ* in the United States statutes. *Kie v. United States*, 27 F. R. 351. Cases arising from acts of persons of another race, committed on a reservation are within United States law and jurisdiction, if committed upon Indians (*United States v. Bridleman*, 7 Sawyer, 243); or, if committed off a reservation upon Indians, are within local law and jurisdiction, and in some cases within United States law and jurisdiction also. *Oregon v. Coleman*, 1 Oregon, 191. But whether committed upon a reservation or not, if committed upon persons of another race than Indian, they are not within United States law and jurisdiction. *United States v. McBratney*, 104 U. S. 621; *United States v. Bailey*, 1 McLean, 234; *United States v. Ward*, 1 Woolw. 17; *Ex parte Sloan*, 4 Sawyer, 330; *United States v. Ward*, McCahon, 199; see, also, *State v. Duxtater*, 47 Wis. 278, 298, which, perhaps, lays down a broader State jurisdiction than now exists under the statute of 1885, as construed in *United States v. Kagama*, *supra*. Where a reservation within State limits becomes extremely reduced in extent, surrounded by dense population in



daily commercial intercourse upon it and with its inhabitants, and is substantially amalgamated with the surrounding region, no special United States jurisdiction or care of it having been exercised for a term of years, it ceases to be Indian country without direct legislation to that effect. *United States v. Cisna*, 1 McLean, 254. Indians cannot punish a crime committed by a negro on a negro on a reservation in the absence of special grant of power from Congress. 2 A. G. Op. 693. Upon an indictment of Indians for killing another Indian, in obedience to tribal regulations, it is not a defence that the defendants never had notice of the above act of 1885. *United States v. Whaley*, 37 F. R. 145.

St. March 2, 1887, ch. 320 (24 St. 464), provides —

“That immediately upon and after the passage of this act any Indians committing against the person of any Indian policeman appointed under the laws of the United States, or any Indian United States deputy marshal, while lawfully engaged in the execution of any United States process, or lawfully engaged in any other duty imposed upon such policeman or marshal by the laws of the United States, any of the following crimes, namely, murder, manslaughter, or assault with intent to kill, within the Indian Territory, shall be subject to the laws of the United States relating to such crimes, and shall be tried by the district court of the United States exercising criminal jurisdiction where said offence was committed, and shall be subject to the same penalties as are all other persons charged with the commission of said crimes, respectively; and the said courts are hereby given jurisdiction in all such cases.”

SECT. 2146. — Amended by St. 1875, ch. 80 (18 St. 318), by adding at the end of the first line: “crimes committed by one Indian against the person or property of another Indian, nor to.”

SECT. 2147. — This removal is discretionary with the officers, and not reviewable in court. *United States v. Sturgeon*, 6 Sawyer, 29. But *obiter*, because the court does examine and pass upon the sufficiency of the occasion for it. This section does not conflict with § 2149, nor is it limited by § 2137.

SECT. 2148. — See notes, §§ 2111, 2127. A return to Indian country after wrongful removal therefrom is within this section. *United States v. Sturgeon*, *supra*. The penalty is recoverable only by proceedings under § 2124. *United States v. Payne*, 22 F. R. 426. It is recoverable in criminal proceedings, and, if recoverable at all, by proceedings under § 2124. That remedy is only cumulative. *United States v. Howard*, 17 F. R. 638; 9 Sawyer, 155. The point was more directly in issue in this case than in *United States v. Payne*.

SECT. 2149. — In the third line “being” is here substituted for “found” in the original act, and in the fifth line “the judgment of the commissioner” for “his judgment.” Indians are within this section. *United States v. Crook*, 5 Dillon, 453, 465. The grounds of the removal are not reviewable in court. *United States v. Sturgeon*, 6 Sawyer, 29. This section, construed in connection with other acts, authorizes the President, on the requisition of the Commissioner of Indian Affairs, and the approval of the Secretary of the Interior, to direct the military force to co-operate with the proper Indian agent in removing intruders from tribal reservations. 12 A. G. Op. 51. Furnishing material contraband of war to hostile Indians brings the person within the articles of war, and he may be either tried by court-martial, or turned over to the civil authority for engaging in unlawful traffic. It is unlawful for any one to enter or be within a reservation from which he is excluded by Indian treaty. 13 A. G. Op. 470; 14 Id. 451. See note, § 2118.

SECT. 2150. — This section does not justify returning an Indian to his reservation by military force. *United States v. Crook*, 5 Dillon, 453, 467.

SECT. 2151. — The officer who makes the arrest cannot detain before removal for more than five days. He must either remove or discharge the prisoner or is liable as a *tort-feasor* for false imprisonment, but may rearrest. While in military custody the prisoner is a civil and not a military prisoner, and cannot be compelled to labor. The custodian is liable as a *tort-feasor* for so compelling him. *Re John A. Carr*, 3 Sawyer, 316; *Waters v. Campbell*, 5 Id. 17. St. July 4, 1884, ch. 180 (23 St. 94), appropriates —



"For the service of not exceeding 800 privates, at \$5 per month each, and not exceeding 100 officers, at \$8 per month each, of Indian police, to be employed in maintaining order and prohibiting illegal traffic in liquor on the several Indian reservations, and for the purchase of equipments and rations for policemen of non-ration agencies, \$72,000: *Provided*, That the agent of the Navajo Indians may employ ten Indian policemen, at a rate of compensation not exceeding \$15 per month each."

SECT. 2153. — St. June 4, 1888, ch. 342 (25 St. 167), provides —

"That after the passage of this act any United States marshal is hereby authorized and required, when necessary to execute any process connected with any criminal proceeding issued out of the circuit or district court of the United States for the district of which he is marshal, or by any commissioner of either of said courts, to enter the Indian Territory, and to execute the same therein in the same manner that he is now required by law to execute like processes in his own district."

St. June 9, 1888, ch. 382 (25 St. 178), provides —

"That any Indian hereafter committing against the person of any Indian agent or policeman appointed under the laws of the United States, or against any Indian United States deputy marshal, posse comitatus, or guard, while lawfully engaged in the execution of any United States process, or lawfully engaged in any other duty imposed upon such agent, policeman, deputy marshal, posse comitatus, or guard by the laws of the United States, any of the following crimes, namely, murder, manslaughter, or assault with intent to murder, assault, or assault and battery, or who shall in any manner obstruct by threats of violence any person who is engaged in the service of the United States in the discharge of any of his duties as agent, policeman, or other officer aforesaid, within the Indian Territory, or who shall hereafter commit either of the crimes aforesaid, in said Indian Territory, against any person who, at the time of the commission of said crime, or at any time previous thereto, belonged to either of the classes of officials hereinbefore named, shall be subject to the laws of the United States relating to such crimes, and shall be tried by the district court of the United States exercising criminal jurisdiction where such offence was committed, and shall be subject to the same penalties as are all other persons charged with the commission of said crimes, respectively; and the said courts are hereby given jurisdiction in all such cases."

SECTS. 2154, 2155. — These sections do not apply to wrongs done by negroes, so far as liability of the United States therefor is concerned. *United States v. Perryman*, 100 U. S. 235. St. Feb. 15, 1888, ch. 10 (25 St. 33), provides —

"That any person hereafter convicted in the United States courts having jurisdiction over the Indian Territory or parts thereof, of stealing any horse, mare, gelding, filly, foal, ass or mule, when said theft is committed in the Indian Territory, shall be punished by a fine of not more than \$1000, or by imprisonment not more than 15 years, or by both such fine and imprisonment, at the discretion of the court.

"SEC. 2. That any person hereafter convicted of any robbery or burglary in the Indian Territory shall be punished by a fine of not exceeding \$1000, or imprisonment not exceeding 15 years, or both, at the discretion of the court; *Provided*, That this act shall not be so construed as to apply to any offence committed by one Indian upon the person or property of another Indian, or so as to repeal any former act in relation to robbing the mails or robbing any person of property belonging to the United States: *And provided further*, That this act shall not affect or apply to any prosecution now pending, or the prosecution of any offence already committed.

"SEC. 3. That all acts and parts of acts inconsistent with this act are hereby repealed: *Provided*, *however*, That all such acts and parts of acts shall remain in force for the punishment of all persons who have heretofore been guilty of the crime of larceny in the Indian Territory."

SECT. 2156. — The cited provision of 1859 repealed § 17 of St. 1834, which gave indemnification to the injured person in the cases covered by this section, such repeal depriving this and the next sections of much of their practical importance. 1 Com. D. 1027. See note, § 2145.



## TITLE XXIX.

## IMMIGRATION.

St. June 23, 1874, ch. 464 (18 St. 251), provides —

"SEC. 1. That whoever shall knowingly and wilfully bring into the United States, or the Territories thereof, any person inveigled or forcibly kidnapped in any other country, with intent to hold such person so inveigled or kidnapped in confinement or to any involuntary service, and whoever shall knowingly and wilfully sell, or cause to be sold, into any condition of involuntarily servitude, any other person for any term whatever, and every person who shall knowingly and wilfully hold to involuntary service any person so sold and bought, shall be deemed guilty of a felony, and, on conviction thereof be imprisoned for a term not exceeding five years and pay a fine not exceeding \$5000.

"SEC. 2. That every person who shall be accessory to any of the felonies herein declared, either before or after the fact, shall be deemed guilty of a felony, and on conviction thereof be imprisoned for a term not exceeding five years and pay a fine not exceeding \$1000."

"*Inveigled*" here includes the enticing of a child in Italy to consent to his being brought to this country for the purpose of being here employed as a beggar or street-musician. *United States v. Aucarola*, 17 Blatch. 423.

St. March 3, 1875, ch. 141 (18 St. 477), provides, —

"SEC. 1. That in determining whether the immigration of any subject of China, Japan, or any Oriental country, to the United States, is free and voluntary, as provided by section two thousand one hundred and sixty-two of the Revised Code, title 'Immigration,' it shall be the duty of the consul-general or consul of the United States residing at the port from which it is proposed to convey such subjects, in any vessels enrolled or licensed in the United States, or any port within the same, before delivering to the masters of any such vessels the permit or certificate provided for in such section, to ascertain whether such immigrant has entered into a contract or agreement for a term of service within the United States, for lewd and immoral purposes; and if there be such contract or agreement, the said consul-general or consul shall not deliver the required permit or certificate.

"SEC. 2. That if any citizen of the United States, or other person amenable to the laws of the United States, shall take, or cause to be taken or transported, to or from the United States any subject of China, Japan, or any Oriental country, without their free and voluntary consent, for the purpose of holding them to a term of service, such citizen or other person shall be liable to be indicted therefor, and, on conviction of such offence, shall be punished by a fine not exceeding \$2000 and be imprisoned not exceeding one year; and all contracts and agreements for a term of service of such persons in the United States, whether made in advance or in pursuance of such illegal importation, and whether such importation shall have been in American or other vessels, are hereby declared void.

"SEC. 3. That the importation into the United States of women for the purposes of prostitution is hereby forbidden; and all contracts and agreements in relation thereto, made in advance or in pursuance of such illegal importation and purposes, are hereby declared void; and whoever shall knowingly and wilfully import, or cause any importation of, women into the United States for the purposes of prostitution, or shall knowingly or wilfully hold, or attempt to hold, any woman to such purposes, in pursuance of such illegal importation and contract or agreement, shall be deemed guilty of a felony, and, on conviction thereof, shall be imprisoned not exceeding five years and pay a fine not exceeding \$5000.

"SEC. 4. That if any person shall knowingly and wilfully contract, or attempt to contract, in advance or in pursuance of such illegal importation, to supply to another the labor of any cooly or other person brought into the United States in violation of § 2158 of the Revised Statutes, or of any other section of the laws prohibiting the cooly-trade or of this act, such person shall be deemed guilty of a felony, and, upon conviction thereof, in any United States court, shall be fined in a sum not exceeding \$500 and imprisoned for a term not exceeding one year.

"SEC. 5. That it shall be unlawful for aliens of the following classes to immigrate into the United States, namely, persons who are undergoing a sentence for conviction in their own country of felonious



crimes other than political or growing out of or the result of such political offences, or whose sentence has been remitted on condition of their emigration, and women 'imported for the purpose of prostitution.' Every vessel arriving in the United States may be inspected under the direction of the collector of the port at which it arrives, if he shall have reason to believe that any such obnoxious persons are on board; and the officer making such inspection shall certify the result thereof to the master or other person in charge of such vessel, designating in such certificate the person or persons, if any there be, ascertained by him to be of either of the classes whose importation is hereby forbidden. When such inspection is required by the collector as aforesaid, it shall be unlawful, without his permission, for any alien to leave any such vessel arriving in the United States from a foreign country until the inspection shall have been had and the result certified as herein provided; and at no time thereafter shall any alien certified to by the inspecting officer as being of either of the classes whose immigration is forbidden by this section, be allowed to land in the United States, except in obedience to a judicial process issued pursuant to law. If any person shall feel aggrieved by the certificate of such inspecting officer stating him or her to be within either of the classes whose immigration is forbidden by this section, and shall apply for release or other remedy to any proper court or judge, then it shall be the duty of the collector at said port of entry to detain said vessel until a hearing and determination of the matter are had, to the end that if the said inspector shall be found to be in accordance with this section and sustained, the obnoxious person or persons shall be returned on board of said vessel, and shall not thereafter be permitted to land, unless the master, owner, or consignee of the vessel shall give bond and security, to be approved by the court or judge hearing the cause, in the sum of five hundred dollars for each such person permitted to land, conditioned for the return of such person, within six months from the date thereof, to the country whence his or her emigration shall have taken place, or unless the vessel bringing such obnoxious person or persons shall be forfeited, in which event the proceeds of such forfeiture shall be paid over to the collector of the port of arrival, and applied by him, as far as necessary, to the return of such person or persons to his or her own country within the said period of six months. And for all violations of this act, the vessel, by the acts, omissions, or connivance of the owners, master, or other custodian, or the consignees of which the same are committed, shall be liable to forfeiture, and may be proceeded against as in cases of frauds against the revenue laws, for which forfeiture is prescribed by existing law."

Sect. 3 of this act forbids importation for prostitution from any country. *United States v. Johnson*, 19 Blatch. 257; 7 F. R. 453; *Ex parte Fook*, 49 Cal. 402.

St. May 6, 1882, ch. 126 (22 St. 58), as amended by St. July 5, 1884, ch. 220 (23 St. 115), which latter act amends §§ 1, 2, 3, 4, 6, 8, 10, 11, 12, 13, 15 of the act of 1882 to read as here printed, and adds §§ 16, 17, the other sections remaining as originally enacted, provides as follows,—

"Whereas in the opinion of the Government of the United States the coming of Chinese laborers to this country endangers the good order of certain localities within the territory thereof; Therefore

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That from and after the passage of this act, and until the expiration of ten years next after the passage of this act, the coming of Chinese laborers to the United States be, and the same is hereby, suspended, and during such suspension it shall not be lawful for any Chinese laborer to come from any foreign port or place, or having so come to remain within the United States.

"SEC. 2. That the master of any vessel who shall knowingly bring within the United States on such vessel, and land, or attempt to land, or permit to be landed any Chinese laborer, from any foreign port or place, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine of not more than \$500 for each and every such Chinese laborer so brought, and may also be imprisoned for a term not exceeding one year.

"SEC. 3. That the two foregoing sections shall not apply to Chinese laborers who were in the United States on November 17, 1880, or who shall have come into the same before the expiration of ninety days next after the passage of the act to which this act is amendatory, nor shall said sections apply to Chinese laborers, who shall produce to such master before going on board such vessel, and shall produce to the collector of the port in the United States at which such vessel shall arrive, the evidence hereinafter in this act required of his being one of the laborers in this section mentioned; nor shall the two foregoing sections apply to the case of any master whose vessel, being bound to a port not within the United States, shall come within the jurisdiction of the United States by reason of being in distress or in stress of weather, or touching at any port of the United States on its voyage to any foreign port or place: *Provided*: That all Chinese laborers brought on such vessel shall not be permitted to land except in case of absolute necessity, and must depart with the vessel on leaving port.



"SEC. 4. That for the purpose of properly identifying Chinese laborers who were in the United States on November 17, 1880, or who shall have come into the same before the expiration of 90 days next after the passage of the act to which this act is amendatory, and in order to furnish them with the proper evidence of their right to go from and come to the United States as provided by the said act and the treaty between the United States and China dated November 17, 1880, the collector of customs of the district from which any such Chinese laborer shall depart from the United States shall, in person or by deputy, go on board each vessel having on board any such Chinese laborer, and cleared or about to sail from his district for a foreign port, and on such vessel make a list of all such Chinese laborers, which shall be entered in registry-books, to be kept for that purpose in which shall be stated the individual, family, and tribal name in full, the age, occupation, when and where followed, last place of residence, physical marks or peculiarities, and all facts necessary for the identification of each of such Chinese laborers, which books shall be safely kept in the custom-house; and every such Chinese laborer so departing from the United States shall be entitled to and shall receive, free of any charge or cost upon application therefor, from the collector or his deputy, in the name of said collector and attested by said collector's seal of office, at the time such list is taken, a certificate, signed by the collector or his deputy and attested by his seal of office, in such form as the Secretary of the Treasury shall prescribe, which certificate shall contain a statement of the individual, family, and tribal name in full, age, occupation, when and where followed, of the Chinese laborer to whom the certificate is issued, corresponding with the said list and registry in all particulars. In case any Chinese laborer, after having received such certificate, shall leave such vessel before her departure, he shall deliver his certificate to the master of the vessel; and if such Chinese laborer shall fail to return to such vessel before her departure from port, the certificate shall be delivered by the master to the collector of customs for cancellation. The certificate herein provided for shall entitle the Chinese laborer to whom the same is issued to return to and re-enter the United States upon producing and delivering the same to the collector of customs of the district at which such Chinese laborer shall seek to re-enter, and said certificate shall be the only evidence permissible to establish his right of re-entry; and upon delivering of such certificate by such Chinese laborer to the collector of customs at the time of re-entry in the United States, said collector shall cause the same to be filed in the custom-house and duly cancelled.

"SEC. 5. That any Chinese laborer mentioned in section four of this act being in the United States, and desiring to depart from the United States by land, shall have the right to demand and receive, free of charge or cost, a certificate of identification similar to that provided for in section four of this act to be issued to such Chinese laborers as may desire to leave the United States by water; and it is hereby made the duty of the collector of customs of the district next adjoining the foreign country to which said Chinese laborer desires to go to issue such certificate, free of charge or cost, upon application by such Chinese laborer, and to enter the same upon registry-books to be kept by him for the purpose, as provided for in section four of this act.

"SEC. 6. That in order to the faithful execution of the provisions of this act, every Chinese person, other than a laborer, who may be entitled by said treaty or this act to come within the United States, and who shall be about to come to the United States, shall obtain the permission of and be identified as so entitled by the Chinese Government, or of such other foreign Government of which at the time such Chinese person shall be a subject, in each case to be evidenced by a certificate issued by such Government, which certificate shall be in the English language, and shall show such permission, with the name of the permitted person in his or her proper signature, and which certificate shall state the individual, family, and tribal name in full, title or official rank, if any, the age, height, and all physical peculiarities, former and present occupation or profession, when and where and how long pursued, and place of residence of the person to whom the certificate is issued, and that such person is entitled by this act to come within the United States. If the person so applying for a certificate shall be a merchant, said certificate shall, in addition to above requirements, state the nature, character, and estimated value of the business carried on by him prior to and at the time of his application as aforesaid: *Provided*, That nothing in this act nor in said treaty shall be construed as embracing within the meaning of the word 'merchant,' hucksters, peddlers, or those engaged in taking, drying, or otherwise preserving shell or other fish for home consumption or exportation. If the certificate be sought for the purpose of travel for curiosity, it shall also state whether the applicant intends to pass through or travel within the United States, together with his financial standing in the country from which such certificate is desired. The certificate provided for in this act, and the identity of the person named therein shall, before such person goes on board any vessel to proceed to the United States, be vided by the indorsement of the diplomatic representatives of the United States in the foreign country from which said certificate issues, or of the consular representative of the United States at the port or place from which the person named in the certificate is about to depart; and such diplomatic representative or consular representative whose indorsement is so required is hereby empowered, and it shall be his duty, before indorsing such certificate as aforesaid, to examine into the



truth of the statements set forth in said certificate, and if he shall find upon examination that said or any of the statements therein contained are untrue, it shall be his duty to refuse to indorse the same. Such certificate vised as aforesaid shall be prima facie evidence of the facts set forth therein, and shall be produced to the collector of customs of the port in the district in the United States at which the person named therein shall arrive, and afterward produced to the proper authorities of the United States whenever lawfully demanded, and shall be the sole evidence permissible on the part of the person so producing the same to establish a right of entry into the United States; but said certificate may be controverted and the facts therein stated disproved by the United States authorities.

"SEC. 7. That any person who shall knowingly and falsely alter or substitute any name for the name written in such certificate or forge any such certificate, or knowingly utter any forged or fraudulent certificate, or falsely personate any person named in any such certificate, shall be deemed guilty of a misdemeanor; and upon conviction thereof shall be fined in a sum not exceeding \$1000, and imprisoned in a penitentiary for a term of not more than five years.

"SEC. 8. That the master of any vessel arriving in the United States from any foreign port or place shall, at the same time he delivers a manifest of the cargo, and if there be no cargo, then at the time of making a report of the entry of the vessel pursuant to law, in addition to the other matter required to be reported, and before landing, or permitting to land, any Chinese passengers, deliver and report to the collector of customs of the district in which such vessels shall have arrived a separate list of all Chinese passengers taken on board his vessel at any foreign port or place, and all such passengers on board the vessel at that time. Such list shall show the names of such passengers (and if accredited officers of the Chinese or of any other foreign Government, travelling on the business of that Government, or their servants, with a note of such facts), and the names and other particulars as shown by their respective certificates; and such list shall be sworn to by the master in the manner required by law in relation to the manifest of the cargo. Any refusal or wilful neglect of any such master to comply with the provisions of this section shall incur the same penalties and forfeiture as are provided for a refusal or neglect to report and deliver a manifest of the cargo.

"SEC. 9. That before any Chinese passengers are landed from any such vessel, the collector, or his deputy, shall proceed to examine such passengers, comparing the certificates with the list and with the passengers; and no passenger shall be allowed to land in the United States from such vessel in violation of law.

"SEC. 10. That every vessel whose master shall knowingly violate any of the provisions of this act shall be deemed forfeited to the United States, and shall be liable to seizure and condemnation in any district of the United States into which such vessel may enter or in which she may be found.

"SEC. 11. That any person who shall knowingly bring into or cause to be brought into the United States by land, or who shall aid or abet the same, or aid or abet the landing in the United States from any vessel, of any Chinese person not lawfully entitled to enter the United States, shall be guilty of a misdemeanor, and shall on conviction thereof, be fined in a sum not exceeding \$1000, and imprisoned for a term not exceeding one year.

"SEC. 12. That no Chinese person shall be permitted to enter the United States by land without producing to the proper officer of customs the certificate in this act required of Chinese persons seeking to land from a vessel. And any Chinese person found unlawfully within the United States shall be caused to be removed therefrom to the country from whence he came, and at the cost of the United States, after being brought before some justice, judge, or commissioner of a court of the United States and found to be one not lawfully entitled to be or to remain in the United States; and in all such cases the person who brought or aided in bringing such person to the United States shall be liable to the Government of the United States for all necessary expenses incurred in such investigation and removal; and all peace officers of the several States and Territories of the United States are hereby invested with the same authority as a marshal or United States marshal in reference to carrying out the provisions of this act or the act of which this is amendatory, as a marshal or deputy marshal of the United States, and shall be entitled to like compensation to be audited and paid by the same officers. And the United States shall pay all costs and charges for the maintenance and return of any Chinese person having the certificate prescribed by law as entitling such Chinese person to come into the United States who may not have been permitted to land from any vessel by reason of any of the provisions of this act.

"SEC. 13. That this act shall not apply to diplomatic and other officers of the Chinese or other Governments travelling upon the business of that Government, whose credentials shall be taken as equivalent to the certificate in this act mentioned, and shall exempt them and their body and household servants from the provisions of this act as to other Chinese persons.

"SEC. 14. That hereafter no State court or court of the United States shall admit Chinese to citizenship; and all laws in conflict with this act are hereby repealed.

"SEC. 15. That the provisions of this act shall apply to all subjects of China and Chinese, whether



subjects of China or any other foreign power; and the words Chinese laborers, wherever used in this act shall be construed to mean both skilled and unskilled laborers and Chinese employed in mining.

"SEC. 16. That any violation of any of the provisions of this act, or of the act of which this is amendatory, the punishment of which is not otherwise herein provided for, shall be deemed a misdemeanor, and shall be punishable by fine not exceeding one thousand dollars, or by imprisonment for not more than one year, or both such fine and imprisonment.

"SEC. 17. That nothing contained in this act shall be construed to affect any prosecution or other proceeding criminal or civil, begun under the act of which this is amendatory; but such prosecution or other proceeding, criminal or civil, shall proceed as if this act had not been passed."

The act of May 6, 1882, not stating when it took effect, went into operation immediately upon its approval by the President. *Re Leong Yick Dew*, 10 Sawyer, 38; 19 F. R. 490.

A Chinaman who is refused the right to land from a ship is entitled to a writ of *habeas corpus* as of common right, but not to a jury-trial; the vessel that brought him cannot be detained pending the proceedings, if found not entitled to land; the marshal holds him in custody until opportunity offers to send him away, and he is not entitled to be admitted to bail. *United States v. Jung Ah Lung*, 124 U. S. 521; 25 F. R. 141; *Re Chow Goo Pooi*, 9 Sawyer, 606; 25 F. R. 77; *Re Ah Kee*, 10 Sawyer, 336; *Re Ah Moy*, Id. 387; *Re Ching Ah Sooeey*, Id. 277; 21 F. R. 393, 701, 785, 808. The court is not bound by the collector's decision as to the legality of his detention (Id.); nor is its jurisdiction affected by the fact that the treaty with China provides for diplomatic action in cases of hardship. *United States v. Jung Ah Lung*, *supra*.

Those who bring Chinese persons here contrary to law are bound to remove them beyond the jurisdiction of the United States, even after the departure of the vessel on which they are brought or a change in its officers or management. *Re Ah Kee*, *supra*. The purpose of the statutes was to exclude laborers of the Chinese race coming from any other part of the world, including those born on the island of Hong-Kong after its cession to Great Britain. *Re Ah Lung*, 9 Sawyer, 306; 18 F. R. 28; disapproving *United States v. Douglas*, 17 F. R. 634. They do not apply to United States citizens, though of Chinese parentage (*Re Look Tin Sing*, 10 Sawyer, 353; 21 F. R. 905); or to Chinese residents who were here before the acts took effect, whose liberty cannot be restrained by class legislation. *Re Quong Woo*, 13 F. R. 229; *Re Ah Chong*, 2 Id. 733; *Re Wong Yung Quy*, Id. 624; see note, § 1977.

"Laborer," as used in these acts, and in the treaty with China of 1880, applies to those who toil physically and work for wages, and does not include a Chinese theatrical performer. *Re Ho King*, *supra*. A Chinese woman, though not a laborer before her marriage, becomes classed as such when she marries a Chinese laborer. *Re Ah Moy*, *supra*.

Under § 3 of the above act, a vessel "touches" at a United States port when she calls there for orders or a cargo for a foreign port. *Re Moncan*, *supra*.

A Chinese laborer who left this country with knowledge of the statute, after it went into effect, cannot return without the certificate, although he did not then intend to return. *Re Tong Ah Chee*, 23 F. R. 441; 18 Id. 527; 9 Sawyer, 346; *Re Leong Yick Dew*, *supra*; *Re Ah Quan*, *supra*; *Re Shong Toon*, 10 Sawyer, 268; 21 F. R. 386.

The provision of St. 1884 that the "certificate shall be the only evidence permissible to establish" the right of re-entry, applies to certificates issued under St. 1882 as well as St. 1884, and a tag authorizing the issue of a certificate at the custom-house is insufficient (*Re Ah Kee*, 10 Sawyer, 336; *Re Kew Ock*, Id. 351; 21 F. R. 701, 789); nor, in the absence of the certificate, can evidence of previous residence here be received. *Re Leong Yick Dew*, *supra*. The act of 1884 is not retroactive. *United States v. Jung Ah Lung*, 124 U. S. 621; 25 F. R. 141.

The prescribed certificate is not required from a laborer who, being already resident here at the date of the treaty of Nov. 17, 1880, left the United States by sea before May 6,



1882, and remained absent until after July 5, 1884, such previous residence being provable by any competent evidence (*Chew Heong v. United States*, 112 U. S. 536; 10 Sawyer, 361; 21 F. R. 791; *Re Ching Ah On*, 9 Sawyer, 343; 18 F. R. 506; *Re Leong Yick Dew*, *supra*; *Re Ah Quan*, 10 Sawyer, 222; 21 F. R. 182; *Re Tung Yeong*, 9 Sawyer, 620; 19 F. R. 184; *Re Ho King*, 8 Sawyer, 439; 14 F. R. 724); or from a Chinese sailor who temporarily lands seeking to ship on an outward voyage (*Re Ah Kee*, 22 Blatch. 520; 22 F. R. 519; *cf. Re Fook*, 65 How. Pr. 404); or whose vessel stops at a port in the course of a foreign voyage, but who does not himself land (*Re Moncan*, 8 Sawyer, 350; 14 F. R. 44); or from a Chinese merchant residing out of China, who temporarily went abroad before the passage of St. 1882 and returned after its passage (*Re Ah Ping*, 11 Sawyer, 17; 23 F. R. 329; *Re Low Yam Chow*, 7 Sawyer, 546; 13 F. R. 605); or from any person who comes on a vessel on which he is employed, but who did not embark thereon at a foreign port, at which such vessel touches (*Re Ah Sing*, 7 Sawyer, 536; *Re Ah Tie*, Id. 542; 13 F. R. 286, 291); or from children too young to be classed as laborers, and sent for by their parents, who reside here. *Re Jung Yeong*, *supra*. The wife or minor children of a Chinese laborer cannot enter upon the certificate authorizing his entry unless the required facts are certified as to the wife and each child. *Re Ah Moy*, *supra*; *Re Ah Quan*, *supra*.

St. Sept. 13, 1888, ch. 1015 (25 St. 476), entitled "An act to prohibit the coming of Chinese laborers to the United States," provides —

"That from and after the date of the exchange of ratifications of the pending treaty between the United States of America and His Imperial Majesty the Emperor of China, signed on March 20, 1888, it shall be unlawful for any Chinese person, whether a subject of China or of any other power, to enter the United States, except as hereinafter provided.

"SEC. 2. That Chinese officials, teachers, students, merchants, or travellers for pleasure or curiosity, shall be permitted to enter the United States, but in order to entitle themselves to do so, they shall first obtain the permission of the Chinese Government, or other Government of which they may at the time be citizens or subjects. Such permission and also their personal identity shall in such case be evidenced by a certificate to be made out by the diplomatic representative of the United States in the country, or of the consular representative of the United States at the port or place from which the person named therein comes. The certificate shall contain a full description of such person, of his age, height, and general physical features, and shall state his former and present occupation or profession and place of residence, and shall be made out in duplicate. One copy shall be delivered open to the person named and described, and the other copy shall be sealed up and delivered by the diplomatic or consular officer as aforesaid to the captain of the vessel on which the person named in the certificate sets sail for the United States, together with the sealed certificate, which shall be addressed to the collector of customs at the port where such person is to land. There shall be delivered to the aforesaid captain a letter from the consular officer addressed to the collector of customs aforesaid, and stating that said consular officer has on a certain day delivered to the said captain a certificate of the right of the person named therein to enter the United States as a Chinese official, or other exempted person, as the case may be. And any captain who lands or attempts to land a Chinese person in the United States, without having in his possession a sealed certificate, as required in this section, shall be liable to the penalties prescribed in section nine of this act.

"SEC. 3. That the provisions of this act shall apply to all persons of the Chinese race, whether subjects of China or other foreign power, excepting Chinese diplomatic or consular officers and their attendants; and the words 'Chinese laborers,' whenever used in this act, shall be construed to mean both skilled and unskilled laborers and Chinese employed in mining.

"SEC. 4. That the master of any vessel arriving in the United States from any foreign port or place with any Chinese passengers on board shall, when he delivers his manifest of cargo, and if there be no cargo, when he makes legal entry of his vessel, and before landing or permitting to land any Chinese person (unless a diplomatic or consular officer, or attendant of such officer), deliver to the collector of customs of the district in which the vessel shall have arrived the sealed certificates and letters as aforesaid, and a separate list of all Chinese persons taken on board of his vessel at any foreign port or place, and of all such persons on board at the time of arrival as aforesaid. Such list shall show the names of such persons and other particulars as shown by their open certificates, or other evidences required by this act, and such list shall be sworn to by the master in the manner required by law in relation to the manifest of the cargo.



"The master of any vessel as aforesaid shall not permit any Chinese diplomatic or consular officer or attendant of such officer to land without having first been informed by the collector of customs of the official character of such officer or attendant. Any refusal or wilful neglect of the master of any vessel to comply with the provisions of this section shall incur the same penalties and forfeitures as are provided for a refusal or neglect to report and deliver a manifest of the cargo.

"SEC. 5. That from and after the passage of this act, no Chinese laborer in the United States shall be permitted, after having left, to return thereto, except under the conditions stated in the following sections.

"SEC. 6. That no Chinese laborer within the purview of the preceding section shall be permitted to return to the United States unless he has a lawful wife, child, or parent in the United States, or property therein of the value of \$1000, or debts of like amount due him and pending settlement. The marriage to such wife must have taken place at least a year prior to the application of the laborer for a permit to return to the United States, and must have been followed by the continuous cohabitation of the parties as man and wife.

"If the right to return be claimed on the ground of property or of debts, it must appear that the property is bona fide and not colorably acquired for the purpose of evading this act, or that the debts are unascertained and unsettled, and not promissory notes or other similar acknowledgments of ascertained liability.

"SEC. 7. That a Chinese person claiming the right to be permitted to leave the United States and return thereto on any of the grounds stated in the foregoing section, shall apply to the collector of customs of the district from which he wishes to depart at least a month prior to the time of his departure, and shall make on oath before the said collector a full statement descriptive of his family, or property, or debts, as the case may be, and shall furnish to said collector such proofs of the facts entitling him to return as shall be required by the rules and regulations prescribed from time to time by the Secretary of the Treasury, and for any false swearing in relation thereto he shall incur the penalties of perjury. He shall also permit the collector to take a full description of his person, which description the collector shall retain and mark with a number. And if the collector, after hearing the proofs and investigating all the circumstances of the case, shall decide to issue a certificate of return, he shall at such time and place as he may designate, sign and give to the person applying a certificate containing the number of the description last aforesaid, which shall be the sole evidence given to such person of his right to return. If this last named certificate be transferred, it shall become void, and the person to whom it was given shall forfeit his right to return to the United States. The right to return under the said certificate shall be limited to one year; but it may be extended for an additional period, not to exceed a year, in cases where, by reason of sickness or other cause of disability beyond his control, the holder thereof shall be rendered unable sooner to return, which facts shall be fully reported to and investigated by the consular representative of the United States at the port or place from which such laborer departs for the United States, and certified by such representative of the United States to the satisfaction of the collector of customs at the port where such Chinese person shall seek to land in the United States, such certificate to be delivered by said representative to the master of the vessel on which he departs for the United States. And no Chinese laborer shall be permitted to re-enter the United States without producing to the proper officer of the customs at the port of such entry the return certificate herein required. A Chinese laborer possessing a certificate under this section shall be admitted to the United States only at the port from which he departed therefrom, and no Chinese person, except Chinese diplomatic or consular officers, and their attendants, shall be permitted to enter the United States except at the ports of San Francisco, Portland, Oregon, Boston, New York, New Orleans, Port Townsend, or such other ports as may be designated by the Secretary of the Treasury.

"SEC. 8. That the Secretary of the Treasury shall be, and he hereby is, authorized and empowered to make and prescribe, and from time to time to change and amend such rules and regulations, not in conflict with this act, as he may deem necessary and proper to conveniently secure to such Chinese persons as are provided for in articles second and third of the said treaty between the United States and the Empire of China, the rights therein mentioned, and such as shall also protect the United States against the coming and transit of persons not entitled to the benefit of the provisions of said articles. And he is hereby further authorized and empowered to prescribe the form and substance of certificates to be issued to Chinese laborers under and in pursuance of the provisions of said articles, and prescribe the form of the record of such certificate and of the proceedings for issuing the same, and he may require the deposit, as a part of such record, of the photograph of the party to whom any such certificate shall be issued.

"SEC. 9. That the master of any vessel who shall knowingly bring within the United States on such vessel, and land, or attempt to land, or permit to be landed any Chinese laborer or other Chinese person, in contravention of the provisions of this act, shall be deemed guilty of a misdemeanor and, on conviction thereof, shall be punished with a fine of not less than \$500 nor more than \$1000, in the discretion of the



court, for every Chinese laborer or other Chinese person so brought, and may also be imprisoned for a term of not less than one year, nor more than five years, in the discretion of the court.

"SEC. 10. That the foregoing section shall not apply to the case of any master whose vessel shall come within the jurisdiction of the United States in distress or under stress of weather, or touching at any port of the United States on its voyage to any foreign port or place. But Chinese laborers or persons on such vessel shall not be permitted to land, except in case of necessity, and must depart with the vessel on leaving port.

"SEC. 11. That any person who shall knowingly and falsely alter or substitute any name for the name written in any certificate herein required, or forge such certificate, or knowingly utter any forged or fraudulent certificate, or falsely personate any person named in any such certificate, and any person other than the one to whom a certificate was issued who shall falsely present any such certificate, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not exceeding \$1000, and imprisoned in a penitentiary for a term of not more than five years.

"SEC. 12. That before any Chinese passengers are landed from any such vessel, the collector, or his deputy, shall proceed to examine such passengers, comparing the certificates with the list and with the passengers; and no passenger shall be allowed to land in the United States from such vessel in violation of law; and the collector shall in person decide all questions in dispute with regard to the right of any Chinese passenger to enter the United States, and his decision shall be subject to review by the Secretary of the Treasury, and not otherwise.

"SEC. 13. That any Chinese person, or person of Chinese descent, found unlawfully in the United States, or its Territories, may be arrested upon a warrant issued upon a complaint, under oath, filed by any party on behalf of the United States, by any justice, judge, or commissioner of any United States court, returnable before any justice, judge, or commissioner of a United States court, or before any United States court, and when convicted, upon a hearing, and found and adjudged to be one not lawfully entitled to be or remain in the United States, such person shall be removed from the United States to the country whence he came. But any such Chinese person convicted before a commissioner of a United States court may, within ten days from such conviction, appeal to the judge of the district court for the district. A certified copy of the judgment shall be the process upon which said removal shall be made, and it may be executed by the marshal of the district, or any officer having authority of a marshal under the provisions of this section. And in all such cases the person who brought or aided in bringing such person into the United States shall be liable to the Government of the United States for all necessary expenses incurred in such investigation and removal; and all peace officers of the several States and Territories of the United States are hereby invested with the same authority in reference to the carrying out the provisions of this act, as a marshal or deputy marshal of the United States, and shall be entitled to like compensation, to be audited and paid by the same officers.

"SEC. 14. That the preceding sections shall not apply to Chinese diplomatic or consular officers or their attendants, who shall be admitted to the United States under special instructions of the Treasury Department, without production of other evidence than that of personal identity.

"SEC. 15. That the act entitled 'An act to execute certain treaty stipulations relating to Chinese,' approved May 6, 1882, and an act to amend said act approved July 5, 1884, are hereby repealed to take effect upon the ratification of the pending treaty as provided in section one of this act."

St. Oct. 1, 1888, ch. 1064 (25 St. 504), entitled "An act a supplement to an act entitled An act to execute certain treaty stipulations relating to Chinese," approved May 6, 1882, provides —

"That from and after the passage of this act, it shall be unlawful for any Chinese laborer who shall at any time heretofore have been, or who may now or hereafter be, a resident within the United States, and who shall have departed, or shall depart, therefrom, and shall not have returned before the passage of this act, to return to, or remain in, the United States.

"SEC. 2. That no certificates of identity provided for in the fourth and fifth sections of the act to which this is a supplement shall hereafter be issued; and every certificate heretofore issued in pursuance thereof, is hereby declared void and of no effect, and the Chinese laborer claiming admission by virtue thereof shall not be permitted to enter the United States.

"SEC. 3. That all the duties prescribed, liabilities, penalties, and forfeitures imposed, and the powers conferred by the second, tenth, eleventh, and twelfth, sections of the act to which this is a supplement are hereby extended and made applicable to the provisions of this act.

"SEC. 4. That all such part or parts of the act to which this is a supplement as are inconsistent herewith are hereby repealed."



Neither the above exclusion act nor the restriction acts of 1882 and 1884 exclude from citizenship persons born in the United States of Chinese parents. *Re Wy Shing*, 36 F. R. 553; *Ex parte Chin King*, 35 Id. 354; *Re Young Sing Hee*, 36 Id. 437. The act of Oct. 1, 1888, is constitutional; it took effect from its passage, and applies to all Chinese laborers who had departed from the country, and had not in fact returned before its passage. *Re Chae Chan Ping*, 36 F. R. 431.

A Chinese subject who ships on an American vessel, at an American port, for a round voyage, and remains on the vessel until her return home, does not depart from the United States within the meaning of the above act of Oct. 1, 1888. *Re Tong Wah Sick*, 36 F. R. 440; *Re Jack Sen*, Id. 441. St. Aug. 3, 1882, ch. 376 (22 St. 214), provides, —

“That there shall be levied, collected, and paid a duty of fifty cents for each and every passenger not a citizen of the United States who shall come by steam or sail vessel from a foreign port to any port within the United States. The said duty shall be paid to the collector of customs of the port to which such passenger shall come, or if there be no collector at such port, then to the collector of customs nearest thereto, by the master, owner, agent, or consignee of every such vessel, within twenty-four hours after the entry thereof into such port. The money thus collected shall be paid into the United States Treasury, and shall constitute a fund to be called the immigrant fund, and shall be used, under the direction of the Secretary of the Treasury, to defray the expense of regulating immigration under this act, and for the care of immigrants arriving in the United States, for the relief of such as are in distress, and for the general purposes and expenses of carrying this act into effect. The duty imposed by this section shall be a lien upon the vessels which shall bring such passengers into the United States, and shall be a debt in favor of the United States against the owner or owners of such vessels; and the payment of such duty may be enforced by any legal or equitable remedy. *Provided*, That no greater sum shall be expended for the purposes hereinbefore mentioned, at any port, than shall have been collected at such port.

“SEC. 2. That the Secretary of the Treasury is hereby charged with the duty of executing the provisions of this act and with supervision over the business of immigration to the United States, and for that purpose he shall have power to enter into contracts with such State commission, board, or officers as may be designated for that purpose by the governor of any State to take charge of the local affairs of immigration in the ports within said State, and to provide for the support and relief of such immigrants therein landing as may fall into distress or need public aid, under the rules and regulations to be prescribed by said Secretary; and it shall be the duty of such State commission, board, or officers so designated to examine into the condition of passengers arriving at the ports within such State in any ship or vessel, and for that purpose all or any of such commissioners or officers, or such other person or persons as they shall appoint, shall be authorized to go on board of and through any such ship or vessel; and if on such examination there shall be found among such passengers any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge, they shall report the same in writing to the collector of such port, and such persons shall not be permitted to land.

“SEC. 3. That the Secretary of the Treasury shall establish such regulations and rules and issue from time to time such instructions not inconsistent with law as he shall deem best calculated to protect the United States and immigrants into the United States from fraud and loss, and for carrying out the provisions of this act and the immigration laws of the United States; and he shall prescribe all forms of bonds, entries, and other papers to be used under and in the enforcement of the various provisions of this act.

“SEC. 4. That all foreign convicts except those convicted of political offences, upon arrival, shall be sent back to the nations to which they belong and from whence they came. The Secretary of the Treasury may designate the State board of charities of any State in which such board shall exist by law, or any commission in any State, or any person or persons in any State whose duty it shall be to execute the provisions of this section without compensation. The Secretary of the Treasury shall prescribe regulations for the return of the aforesaid persons to the countries from whence they came, and shall furnish instructions to the board, commission, or persons charged with the execution of the provisions of this section as to the mode of procedure in respect thereto, and may change such instructions from time to time. The expense of such return of the aforesaid persons not permitted to land shall be borne by the owners of the vessels in which they came.

“SEC. 5. That this act shall take effect immediately.”

St. June 26, 1884, ch. 121, § 22 (23 St. 58), provides that until § 1 of the above act,—

“shall be made applicable to passengers coming into the United States by land carriage, said provisions shall not apply to passengers coming by vessels employed exclusively in the trade between the ports of the United States and the ports of the Dominion of Canada or the ports of Mexico.”



"*Passengers*" here includes children under one year of age. *Edye v. Robertson, infra.*

This act is constitutional, being a regulation of commerce with foreign nations, and if in conflict with prior treaties, it supersedes them. *Head Money Cases*, 112 U. S. 580; *S. C. nom. Edye v. Robertson*, 21 Blatch. 460; 18 F. R. 135; *Re Ah Lung*, 9 Sawyer, 306; *Re Chin Ah On*, Id. 343; *Re Tung Yeong*, Id. 620; *Lin Sing v. Washburn*, 20 Cal. 534. A State statute levying a similar tax is unconstitutional. *People v. Compagnie Générale Transatlantique*, 107 U. S. 59; 10 F. R. 357; *People v. Pacific M. S. Co.*, 16 Id. 344; *Chy Lung v. Freeman*, 92 U. S. 275; *Re Ah Fong*, 3 Sawyer, 144; *Henderson v. New York*, 92 U. S. 259; *Smith v. Turner*, 7 How. 283; *New York v. Miln*, 11 Pet. 102.

As this statute makes no provision for a review by the court of the decision of the Immigration Commissioners as to whether immigrants are likely to become a common charge, additional facts learned after the decision are to be presented to the Commissioners. *Re Day*, 27 F. R. 678.

St. Feb. 26, 1885, ch. 164 (23 St. 332), repealing all laws or parts of laws conflicting therewith, and amended by St. Feb. 23, 1887, ch. 220 (24 St. 414), by adding the sections after § 5, provides: —

"That from and after the passage of this act it shall be unlawful for any person, company, partnership, or corporation in any manner whatsoever, to prepay the transportation, or in any way assist or encourage the importation or migration of any alien or aliens, any foreigner or foreigners, into the United States, its Territories, or the District of Columbia, under contract or agreement, parol or special, express or implied, made previous to the importation or migration of such alien or aliens, foreigner or foreigners, to perform labor or service of any kind in the United States, its Territories, or the District of Columbia.

"SEC. 2. That all contracts or agreements, express or implied, parol or special, which may hereafter be made by and between any person, company, partnership, or corporation, and any foreigner or foreigners, alien or aliens, to perform labor or service or having reference to the performance of labor or service by any person in the United States, its Territories, or the District of Columbia previous to the migration or importation of the person or persons whose labor or service is contracted for into the United States, shall be utterly void and of no effect.

"SEC. 3. That for every violation of any of the provisions of section one of this act the person, partnership, company, or corporation violating the same, by knowingly assisting, encouraging or soliciting the migration or importation of any alien or aliens, foreigner or foreigners, into the United States, its Territories, or the District of Columbia, to perform labor or service of any kind under contract or agreement, express or implied, parol or special, with such alien or aliens, foreigner or foreigners, previous to becoming residents or citizens of the United States, shall forfeit and pay for every such offence the sum of \$1000, which may be sued for and recovered by the United States or by any person who shall first bring his action therefor including any such alien or foreigner who may be a party to any such contract or agreement, as debts of like amount are now recovered in the circuit courts of the United States; the proceeds to be paid into the Treasury of the United States; and separate suits may be brought for each alien or foreigner being a party to such contract or agreement aforesaid. And it shall be the duty of the district attorney of the proper district to prosecute every such suit at the expense of the United States.

"SEC. 4. That the master of any vessel who shall knowingly bring within the United States on any such vessel, and land, or permit to be landed, from any foreign port or place, any alien laborer, mechanic, or artisan who, previous to embarkation on such vessel, had entered into contract or agreement, parol or special, express or implied, to perform labor or service in the United States, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by a fine of not more than \$500 for each and every such alien laborer, mechanic or artisan so brought as aforesaid, and may also be imprisoned for a term not exceeding six months.

"SEC. 5. That nothing in this act shall be so construed as to prevent any citizen or subject of any foreign country temporarily residing in the United States, either in private or official capacity, from engaging, under contract or otherwise, persons not residents or citizens of the United States to act as private secretaries, servants, or domestics for such foreigner temporarily residing in the United States as aforesaid; nor shall this act be so construed as to prevent any person, or persons, partnership, or corporation from engaging, under contract or agreement, skilled workmen in foreign countries to perform labor in the United States in or upon any new industry not at present established in the United States: *Provided*, That skilled labor for that purpose cannot be otherwise obtained; nor shall the provisions of this



act apply to professional actors, artists, lecturers, or singers, nor to persons employed strictly as personal or domestic servants: *Provided*, That nothing in this act shall be construed as prohibiting any individual from assisting any member of his family or any relative or personal friend, to migrate from any foreign country to the United States, for the purpose of settlement here.

"SEC. 6. That the Secretary of the Treasury is hereby charged with the duty of executing the provisions of this act, and for that purpose he shall have power to enter into contracts with such State Commission, board, or officers as may be designated for that purpose by the Governor of any State to take charge of the local affairs of immigration in the ports within said State, under the rules and regulations to be prescribed by said Secretary; and it shall be the duty of such State Commission, board, or officers so designated to examine into the condition of passengers arriving at the ports within such State in any ship or vessel, and for that purpose all or any of such commissioners or officers, or such other person or persons as they shall appoint, shall be authorized to go on board of and through any such ship or vessel; and if in such examination there shall be found among such passengers any person included in the prohibition in this act, they shall report the same in writing to the collector of such port, and such persons shall not be permitted to land.

"SEC. 7. That the Secretary of the Treasury shall establish such regulations and rules, and issue from time to time such instructions, not inconsistent with law, as he shall deem best calculated for carrying out the provisions of this act; and he shall prescribe all forms of bonds, entries, and other papers to be used under and in the enforcement of the various provisions of this act.

"SEC. 8. That all persons included in the prohibition in this act, upon arrival, shall be sent back to the nations to which they belong and from whence they came. The Secretary of the Treasury may designate the State board of charities of any State in which such board shall exist by law, or any commission in any State, or any person or persons in any State, whose duty it shall be to execute the provisions of this section and shall be entitled to reasonable compensation therefor to be fixed by regulation prescribed by the Secretary of the Treasury. The Secretary of the Treasury shall prescribe regulations for the return of the aforesaid persons to the countries from whence they came, and shall furnish instructions to the board, commission, or persons charged with the execution of the provisions of this section as to the time of procedure in respect thereto, and may change such instructions from time to time. The expense of such return of the aforesaid persons not permitted to land shall be borne by the owners of the vessels in which they came. And any vessel refusing to pay such expenses shall not thereafter be permitted to land at or clear from any port of the United States. And such expenses shall be a lien on said vessel. That the necessary expense in the execution of this act for the present fiscal year, shall be paid out of any money in the Treasury not otherwise appropriated.

"SEC. 9. That all acts and parts of acts inconsistent with this act are hereby repealed.

"SEC. 10. That this act shall take effect at the expiration of thirty days after its passage."

This law is constitutional, as regulating commerce with foreign nations: the offence it defines is not complete until the alien has entered the territory of the United States; and a civil action for the penalty prescribed by § 3 lies in the district into which he enters or where he may be found. *United States v. Craig*, 28 F. R. 795. The decision of the collector, upon competent evidence, that an immigrant is not to land is conclusive, as is also the Commissioner's finding on the question whether immigrants are likely to become a public charge, and neither can be reviewed judicially on *habeas corpus*. *Re Cummings*, 32 F. R. 75; *Re Day*, 27 Id. 678. An immigrant who comes here bound by contract to labor on an ordinary dairy farm is not a person excepted by § 5 of the above act. *Re Cummings, supra*. A religious corporation, which engaged an alien residing in England to come here and take charge of its church as pastor, was held not exempt under the provisos of § 5 of the above act, but liable to the penalty prescribed. *United States v. Church of the Holy Trinity*, 36 F. R. 303. The payment by the British government of an immigrant's passage-money is not conclusive evidence of inability for self-support. *Re O'Sullivan*, 24 Blatch. 416; 31 F. R. 447.

By 25 St. 566, the Secretary of the Treasury may cause immigrants illegally landed to be returned within one year, and may pay informers who furnish original information such share of the penalties recovered as he deems reasonable and just, not exceeding fifty per cent.



## TITLE XXX.

## NATURALIZATION.

NATURALIZATION is a judicial act, and is not provable by parol. The court's jurisdiction is dependent upon statute; its action must be recorded as its judgment, and this, when valid, is final; but the record need not disclose the facts upon which the proceeding was founded. *Charles Green's Son*, 31 F. R. 106; *United States v. Walsh*, 22 Id. 644; *Stark v. Chesapeake Ins. Co.*, 7 Cranch, 420; *Spratt v. Spratt*, 4 Pet. 393. Hence it is not necessary that it should appear in the certificate granted by the court that the person naturalized "had behaved as a man of good moral character," etc., as the granting of a certificate by a competent court raises the presumption that the court was satisfied as to the moral character of the alien. *Campbell v. Gordon*, 6 Cranch, 176. When a naturalized citizen is made a citizen under an act of Congress, and the act does not prescribe or regulate his capacities, he becomes distinguishable in nothing from a native citizen, except so far as the Constitution makes the distinction. The law makes none. *Osborn v. United States Bank*, 9 Wheat. 738, 827. The naturalization laws apply only to foreigners, subjects of another allegiance. They do not include Indians. 7 A. G. Op. 746. The power of naturalization is exclusively in Congress, but the treaty of amity and commerce between the United States and France of 1778, art. 11, enabled the subjects of France to purchase and hold lands in the United States. *Chirac v. Chirac*, 2 Wheat. 259. If records of naturalization are destroyed, secondary evidence of their contents may be received. *Kreitz v. Behrensmeyer*, 125 Ill. 141.

SECT. 2165. — See note, § 1992. St. Feb. 1, 1876, ch. 5 (19 St. 2), provides —

"That the declaration of intention to become a citizen of the United States, required by Rev. Stats. § 2165, may be made by an alien before the clerk of any of the courts named in said § 2165; and all such declarations heretofore made before any such clerk are hereby declared as legal and valid as if made before one of the courts named in said section."

The declaration of intention to become naturalized cannot now be taken by a clerk of the circuit court carrying the records to the party's domicile and there taking the declaration. *Re Langtry*, 12 Sawyer, 467; 31 F. R. 879.

Cl. 1. The probate court of Shelby County, Tenn., has no common-law jurisdiction, and cannot take this declaration. *Ex parte Tweedy*, 22 F. R. 85. City, police, and county courts in various States, when courts of record and having a clerk, have been held entitled to take it. *United States v. Power*, 14 Blatch. 223; *Ex parte Gladhill*, 8 Met. 168; *Ex parte Cregg*, 2 Curtis, 98; *State v. Whittemore*, 50 N. H. 245; *Re Conner*, 39 Cal. 98; *Levy's Case*, 14 A. G. Op. 509; *State v. Webster*, 7 Neb. 469; *Morgan v. Dudley*, 18 B. Mon. 693; *People v. McGowan*, 77 Ill. 649. State courts, in admitting aliens, act as United States courts. *Re Christern*, 43 N. Y. Sup. Ct. 523.

Cl. 3. The last clause of this provision amounts to a prohibition against taking the applicant's oath; such oath, if admitted, is extra-judicial, and perjury cannot be assigned thereon. *United States v. Grottkau*, 30 F. R. 672. An alien, convicted of perjury while residing here, though pardoned, is not "of a good moral character." *Re Spencer*, 6 Sawyer, 195. The oath, when lawfully taken, confers the right of a citizen. *Campbell v. Gordon*, 6 Cranch, 176; *Stark v. Chesapeake Ins. Co.*, 7 Id. 420. But in the absence of evidence



of naturalization by the court records, parol evidence is inadmissible to prove the fact, and the court cannot make its order retroactive. *Dryden v. Swinburne*, 20 W. Va. 89; *Re Desty*, 8 Abb. N. C. (N. Y.) 250; *People v. McNally*, 59 How. Pr. (N. Y.) 500; *The Acorn*, 2 Abb. U. S. 434; *Re Coleman*, 15 Blatch. 406; *Green v. Salas*, 31 F. R. 106.

SECT. 2166. — This has been held to include the Navy as well as the Army. *Re Stewart*, 7 Rob. (N. Y.) 635. But see *Re Bailey*, 2 Sawyer, 200, where it was held not to apply to marines. *Re Bye*, 2 Daly (N. Y.), 525.

SECT. 2167. — The declaration of intention must be under oath. *United States v. Walsh*, 22 F. R. 644.

"*Required therein at the time of his admission.*" — This refers to the declaration required by the second condition of § 2165. *State v. MacDonald*, 24 Minn. 48; *United States v. Walsh*, 22 F. R. 644.

It is not necessary that two of the five years' residence here required in the case of a minor alien should occur after the applicant has attained his majority. *Schultz's Petition* (N. H.), 10 East. Rep. 672, and 8 Atl. Rep. 827; *Ex parte Merry*, 14 Phila. 212; *Ex parte Randall*, Id. 224. If an alien is admitted to citizenship by a court of competent jurisdiction, such act has the force and effect of a judgment, and the government is not authorized to evade it or treat it as a nullity. 14 A. G. Op. 509.

SECT. 2168. — See note, § 1994.

SECT. 2169. — Amended by 18 St. 318, by adding, after "aliens," "being free white persons, and to aliens." "*White persons*" here does not include persons of the Mongolian race (*Re Ah Yup*, 5 Sawyer, 155); or those of half white and half Indian blood. *Re Camille*, 6 Sawyer, 541; 6 F. R. 256; 2 Kent Com. 72; *Lynch v. Clarke*, 1 Sand. Ch. 583; 9 A. G. Op. 373; 7 Id. 746; *Elk v. Wilkins*, 112 U. S. 94.

SECT. 2170. — *Spratt v. Spratt*, 4 Pet. 393; *Ex parte Walton*, 1 Cranch C. C. 186; *Ex parte Saunderson*, Id. 219; *Ex parte Pasqualt*, Id. 243; *Anon.*, Pet. C. C. 457.

SECT. 2171. — *The Frances*, 8 Cranch, 335; *Ex parte Newman*, 2 Gall. 11.

SECT. 2172. — This provision is prospective, and embraces the children of those thereafter naturalized as well as those already duly naturalized under any United States law; and the infant children of aliens, born out of the country, if dwelling here when their parents are naturalized, become citizens by such naturalization. *State v. Penney*, 10 Ark. 621; *O'Connor v. State*, 9 Fla. 215; *West v. West*, 8 Paige, 433; *United States v. Kellar*, 13 F. R. 82; *State v. Andriano*, 92 Mo. 70; see note, § 1993; *People v. Newell*, 1 How. Pr. N. S. 8; *Campbell v. Gordon*, 6 Cranch, 176; *United States v. Hirshfield*, 13 Blatch. 330; 15 A. G. Op. 114. Children of United States citizens, who are born abroad, are United States citizens. *Wolff v. Archibald*, 14 F. R. 369; 15 A. G. Op. 114; 10 Id. 328; *People v. Newell*, 33 Hun, 78. Children, born in foreign countries of parents who were then aliens, but who subsequently emigrated to this country, and became naturalized during the time such children were minors, are citizens of this country. 10 A. G. Op. 329. But a child born out of the country after his father has renounced his allegiance to the United States, is not a citizen or entitled to registration as a voter. *Browne v. Dexter*, 66 Cal. 39; *Re Look Tin Sing*, 10 Sawyer, 353.

SECT. 2174. — This does not extend to the naval service. *Re Gormly*, 14 Phila. 211.

St. June 9, 1874, ch. 260 (18 St. 64), provides that none of the provisions of the cited act of 1872 —

"shall apply to sail or steam vessels engaged in the coastwise trade, except the coastwise trade between the Atlantic and Pacific coasts, or in the lake-going trade touching at foreign ports or otherwise, or in the trade between the United States and the British North American possessions, or in any case where the seamen are by custom or agreement entitled to participate in the profits or result of a cruise, or voyage."



## TITLE XXXI.

## THE CENSUS.

ALL the provisions of this title, except the tables set forth in § 2206, appear to be superseded by 20 St. 473, ch. 195 (Sup. 471–497), providing for the taking of the Tenth and subsequent censuses, amended by 21 St. 75; Sup. 516. See also, on the Tenth Census, 22 St. 2, 4, 344; 23 St. 16. St. March 3, 1885, ch. 359 (23 St. 462), abolished the office of the Tenth Census, and transferred the records and other property of the Census Office to the office of the Secretary of the Interior, where the uncompleted work thereof is to be completed. St. March 1, 1889, repealed previous laws inconsistent with its provisions, and in part provided —

“That a census of the population, wealth, and industry of the United States shall be taken as of the date of June 1, 1890.

“SEC. 2. That there shall be established in the Department of the Interior an office to be denominated the Census Office, the chief officer of which shall be called the Superintendent of Census, whose duty it shall be, under the direction of the head of the Department, to superintend and direct the taking of the Eleventh Census of the United States, in accordance with the laws relating thereto, and to perform such other duties as may be required of him by law.”



## TITLE XXXII.

### THE PUBLIC LANDS.

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#### CHAPTER I.

##### SURVEYORS AND DEPUTY SURVEYORS.

**SECT. 2207.** — St. July 31, 1876, ch. 246 (19 St. 102), abolished the office of Surveyor-General of Kansas after Sept. 30, 1876.

**SECT. 2215.** — 10 St. 158, requiring the Surveyor-General of Oregon to give bond in the sum of \$50,000, was passed while that officer acted also as a receiver of public money, and was held at the General Land Office merely temporary. 1 Com. D. 1065. Surveyors for special districts of country appointed by the Treasury Department were held to be within this section. *Farrar v. United States*, 5 Pet. 373. Surveyors of public lands are disbursing officers. *Id.* The omission of one condition from the bond, where the conditions are cumulative, cannot invalidate the bond so far as the other operates to bind the party. *Id.* Where a surveyor-general, receiver, or register is in default in discharge of his official duties after his commission has expired and before his successor has entered upon the discharge of his duties, under St. March 3, 1853, ch. 145, § 10, the sureties on his bond are liable therefor. *United States v. Jameson*, 16 F. R. 331. See also *Bryan v. United States*, 1 Black, 140; *United States v. Linn*, 2 McLean, 501.

**SECT. 2218.** — St. June 6, 1874, ch. 223 (18 St. 62), authorized the discontinuance of the office of Recorder of Land Titles in Missouri and the transfer of the records to that State, and released the interest of the United States in confirmed lands, saving, however, the valid rights of third parties. St. July 31, 1876, ch. 246 (19 St. 102), authorized the Secretary of the Interior to transfer the local land-office records to the States of Ohio, Indiana, Illinois, and Missouri, respectively.

**SECTS. 2219, 2220, 2221.** — See note, § 2218. St. Oct. 2, 1888, ch. 1069 (25 St. 525), provides —

“For surveys and resurveys of public lands \$100,000, at rates not exceeding \$9 per lineal mile for standard and meander lines, \$7 for township, and \$5 for section lines, except that as to mountainous lands or lands covered with dense timber or under brush, the rate shall not exceed \$13 per mile for standard and meander lines, \$11 for township and \$7 for section lines, when the survey is made upon the order of the Secretary of the Interior: *Provided*, That in expending this appropriation preference shall be given in favor of surveying townships occupied, in whole or in part, by actual settlers; and the surveys shall be confined to lands adapted to agriculture and lines of reservations. And of the sum hereby appropriated not exceeding twenty thousand dollars may be expended for the examination of surveys in the field, to test the accuracy of the work, including in this, and if found necessary by the Secretary of the Interior, the resurvey of township thirty south of range four west of Willamette meridian, in the State of Oregon, and to prevent payment for fraudulent and imperfect surveys returned by deputy surveyors; and for inspecting mineral deposits, coal-fields, and timber districts, and for making such other surveys or examinations as may be required for identification of lands for purposes of evidence in any suit or proceeding in behalf of the United States: *Provided further*, That the Secretary of the Interior be, and is hereby, authorized to transfer to the Secretary of State of the States of Nebraska and Iowa, or to such officers as may be entitled to receive them, the field-notes, maps, records, and other papers appertaining to land surveys in said States which are now stored in the district land-office at Lincoln, Nebraska; and the office



of surveyor-general for the district of Nebraska and Iowa is hereby abolished : *Provided*, That the aforesaid field-notes, maps, records, and other papers pertaining to the State of Nebraska shall not be delivered to the proper authorities until said State shall have provided by law for the safe keeping of the same as public records, and for the allowance of free access to field-notes, maps, records, and other papers by the authorities of the United States, as provided by Rev. Stats. § 2221, the State of Iowa having heretofore enacted the requisite legislation."

SECT. 2222. — The sureties are liable for the default of any register or receiver, occurring after the expiration of his commission and before his successor enters upon the duties of the office. *United States v. Jameson*, 16 F. R. 331. Suspension by the President takes effect on due notice, but if the officer acts subsequently, his acts are the acts of a *de facto* officer and binding as such. 15 A. G. Op. 62.

SECT. 2223. — St. July 31, 1876, ch. 246 (19 St. 102), provided that the Surveyor-General shall keep an account of the cost of surveying every private land-claim and report to the General Land Office; that no patent shall issue, or copy of survey be furnished, till the cost of the survey has been paid by the claimant; and that the cost of surveying, &c., lands granted to railroads shall be paid by the railroads, unless exempted by law, before the conveyance of such lands by the United States. The decisions of department officers in the General Land Office, upon law or fact, cannot be attacked collaterally. *Aurora Hill C. M. Co. v. 85 M. Co.*, 34 F. R. 515. See *Sioux City R. Co. v. United States*, *Id.* 835; *Casey v. Vassor*, 4 McCrary, 127.

St. July 10, 1886, ch. 764 (24 St. 143), enacted as follows: —

"That no lands granted to any railroad corporation by any act of Congress shall be exempt from taxation by States, Territories, and municipal corporations on account of the lien of the United States upon the same for the costs of surveying, selecting, and conveying the same, or because no patent has been issued therefor; but this provision shall not apply to lands unsurveyed: *Provided*, That any such land sold for taxes shall be taken by the purchaser subject to the lien for costs of surveying, selecting, and conveying, to be paid in such manner by the purchaser as the Secretary of the Interior may by rule provide and to all liens of the United States, all mortgages of the United States, and all rights of the United States in respect of such lands: *Provided further*, That this act shall apply only to lands situated opposite to and coterminous with completed portions of said roads, and in organized counties: *Provided further*, That at any sale of lands under the provisions of this act the United States may become a preferred purchaser, and in such case the lands sold shall be restored to the public domain and disposed of as provided by the laws relating thereto.

"SEC. 2. That if any railroad corporation required by law to pay the costs of surveying, selecting, or conveying any lands granted to such company or for its use and benefit by act of Congress shall for thirty days neglect or refuse to pay any such costs after demand for payment thereof by the Secretary of the Interior, he shall notify the Attorney-General, who shall at once commence proceedings to collect the same. But when any sum shall be collected of such railroad company as costs of surveying, selecting, and conveying any tract of land which shall have been purchased under the provisions of section one hereof, the Secretary of the Interior shall out of such collections reimburse said purchaser, his heirs or assigns, the amount of money paid by him as the costs of such surveying, selecting, and conveying.

"SEC. 3. That this act shall not affect the right of the Government to declare or enforce a forfeiture of any lands so granted; but all the rights of the United States to said lands or to any interest therein shall be and remain as if this act had not passed, except as to the lien mentioned in the first section hereof.

"SEC. 4. That § 21 of ch. 216, approved July 2, 1864, is hereby so amended as that the costs of surveying, selecting, and conveying therein required to be paid shall become due and payable at and on the demand therefor made by the Secretary of the Interior as provided in section two of this act, and nothing in this act shall be construed or taken in any wise to affect or impair the right of Congress at any time hereafter further to alter, amend, or repeal the said act, as in the opinion of Congress, justice or the public welfare may require, or to impair or waive any right or remedy in the premises now existing in favor of the United States. This act shall be subject to alteration, amendment, or repeal."

SECT. 2229. — The other parts of St. 1858, having been long before executed, were treated as having no subsisting force. 1 Com. D. 1070.



## CHAPTER II.

## REGISTERS AND RECEIVERS.

SECT. 2234. — See notes, §§ 2256, 2319. Section 2234 was generalized from numerous statutes, the appointment of a register and receiver having been authorized by Congress in each act establishing a land-district, except St. March 10, 1872, as to the Monroe land-district in Louisiana, where the omission was perhaps by inadvertence. 1 Com. D. 1072.

The President has since been authorized to appoint registers and receivers as follows: By St. March 3, 1874, ch. 43 (18 St. 18), for the La Messilla, New Mex., district; by St. April 24, 1874, ch. 127 (18 St. 34), for the Bismarck, Dak., district; by St. June 20, 1874, ch. 341 (18 St. 122), for the Del Norte, Col., district; by St. June 20, 1874, ch. 340 (18 St. 121), for the Western and the Ark. Valley, Kansas, districts; by St. June 20, 1874, ch. 342 (18 St. 123), for the Bozeman, Montana, district; by St. Jan. 11, 1875, ch. 13 (18 St. 294), for the The Dalles, Oregon, district; by St. April 25, 1876, ch. 78 (19 St. 36), for the Beaver, Utah, district; by St. Aug. 9, 1876, ch. 256 (19 St. 126), for the Evanston, Wyoming, district; by St. Aug. 15, 1876, ch. 307 (19 St. 207), for the Whitman, Wash., district; by St. Feb. 4, 1879, ch. 48 (20 St. 282), for the Oneida, Idaho, district; by St. Jan. 21, 1880, ch. 8 (21 St. 60), for the Grand Forks, Dak., district; provided also that they should reside at Grand Forks until the President should remove the site of the office; by St. April 30, 1880, ch. 71 (21 St. 81), for the Yellowstone, Montana, district; by St. May 24, 1880, ch. 100 (21 St. 141), for the Northern, Kansas, district; by St. June 16, 1880, ch. 242 (21 St. 283), for the Yakima, Wash., district; by St. March 3, 1881, ch. 146 (21 St. 508), for the Southwestern, Kansas, district; by St. March 3, 1883, ch. 140 (22 St. 582), for three additional districts in Dakota; by St. June 19, 1882, ch. 230 (22 St. 106), for the Minnekadusa and the Hitchcock, Neb., districts; by St. May 3, 1886, ch. 81 (24 St. 20), for the Northwest and the Sidney, Neb., districts; by St. Aug. 4, 1886, ch. 895 (24 St. 218), for the Bent, Col., district; by St. March 3, 1887, ch. 362 (24 St. 526), for the Buffalo, Wyoming, district; by St. May 21, 1888, ch. 297 (25 St. 152), for the Harney, Oregon, district; by St. Dec. 18, 1888 (25 St. 637), for the Colfax, New Mex., district; and by St. March 1, 1889 (25 St. 772), for the Lincoln, New Mex., district.

Registers and receivers may purchase public lands at private entry; but neither can obtain such lands, within their respective districts, by pre-emption. 7 A. G. Op. 647. But see 4 Id. 223. They are merely agents of the Interior Department to execute its orders, and will not be interfered with by the courts in the exercise of discretionary powers vested in them. In acting upon a claim to pre-empt land they exercise a judicial discretion, and judicial jurisdiction over their decisions will not be assumed until after the Land Department has ceased to act. *Litchfield v. Register*, 1 Woolw. 299.

SECT. 2236. — See notes, §§ 1768, 2222. As to the liability of sureties upon a receiver's bond, see 5 A. G. Op. 291, 396. A receiver does not stand in the ordinary position of a bailee. He cannot discharge himself from liability under a bond by showing that the money was violently taken from him notwithstanding all the resistance he was capable of making. *Boyden v. United States*, 13 Wall. 17. The act of God or the public enemy, without neglect or fault on the part of the officer, excuses him from liability on his bond. *United States v. Thomas*, 15 Wall. 337; *Bevens v. United States*, 13 Id. 56. Sureties are liable for the receiver's neglect in any matter which pertains to his office, and the government may recover of them a reasonable sum as compensation for the performance of labor which he has neglected. *United States v. Wann*, 3 McLean, 179. See note, § 2215. A bond executed under an act of Congress is not governed by the law of the State where it is executed, but, in contemplation of law, is given at the seat of the Federal government. A



bond with a scrawl for a seal is good. *United States v. Stephenson*, 1 McLean, 462. An unsealed obligation is not a bond within the act of Congress, but it is good at common law. The emoluments of the office constitute a good consideration to the sureties. *United States v. Linn*, 15 Pet. 290. A receiver of public moneys at a local land office is not entitled, in a suit on his official bond, to set off against the government a rejected account for unauthorized clerk-hire, fuel, and lights, and for transmitting money to the proper depository. A claim for office rent might be allowed as an equitable credit under the act of March 3, 1797. *United States v. Lowe*, 1 Dillon, 585.

No claim for any credit can be admitted at the trial which has not been presented to, and disallowed by, the accounting officer of the Treasury, except as provided in the act. *Walton v. United States*, 9 Wheat. 651. The official bond does not extinguish the contract relation between the officer and the government arising from a balance of an account due from him to it. An action of *assumpsit* for such balance and an action of debt upon the bond against the officer and his sureties may be maintained at the same time. *Walton v. United States*, 9 Wheat. 651. Although the law requires receivers to pay over moneys upon demand of the Secretary of the Treasury, a declaration which alleges that the receiver had been often requested to pay is good after verdict, there having been general regulations in force at the time the bond in suit was given, requiring receivers to pay at stated times. *Boyden v. United States*, 13 Wall. 17.

SECT. 2238. — See notes, §§ 2240, 2283, 2291, 2306. See St. June 14, 1878, printed in full in note, § 2464. St. Dec. 17, 1880, ch. 2 (21 St. 311), repeals par. 6, and substitutes fees one half as large as are allowed in said paragraph in donation cases. St. June 3, 1878, ch. 151 (20 St. 89), allows to the registers and receivers in case of purchases under that act the same fees as provided for in case of mining claims. St. May 14, 1880, ch. 89 (21 St. 140), allows a fee of \$1 to the register for giving notice of cancellation to the contestant of an entry, said fee not to be reported.

SECT. 2240. — St. March 3, 1883, ch. 101 (22 St. 484), provides —

“That the fees allowed registers and receivers for testimony reduced by them to writing for claimants, in establishing pre-emption and homestead rights and mineral entries, and in contested cases, shall not be considered or taken into account in determining the maximum of compensation of said officers.

“SEC. 2. That registers and receivers shall, upon application, furnish plats or diagrams of townships in their respective districts showing what lands are vacant and what lands are taken, and shall be allowed to receive compensation therefor from the party obtaining said plat or diagram at such rates as may be prescribed by the Commissioner of the General Land Office, and said officers shall, upon application by the proper State or Territorial authorities, furnish, for the purpose of taxation, a list of all lands sold in their respective districts, together with the names of the purchasers, and shall be allowed to receive compensation for the same not to exceed ten cents per entry; and the sums thus received for plats and lists shall not be considered or taken into account in determining the maximum of compensation of said officers.”

St. Aug. 4, 1886, ch. 902 (24 St. 239; see *Id.* 526), provided for covering into the Treasury all fees which would increase the salaries beyond \$3000, except so much as may be necessary to pay the actual cost of clerical services employed exclusively in contested cases.

Fees for locating military bounty land-warrants, in excess of the maximum, must be paid into the Treasury. *United States v. Babbit*, 1 Black, 55; *United States v. Brindle*, 110 U. S. 688.

SECT. 2241. — See note, § 2240.

SECT. 2244. — A commission for four years from March 2, 1845, is in force on March 2, 1849. The day of its date is excluded. *Best v. Polk*, 18 Wall. 112.

SECT. 2245. — The failure to make returns as required is a breach of the bond; and if, in consequence of such neglect, the receiver is forcibly deprived of moneys in his possession by the public enemy, he will be liable on his bond. *Bevans v. United States*, 13 Wall. 56.



## CHAPTER III.

## LAND DISTRICTS.

SECT. 2248. — St. June 19, 1878, ch. 329 (20 St. 178), provided that public lands in States where there are no land offices may be entered at the General Land Office; proofs and affidavits to be made before a competent officer, with certificate of his official character by the clerk of a court of record. The same provision was contained in St. March 3, 1877, ch. 102 (19 St. 310).

SECT. 2256. — See note, § 2234. This section was prepared from information supplied by the surveying division in the General Land Office. 1 Com. D. 1078.

New land districts have been established as follows: By St. March 3, 1874, ch. 43 (18 St. 18), the La Messilla, New Mex., district; by St. April 24, 1874, ch. 127 (18 St. 34), the Bismarck, Dak., district; the office was located at Bismarck; by St. June 20, 1874, ch. 340 (18 St. 121), the Western and Ark. Valley, Kansas, districts; by St. June 20, 1874, ch. 341 (18 St. 122), the Del Norte, Col., district; the office was located at Del Norte, subject to change by the President, and unfinished business relating to lands in this district was transferred to this office; by St. June 20, 1874, ch. 342 (18 St. 123), the Bozeman, Mont., district; the office was located at Bozeman, subject to change by the President; by St. Jan. 11, 1875, ch. 13 (18 St. 294), the The Dalles, Oregon, district; the office was located at The Dalles, subject to change by the President; this statute also provided that the public lands within this district should be subject to sale on the same terms as other United States public lands, and confirmed prior sales and locations at the office of the old district; by St. April 25, 1876, ch. 78 (19 St. 36), the Beaver, Utah, district; by St. Aug. 9, 1876, ch. 256 (19 St. 256), the Evanston, Wyoming, district; by St. Aug. 15, 1876, ch. 307 (19 St. 207), the Whitman, Wash., district; the office was located at Colfax, or as the President may direct; the same provisions were made as to the public lands and as to prior sales, as in the case of the The Dalles district, *supra*; by St. Feb. 4, 1879, ch. 48 (20 St. 282), the Oneida, Idaho, district; the office was located at Oxford, subject to change by the President; unfinished business relating to lands in the district was transferred, and it was provided that all proofs and entries for lands in the district should thereafter be made at this land office; by St. Jan. 21, 1880, ch. 8 (21 St. 60), the Grand Forks, Dak., district; by St. April 30, 1880, ch. 71 (21 St. 81), the Yellowstone, Mont., district; the office was located at Miles City; by St. May 24, 1880, ch. 100 (21 St. 141), the Northern, Kansas, district; by St. June 16, 1880, ch. 242 (21 St. 283), the Yakima, Wash., district; the office was located at Yakima City, and the same provision was made as to unfinished business, as in the case of the Oneida district, *supra*; by St. March 3, 1881, ch. 146 (21 St. 508), the Southwestern, Kansas, district; prior sales and locations within the district were confirmed; by St. March 3, 1883, ch. 140 (22 St. 582), three additional districts in Dakota, when the cession of the Great Sioux reservation shall have been duly made; by St. June 19, 1882, ch. 230 (22 St. 106), the Minnekadusa and the Hitchcock, Neb., districts; by St. May 3, 1886, ch. 81 (24 St. 20), the Northwest and the Sidney, Neb., districts; by St. Aug. 4, 1886, ch. 895 (24 St. 218), the Bent, Col., district, with the office located at Lamar; by St. March 3, 1887, ch. 362 (24 St. 526), the Buffalo, Wyoming, district; the office was located at Buffalo until the President, in his discretion, should remove the site of the land office therefrom; by St. May 21, 1888, ch. 297 (25 St. 152), the Harney, Oregon, district, the location of the office to be designated by the President, and changed by him as the public convenience requires; by St. Dec. 18, 1888 (25 St. 637), the Colfax, New Mex., district, with the office located at Folsom; and by St. March 1, 1889 (25 St. 772), the Lincoln, New Mex., district, with the office located at Roswell. By St. July 31, 1876,



ch. 246 (19 St. 102), the land offices at Chillicothe, Ohio, Indianapolis, Ind., and Springfield, Ill., and the office of Recorder of Land Titles for the State of Missouri were abolished, to take effect Sept. 30, 1876.

## CHAPTER IV.

### PRE-EMPTIONS.

SECT. 2257. — See notes, §§ 2289, 2353, 2461. St. June 9, 1874 ch. 261 (18 St. 65), subjected lands theretofore included in the Fort Sanders reservation and excluded from the new limits thereby established, to the operation of the land laws, and provided that the actual settlers on said lands should have preference right of entry under the pre-emption and homestead laws, by filing their declaratory statements within six months thereafter. St. July 21, 1876, ch. 220 (19 St. 94), authorized the Secretary of the Interior to offer the Fort Kearney, Neb., reservation to actual settlers only at minimum price, in accordance with the homestead laws, and provided that any actual settler thereon who had made permanent improvements prior to June 1, 1876, and had exhausted his homestead right, might (or his heirs for him) enter one quarter-section under the pre-emption laws; the heirs of any qualified person, deceased, were allowed to complete his pre-emption or homestead entry. St. Feb. 23, 1875 ch. 99 (18 St. 334), gave priority of right to pre-empt or homestead lands in Missouri, selected as swamp lands, but rejected by the United States, to actual settlers thereon, who had theretofore purchased from the state or county and had improved the same to the value of \$100.00, saving the rights of any prior actual settler under the pre-emption or homestead laws. St. June 22, 1874, ch. 400 (18 St. 194), provided that pre-emption and homestead entries or filings of or for lands to which the right of any railroad had been declared by the land office to have previously attached, may be perfected into complete title as if said lands had not been granted to the railroad, if in the adjustment of any railroad land grant said lands are found in the possession of an actual settler under such entry or filing. St. April 21, 1876, ch. 72 (19 St. 35), confirmed all lawful entries of public lands, in compliance with any law, upon tracts of not more than 160 acres each, made in good faith, within the limits of any land grant, prior to the receipt at the local land office of notice of the withdrawal of such lands, or after their restoration to market; and provided that valid pre-emption or homestead claims upon any lands within such grants, which existed at the time of such withdrawal, were afterwards abandoned and were re-entered by claimants who have complied with the laws, and shall make the proper proofs, and all such pre-emption or homestead entries made, by permission of the Land Department, after the expiration of such land grant, shall be deemed valid, and patents shall issue thereon in due course. By St. Jan. 30, 1879, ch. 36 (20 St. 276), the Fort Wayne, Ark., reservation was made subject to entry under the land laws, as other public lands in said state, with prior right to entry within six months thereafter given to all persons owning improvements on the reservation, at the time of the passage of the act. St. March 3, 1879, ch. 189 (20 St. 470), provided for the entry and sale, under the land laws, of certain lands in Florida theretofore reserved for naval purposes, reserving prior right of purchase at \$1.25 per acre, by any occupant who had theretofore in good faith made improvements on said lands, of the portion so occupied and improved, not exceeding 160 acres, within a reasonable time to be fixed by the Secretary of the Interior. St. March 3, 1879, ch. 190 (20 St. 471), superseding St. Aug. 15, 1876, ch. 308, § 3, authorized the Secretary of the Interior to offer 120,000 acres from the western side of the Sac and Fox, Kansas, reservation, for sale, through the Beatrice, Neb., land office, in tracts not exceeding 160 acres to each purchaser, at \$2.50 per acre or at the appraised value, if greater, to actual settlers, or to intending occupants who, having applied to purchase and



made oath of their intention to occupy shall, within three months after application, make a permanent settlement; the sale shall be for cash, unless the Secretary, with the consent of the Indian owners, shall consider it more advantageous to make the terms one-third cash, one-third in one year, one-third in two years with interest at six per cent; in certain cases a small excess over 160 acres may be allowed to a single purchaser, and *bona fide* claimants, in present occupancy under the provisions of the previous act, may be allowed, not to exceed one year, extra time on each deferred payment.

By St. April 1, 1880, ch. 40 (21 St. 69), the Fort Ripley, Minn., reservation, except a certain railroad grant, was made subject to entry by actual settlers, under the pre-emption and homestead laws, at \$1.25 per acre, the rights of all qualified, actual occupants to date from their actual settlement; provided that purchasers at the War Department sale in 1857, who paid \$1.25 per acre, shall be entitled to patents without further payment and provided that any tracts on which there are public buildings or improvements shall be first appraised and shall not be sold at less than the appraisal. St. May 14, 1880, ch. 89 (21 St. 140), provided, that land relinquished by a homestead pre-emption or timber-culture claimant should be open to settlement and entry immediately upon the filing of the relinquishment in the local land-office; that contestants of homestead, pre-emption or timber-culture entries should be notified of the cancellation of the contested entry by the register and should be allowed thirty days from the date of the notice to make entry; that settlers intending to claim under the homestead laws should be allowed the same time to file applications and perfect entries and their rights should relate the same, as in the case of pre-emption claims. St. June 8, 1880, ch. 136 (21 St. 106), provided that the person legally authorized to act for any insane homestead or pre-emption claimant might make proof and payment for such claimant, if the Commissioner should be satisfied that the complainant complied with the laws up to the time of the disability and in such cases the requirement of an affidavit of allegiance was dispensed with. St. June 10, 1880, ch. 187 (21 St. 172), authorized the Secretary of the Interior to have the Fort Abercrombie, Fort Seward and Fort Ransom, Dak., reservations surveyed and made subject to homestead and pre-emption entry and sale; provided that the rights of settlers in occupancy shall date from their actual settlement and their claims shall be made to conform to the survey. St. Feb. 19, 1874, ch. 30 (18 St. 16) reserved the rights of homestead and pre-emption settlers, prior to Jan. 1, 1874, out of grant of Swamp Lands to Holt County, Mo. St. April 15, 1874, ch. 99 (18 St. 29), forfeited the unpatented lands theretofore granted to the Placerville and Sacramento Valley railroad and made them subject to disposal as other public lands. As to the early acts relating to Minnesota, see *Minnesota v. Bachelder*, 1 Wall. 109.

St. March 2, 1889, provides: —

“That from and after the passage of this act no public lands of the United States, except those in the State of Missouri shall be subject to private entry.

“SEC. 2. That any person who has not heretofore perfected title to a tract of land of which he has made entry under the homestead law, may make a homestead entry of not exceeding one-quarter section of public land subject to such entry, such previous filing or entry to the contrary notwithstanding; but this right shall not apply to persons who perfect title to lands under the pre-emption or homestead laws already initiated: *Provided*, That all pre-emption settlers upon the public lands whose claims have been initiated prior to the passage of this act may change such entries to homestead entries and proceed to perfect their titles to their respective claims under the homestead law notwithstanding they may have heretofore had the benefit of such law, but such settlers who perfect title to such claims under the homestead law shall not thereafter be entitled to enter other lands under the pre-emption or homestead laws of the United States.

“SEC. 3. That whenever it shall be made to appear to the register and receiver of any public land office, under such regulations as the Secretary of the Interior may prescribe, that any settler upon the public domain under existing law is unable by reason of a total or partial destruction or failure of crops, sickness, or other unavoidable casualty, to secure a support for himself, herself, or those dependent upon him



or her upon the lands settled upon, then such register and receiver may grant to such settler a leave of absence from the claim upon which he or she has filed for a period not exceeding one year at any one time, and such settler so granted leave of absence shall forfeit no rights by reason of such absence: *Provided*, That the time of such actual absence shall not be deducted from the actual residence required by law.

"SEC. 4. That the price of all sections and parts of sections of the public lands within the limits of the portions of the several grants of lands to aid in the construction of railroads which have been heretofore and which may hereafter be forfeited, which were by the act making such grants or have since been increased to the double minimum price, and, also, of all lands within the limits of any such railroad grant, but not embraced in such grant lying adjacent to and coterminous with the portions of the line of any such railroad which shall not be completed at the date of this act, is hereby fixed at \$1.25 per acre.

"SEC. 5. That any homestead settler who has heretofore entered less than one quarter-section of land may enter other and additional land lying contiguous to the original entry, which shall not, with the land first entered and occupied, exceed in the aggregate 160 acres without proof of residence upon and cultivation of the additional entry; and if final proof of settlement and cultivation has been made for the original entry, when the additional entry is made, then the patent shall issue without further proof: *Provided*, That this section shall not apply to or for the benefit of any person who at the date of making application for entry hereunder does not own and occupy the lands covered by his original entry: *And provided*, That if the original entry should fail for any reason, prior to patent or should appear to be illegal or fraudulent, the additional entry shall not be permitted, or if having been initiated shall be cancelled.

"SEC. 6. That every person entitled, under the provisions of the homestead laws, to enter a homestead, who has heretofore complied with or who shall hereafter comply with the conditions of said laws, and who shall have made his final proof thereunder for a quantity of land less than 160 acres and received the receiver's final receipt therefor, shall be entitled under said laws to enter as a personal right, and not assignable, by legal subdivisions of the public lands of the United States subject to homestead entry, so much additional land as added to the quantity previously so entered by him shall not exceed 160 acres: *Provided*, That in no case shall patent issue for the land covered by such additional entry until the person making such additional entry shall have actually and in conformity with the homestead laws resided upon and cultivated the lands so additionally entered and otherwise fully complied with such laws: *Provided, also*, That this section shall not be construed as affecting any rights as to location of soldiers certificates heretofore issued under Rev. Stats., § 2306.

"SEC. 7. That the 'act to provide additional regulations for homestead and pre-emption entries of public lands,' approved March 3, 1879, shall not be construed to forbid the taking of testimony for final proof within ten days following the day advertised as upon which such final proof shall be made, in cases where accident or unavoidable delays have prevented the applicant or witnesses from making such proof on the date specified.

"SEC. 8. That nothing in this act shall be construed as suspending, repealing, or in any way rendering inoperative the provisions of the act entitled, 'An act to provide for the disposal of abandoned and useless military reservations,' approved July 5, 1884."

St. April 21, 1876, noted *supra*, does not apply to a case where, prior to the entry, the lands had been specially granted by an act of Congress and had fully vested in the grantee. *Taboreck v. B. & M. R. Co.*, 13 F. R. 103. But it does apply to a case arising between filing the map of the survey and giving notice of the withdrawal of the lands. 15 A. G. Op. 583.

Pending a proceeding in a United States tribunal for the confirmation of a claim to lands under a Mexican grant, no portion of them within the designated boundaries is open to settlement. *Hosmer v. Wallace*, 97 U. S. 575; *Trenouth v. San Francisco*, 100 Id. 251; *Van Reynegan v. Bolton*, 95 Id. 33. The power of Congress to regulate and dispose of public lands only ceases when all the preliminary acts prescribed by the pre-emption laws for the acquisition of title thereto, including the payment required to be made, have been performed by the settler. A mere settlement thereon with a declared intention to obtain title pursuant to such laws does not create a vested interest so as to deprive Congress of the power to dispose of the land to another party. *Yosemite Valley Case*, 15 Wall. 77; *Shepley v. Cowan*, 91 U. S. 330. A pre-emptive right to public land cannot be initiated so long as the Indian title remains unextinguished. *Buttz v. N. P. R. Co.*, 119 U. S. 70.



SECT. 2258. — See notes to §§ 2257, 2289, 2318, 2485. St. Jan. 12, 1877, ch. 18 (19 St. 221), provided that registers and receivers should ascertain the true character of lands within their districts supposed to be saline and report to the Commissioner, who, if satisfied that such lands are saline, shall cause them to be offered for sale at the local land-office, at public auction, and sold for cash at not less than \$1.25 per acre and if not sold at public auction, they shall be subject to private sale, for cash, at the same price; provided that this act shall not apply to any State or Territory which has not had a grant of salines, fully satisfied or expired by limitation, and that all sales shall be quit-claim merely. St. March 3, 1875, ch. 139 (18 St. 474), granted to Colorado all salt springs within the State, not exceeding twelve in number, with six sections of land, adjoining and continuous to each, to be selected by the governor within two years after the admission of the State, saving the vested rights of individuals.

“*Reservation.*” — The government may abandon a military reservation when its usefulness for public purposes has ceased; after notice has been given by the proper department, it may be considered as a part of the public lands, and, after survey and being offered at public auction, may be open to entry. *United States v. Railroad Bridge Co.*, 6 McLean, 517. See *Dupas v. Wassell*, 1 Dillon, 213; *Josephs v. United States*, 1 Ct. Cl. 197; *Johnson v. United States*, 2 Id. 391. While the Indian title to occupancy remains in lands, the right of pre-emption cannot be acquired. *Russell v. Beebe*, Hemp. 704. It is enough to constitute a reservation if the words used show that it was the purpose of the power that acts to accomplish the end aimed at. Where land has been reserved and severed from the mass of public lands, no subsequent law or proclamation, general in terms, will be construed to embrace it, especially in the case of Indian reservations. *United States v. Payne*, 8 F. R. 883; *Wilcox v. Jackson*, 13 Pet. 498; *Leavenworth Road v. United States*, 92 U. S. 733. The direction of the Secretary of the Treasury to reserve land from sale several months after it had been sold and paid for, is void. No statute of the United States gives a collector authority to make an appropriation of land for its use. *United States v. Fitzgerald*, 15 Pet. 407. Even under the Oregon Donation Act, Sept. 27, 1850 (9 St. 500), which provided for reservation by “designation” by authority of the President, the reservation must be designated, marked out and appropriated by the President or under his direction, in order to effect a lawful withdrawal of the lands. *United States v. Tichenor*, 12 F. R. 415. A provision in an Indian treaty that the proceeds of the sale of certain land should be paid over to certain parties is a withdrawal of the land from general appropriation. *Turner v. Am. Baptist Miss. Union*, 5 McLean, 344. A reservation in a Spanish grant as originally made by the King of Spain passed to the United States by the cession. *Josephs v. United States*, 1 Ct. Cl. 197. Land in the occupation of another cannot be taken up under the land laws. *Atherton v. Fowler*, 96 U. S. 513; *Quinby v. Conlan*, 104 Id. 420; *Hosmer v. Wallace*, 97 Id. 575; *McBrown v. Morris*, 59 Cal. 64; *Mower v. Fletcher*, 116 U. S. 380; *N. N. Min. Co. v. O. Min. Co.*, 11 F. R. 125; *Cowell v. Lammers*, 21 Id. 200; *Davis v. Scott*, 56 Cal. 165; *Hosmer v. Duggan*, Id. 257. But see *Hiatt v. Brooks*, 17 Neb. 33, *semble, contra*.

“*By any treaty.*” — A treaty is the supreme law of the land only when the power which negotiates it can carry it into effect. A treaty which stipulates for the payment of money does not become operative until Congress has acted upon it. The reservation of a tract of land by a treaty which provided for its sale, in order to pay over the proceeds thereof to those entitled, is a withdrawal of the land from pre-emption. *Turner v. Am. Baptist Miss. Union*, 5 McLean, 344. See *United States v. Payne*, 8 F. R. 883.

“*Proclamation of the President.*” — Under a statute which provides for a reservation from sale “by order of the President,” a reservation by an order from the War Department is good, the presumption being that the War Department acts by direction of the President. *Wilcox v. Jackson*, 13 Pet. 498, 513.



The word "proclamation" in this statute does not have a signification so different from "order" in the former statute as to cause a material distinction. A proclamation by the President, reserving lands from sale, is his official public announcement of an order to that effect. No particular form is necessary, and it is enough if it has sufficient publicity to accomplish the desired end. Hence an order sent from the proper executive department in the regular course of business is the equivalent of the President's own order to the same effect. *Wolsey v. Chapman*, 101 U. S. 755, 769. The President may modify a reservation previously made by reducing or enlarging it, and this on a modification of a compromise on an opposing private claim. *Grisar v. McDowell*, 6 Wall. 363. An order made by a military officer in command of a department, directing the establishment of a military reservation, is not presumed to be made by authority of the President. *United States v. Tichenor*, 12 F. R. 415.

*"Lands within the limits of any incorporated town."*—This provision is not affected by the extent of territory which the State or Territorial legislature may include in an incorporated town. It was not repealed as to Nebraska by the organic act of the Territory, which provided that the legislature thereof should not interfere with the primary disposal of the soil. The power of States to incorporate towns on the public domain has never been questioned. It is the act of Congress, not the act of incorporation, which withdraws land from the operation of the pre-emption law. *Root v. Shields*, Woolw. 340. The extension of the town site act to Oregon, and the issue of a patent to the municipal authorities, passed no title against one whose right to a patent was perfected previously to the extension of said act. *Stark v. Starrs*, 6 Wall. 402. Land is not withdrawn from pre-emption because a company has made an effort to build a town thereon, after the project has been abandoned. *Smiley v. Sampson*, 1 Neb. 56.

*"Known salines or mines."*—To constitute the exemption here contemplated, there should be upon the land ascertained coal deposits of such an extent and value as to make the land more valuable to be worked as a coal mine, under the conditions existing at the time, than for merely agricultural purposes. The circumstance that there are surface indications of the existence of veins of coal does not constitute a mine. It does not even prove that the land will ever be under any conditions sufficiently valuable on account of its coal deposits to be worked as a mine. A change in the conditions, occurring subsequently to the sale, whereby new discoveries are made, or by means whereof it may become profitable to work the veins as mines, cannot affect the title as it passed at the time of the sale. The question must be determined according to the facts in existence at that time. If upon the premises at that time there were not actual "known mines," capable of being profitably worked for their product so as to make the land more valuable for mining than for agriculture, a title to them acquired under the pre-emption act cannot be successfully assailed. *Colorado Coal Co. v. United States*, 123 U. S. 307, 328. The practical rule of the Land Department is that if the land is worth more for agriculture than mining, it is not mineral land, although it may contain some gold or silver. In the application of this rule no account can be taken of profits resulting from mining under other and more favorable conditions than actually exist, or may be produced or expected in the ordinary course of events. *United States v. Reed*, 28 F. R. 482, 486. A patent will be cancelled if it appears that the person who obtained it knew that there were mines on the land covered by it at the time he made application. In this case it appeared that cinnabar, the mineral which carries quicksilver, was found on the land in 1863; that a man resided on the land and mined cinnabar at that time, and in 1866 established some form of reduction works there; that these were on the ground when application for the patent was made by the agent of the patentee, and that these facts were known to him. *McLaughlin v. United States*, 107 U. S. 526. See *Mullan v. United States*, 118 Id. 271.



Known coal lands are mineral lands, and as to all transactions after the enactment of the statutes of 1851 (5 St. 453), and 1864 (13 St. 343), they were to be treated as such. If parties knew their character before they obtained title to them, the patents therefor may be cancelled in a suit in equity brought by government for that purpose. *Mullan v. United States*, 118 U. S. 271; *Deffebach v. Hawke*, 115 Id. 392. This case reviews the legislation on the subject at length. It has been the policy of the government since the acquisition of the Northwest Territory, and the inauguration of its land system, to reserve salt springs from sale. This policy was applied to the Louisiana Territory, and probably applied to the Territory of Nebraska. Whether or not it applied there under the act of July 22, 1854, it applied at least so far as to render void an entry where the salines at the time had been noted on the field-books, were palpable to the eye, and were discovered prior to entry. *Morton v. Nebraska*, 21 Wall. 660. See *United States v. Gear*, 3 How. 120. The act of July 1, 1864 (13 St. 343), gave a legislative construction to the word "mines" by which it includes all coal-beds or coal-fields, in which no interest had become vested. *United States v. Mullan*, 10 F. R. 785. See § 2318.

SECT. 2259. — See notes, §§ 2257, 2258, 2261, 2273, 2319, 2353. The rights of a purchaser of public lands under the land laws, after payment and before patent, are designated as follows: The land described in the certificate becomes the property of the pre-emptor; he has the equitable title thereto, and a right to the legal title as soon as the patent can issue in due course; and he can dispose of the same and pass his interest therein as if the purchase had been made from a private person. *Smith v. Ewing*, 23 F. R. 741; *N. P. R. Co. v. Traill Co.*, 115 U. S. 600; *Wirth v. Branson*, 98 Id. 118; *Carroll v. Safford*, 3 How. 441. The land is taxable, as owned in fee-simple absolute by the pre-emptor, so soon as the certificate of purchase has issued. *Carroll v. Safford*, 3 How. 441; *Witherspoon v. Duncan*, 4 Wall. 210. The land descends as realty before issue of patent. (*Carroll v. Safford*, *supra*); and is subject to dower. *Pka-o-wah-ash-kum v. Sorin*, 8 F. R. 740. But it cannot be assessed for taxation until all claims of the United States, such as fees for survey in case of railroad lands, have been paid; because if the land is assessable at all, the purchaser at a tax sale would take it free of all prior claims of the United States. *N. P. R. Co. v. Traill Co.*, 115 U. S. 600; *Railway Co. v. McShane*, 22 Wall. 444; *Hunnewell v. Cass Co.* Id. 464; *Railway Co. v. Prescott*, 16 Id. 603. After final entry and payment, the purchaser has a legal right to the land occupied by him as against the owner, the United States, but until the claimant has entitled himself to make entry, he has only a legal right, as against other parties, to be preferred in the purchase of the land when the United States has concluded to sell. *Yosemite Valley Case* (*Hutchings v. Low*), 15 Wall. 77; *Johnson v. Towsley*, 13 Id. 72; *Frisbie v. Whitney*, 9 Id. 187; *Busch v. Donohue*, 31 Mich. 482. After final entry and payment, the certificate holder may lawfully sell and convey the land to the same effect as if the patent had issued, and the patent, when issued, will enure to the benefit of the grantee. *Myers v. Croft*, 13 Wall. 291; *Richards v. Snyder*, 11 Oregon, 501; *Brown v. Warren*, 16 Nev. 228, *semble*; *Cady v. Eighmey*, 54 Iowa, 615; *Sillyman v. King*, 36 Id. 207. The land ceases, at final entry, to be the property of the United States; it is segregated thereby from the public lands, and is no longer subject to sale; the government holds the legal title only in trust for the holder of the certificate. *Deffebach v. Hawke*, 115 U. S. 392; *Simmons v. Wagner*, 101 Id. 260; *Carroll v. Safford*, 3 How. 441; *Pac. C. Min. Co. v. Spargo*, 16 F. R. 348; *People v. Shearer*, 30 Cal. 648; *Gwynne v. Niswanger*, 15 Ohio, 367; *Astrom v. Hammond*, 3 McLean, 107; *Carroll v. Perry*, 4 Id. 25; *Witherspoon v. Duncan*, 4 Wall. 210; *Hughes v. United States*, Id. 232; *Union M. & M. Co. v. Dangberg*, 2 Sawyer, 454; *Smith v. Hollis*, 46 Ark. 23; *Coleman v. Hill*, 44 Id. 452; *Treadway v. Wilder*, 12 Nev. 114; *Brown v. Warren*, 16 Id. 228. And this is true even where the certificate was obtained by fraud. *Stark v. Starrs*, 6 Wall. 402.



The certificate is, so far as the acquisition of title by any one else is concerned, equivalent to a patent. *Deffeback v. Hawke*, *supra*; *Simmons v. Ogle*, 105 U. S. 271; *Simmons v. Wagner*, *supra*; *Stark v. Starrs*, *supra*. And a subsequent patent to other than the certificate holder conveys no title, and therefore the certificate will prevail against a subsequent patent, in an action of ejectment brought by the patentee. *Simmons v. Wagner*, *supra*. A final certificate of entry and purchase can no more be cancelled than a patent. *Carroll v. Safford*, 3 How. 441; *Cady v. Eighmey*, 54 Iowa, 615; *Arnold v. Grimes*, 2 Id. 1; *Sillyman v. King*, 36 Id. 207; *Moyer v. McCullough*, 1 Ind. 339; *Brill v. Stiles*, 35 Ill. 305; *Aldrich v. Aldrich*, 37 Id. 32; *Morton v. Blankenship*, 5 Mo. 346; *Perry v. O'Hanlon*, 11 Id. 585; *O'Brien v. Perry*, 28 Id. 500; *Cornelius v. Kessel*, 58 Wis. 237; *Boyce v. Danz*, 29 Mich. 146; *Streeter v. Rolph*, 13 Neb. 388. But see *contra*, *Hill v. Miller*, 36 Mo. 182; *Gray v. Stockton*, 8 Minn. 529; *Judd v. Randall*, 29 N. W. Rep. (Minn.) 589; *Darcy v. McCarthy*, 12 Pac. Rep. (Kan.) 104; *McLane v. Bovee*, 35 Wis. 27; *Hosmer v. Wallace*, 47 Cal. 461.

Catron, J., said in *Harkness v. Underhill*, 1 Black, 316, "The question is again raised, whether this entry, having been allowed by the register and receiver, could be set aside by the Commissioner. . . . This question has several times been raised and decided in this court, upholding the Commissioner's powers;" citing *Garland v. Wynn*, 20 How. 8, and *Lytle v. Arkansas*, 22 Id. 193, but *Carroll v. Safford*, *supra*, was not overruled or referred to, and the cases cited do not appear to support the remark. In *Lytle v. Arkansas* there never had been an entry, and in *Garland v. Wynn* the question was whether or not the Commissioner's decision was reviewable in the courts, and Catron, J., overruled the contention that the Commissioner's decision was final, and reversed it on a question of fact.

In *Barnard v. Ashley*, 18 How. 43, Catron, J., held that the Commissioner had power to revise the findings of the register and receiver under his general supervisory power; but in *Johnson v. Towsley*, 13 Wall. 72, Miller, J., held that the supervisory power of the Commissioner was suspended by St. 1841, and *United States v. Butterworth*, 112 U. S. 50, settles that quasi-judicial decisions of inferior executive officers cannot be controlled or reviewed by superior officers unless the power to do so is expressly given by statute, mere general supervisory power not being sufficient. A certificate of purchase, issued in due form, in favor of a pre-emptor, for land subject to entry under the pre-emption law, cannot be cancelled by the Land Department for alleged fraud in obtaining it; in such case the government must seek redress in the courts, where the matter may be heard and determined according to the law applicable to the rights of individuals under like circumstances. The right of a party holding a certificate of purchase of public land and that of his grantee, is a right in and to property of which neither of them can or ought to be deprived without due process of law. *Smith v. Ewing*, 23 F. R. 741. A purchaser for value without notice, of land held under a certificate of purchase, before patent, takes the land purged of any fraud of the pre-emptor in procuring the certificate. *Smith v. Ewing*, *supra*. It was held in early cases that the legal title remains in the United States until patent, and that therefore the patent must prevail against a certificate at law. *Bagnall v. Broderick*, 13 Pet. 436; *Wilcox v. Jackson*, Id. 498; *Gibson v. Chouteau*, 13 Wall. 92. But this doctrine was virtually overruled in *Simmons v. Wagner*, 101 U. S. 260.

The rights of the patentee, and of the government and third parties against the patentee, have been designated as follows: The recall and destruction by the Land Department of a patent recorded, but not actually delivered, are utterly nugatory acts, and do not affect the force and effect of the grant. *Bicknell v. Comstock*, 113 U. S. 149; *Moore v. Robbins*, 96 Id. 530; *Gilmore v. Sapp*, 100 Ill. 297; *cf.* *Bell v. Hearne*, 19 How. 252. But a patent for land which has been previously sold, granted, or reserved, is void. *Morton v. Nebraska*, 21 Wall. 660. And a void patent may be cancelled at the suit of the United States. *United States v. Stone*, 2 Wall. 525; *United States v. Hughes*, 11 How. 552, and 4 Wall. 232. Also a patent voidable for fraud. *United States v. Minor*,



114 U. S. 233; overruling *United States v. Minor*, 26 F. R. 672, and *United States v. White*, 17 Id. 561; *Moffat v. United States*, 112 U. S. 24; *United States v. Iron S. M. Co.*, 128 Id. 673; *United States v. San Jacinto Tin Co.*, 123 Id. 273; *United States v. Williams*, 12 Sawyer, 138. But not after the title to the land has passed to a *bona fide* purchaser without notice (*United States v. Minor*, 29 F. R. 134); or after the lapse of many years. *United States v. Wentz*, 34 F. R. 154. And the allegations of fraud must be full and particular. *United States v. Atherton*, 102 U. S. 372. Where there has been a settled judicial determination, it will not be disturbed on allegations of fraud and perjury as to matters examinable and examined by the original tribunal. *United States v. Throckmorton*, 98 U. S. 61; *Vance v. Burbank*, 101 Id. 514. But it is intimated in *Lee v. Johnson*, 116 U. S. 48, that if the plaintiff could show that except for fraud and perjury in the proceedings in the Land Department, the patent would have been issued to him, he may impeach the patentee's right on that ground.

The United States can maintain a suit to have a patent vacated on the ground that it was issued by mistake (*United States v. Curtner*, 26 F. R. 296); but not where the United States has assumed no obligation and suffered no injury. *United States v. Central Pacific R. R. Co.*, 26 F. R. 479. A patent cannot be impeached collaterally except by matter showing it to be void. *Steel v. Smelting Co.*, 106 U. S. 447; *Smelting Co. v. Kemp*, 104 Id. 636; *Quinby v. Conlan*, Id. 426; *Moore v. Robbins*, 96 Id. 530.

Where a patent is issued to one person, and another can show that he has a prior and stronger right to the land, the patentee will be ordered to convey. *Silver v. Ladd*, 7 Wall. 219; *Cunningham v. Ashley*, 14 How. 377; *Lytle v. Arkansas*, 9 Id. 314; *Warren v. Van Brunt*, 19 Wall. 646; *Samson v. Smiley*, 13 Id. 91; *Hughes v. United States*, 4 Id. 232, *semble*; *O'Brien v. Perry*, 1 Black, 132, *semble*; *Garland v. Wynn*, 20 How. 6; *Lindsey v. Hawes*, 2 Black, 554; 5 A. G. Op. 551.

Sect. 2259 implies a residence both continuous and personal. Only under special circumstances is residence away from the land permissible. The settler may be excused for temporary absences caused by well-founded apprehensions of violence, by sickness, by the presence of an epidemic, by judicial compulsion, or by engagement in the military or naval service. Except in such and like cases the requirement of a continuous residence on his part is imperative. *Bohall v. Dilla*, 114 U. S. 47. One who settles upon a quarter section of land and in good faith complies with the law has a right superior to that of subsequent settlers, although they purchase the right of a prior settler who had not made an actual entry at the proper office. *Quinby v. Conlan*, 104 U. S. 420. When the fractional section contains more than 160 acres, the pre-emptor may be allowed to enter a quantity of acres not exceeding that number, in any tracts which form legal subdivisions of the section on which he has made improvements. 3 A. G. Op. 313. See Id. 211, 563. The pre-emptioner cannot go beyond the fractional section upon which he has made improvements in order to make up the 160 acres to which settlers are generally entitled. *Lytle v. Arkansas*, 9 How. 314. Under § 6 of St. 1853 (10 St. 244), a settler upon unsurveyed public lands in California has no valid claim to pre-empt any land unless the government surveys, when made and filed, show that his dwelling was on the quarter section which he desired to enter. *Ferguson v. McLaughlin*, 96 U. S. 174. The rights acquired by a compliance with the pre-emption laws cannot be impaired by a selection made under a subsequent act of Congress. *Lytle v. Arkansas*, 9 How. 314. The pre-emption right only inures in favor of one who has performed the conditions imposed by statute. These cannot be performed when another is occupying the land. *Hosmer v. Wallace*, 97 U. S. 575. But if the first settler rents his improvements to another, the right of pre-emption is in the lessor. 2 A. G. Op. 367, ruled under the act of 1830.

An officer of the United States has the same right to acquire a portion of the public lands by any mode of purchase authorized by law as any other citizen. *United States v.*



Fitzgerald, 15 Pet. 407. An army officer in actual service could pre-empt lands under the act of 1834. 3 A. G. Op. 303. The pre-emption laws do not apply to Indians. Half-breeds are to be considered Indians so long as they retain their tribal relations. Neither Indians nor half-breeds become citizens of the United States by being made electors under State laws. 7 A. G. Op. 746. See note, § 2141. Under the acts of 1830 and 1834 the right to pre-empt public lands might be exercised by aliens, especially where the local law enabled them to hold and convey real estate. 3 A. G. Op. 90. See *Id.* 128, 309.

SECT. 2260. — A person does not become a proprietor within the meaning of the law by holding lands in trust for others, or by entering lands at the land office; the proprietorship contemplated is a legal and absolute one. *Aiken v. Ferry*, 6 Sawyer, 79. The applicant for pre-emption under St. May 30, 1862, which authorized settlements upon lands in California, must have all the qualifications prescribed under the general pre-emption law. *Gimmy v. Culverson*, 5 Sawyer, 605.

SECT. 2261. — See note, § 2283. A filing made by a minor does not impair his right to a second filing after becoming twenty-one. *Tatro v. French*, 33 Kan. 49. A second filing for the same tract is not prohibited. *Cumens v. Cyphers*, 56 Cal. 383. It was held, in *Johnson v. Towsley*, 13 Wall. 72, that the prohibition of a second filing applied only to lands subject to private sale (§ 2264), and not to lands not yet proclaimed (§ 2265); but it was held, in *Baldwin v. Stark*, 107 U. S. 463, that the prohibition applies generally since the Revision. Entering one quarter of a quarter-section is an abandonment of the right to enter the other three quarters. *Nix v. Allen*, 112 U. S. 129.

SECT. 2262. — See notes, §§ 2248, 2257, 2258, 2259, 2291, 2296, 2306. St. March 3, 1879, ch. 192 (20 St. 472), provided for the filing, with the register, of notice of intention to make final proof in pre-emption or homestead cases, stating the description of the lands and the names of the witnesses; the register thereupon to publish a notice of such intention, including the names of the witnesses, once a week for thirty days in a paper designated by him as published nearest to the land, and to post such notice in his office for the same period, and at the expiration of the thirty days, the claimant to make his proof. St. June 9, 1880, ch. 164 (21 St. 169), allowed the affidavits required by §§ 2262, 2301, to be made before the clerk of the county court, or of any court of record of the county and State, or district and Territory, in which the lands are situated, or of any adjacent county if said first-mentioned county is unorganized; the affidavit to be transmitted by the clerk to the register and receiver.

The exception made by the statute in favor of *bona fide* purchasers is only against the forfeiture of the land for perjury. *Smith v. Ewing*, 23 F. R. 741. But Deady, J., said, in *Smith v. Ewing*, *supra*: "My impression is that an innocent purchaser for a valuable consideration from the party having the certificate of purchase takes the land and the right to the patent, purged of any fraud that may have been committed by his grantor in obtaining such certificate." An agreement by a pre-emptioner, that if his entry is not opposed he will thereafter convey certain rights in the land, is void. *Snow v. Kimmer*, 52 Cal. 624. Specific performance cannot be obtained of a contract by which one party is to furnish half the government price of land and of improving it, in consideration of the other party pre-empting and conveying half the land to him after title acquired. *Marshall v. Cowles*, 3 S. W. Rep. (Ark.), 188. See 2 A. G. Op. 383. The frauds for which a patent will be set aside at the suit of the United States are such as are extrinsic or collateral to the matter tried and determined upon which the patent issued, and not perjury in the matter on which the determination was made. *United States v. White*, 17 F. R. 561. A "*bona fide* pre-emption claimant," as these words were used in another statute, signified one who had settled upon lands subject to pre-emption, intending to acquire them, and who, in order to do so, had complied, or was complying, in good faith, with the requirements of the law on the subject. *Hosmer v. Wallace*, 97 U. S. 575. Persons who



purchase land without actual knowledge of a defect in the title are not *bona fide* purchasers if they bought before patent issued, when the defect arose out of a rule of law of which they were bound to take notice, and when the title acquired is absolutely void. *Root v. Shields*, Woolw., 340. The penalty provided for can only be enforced by a proceeding at law, where the party accused may have a trial by jury. *United States v. White*, 17 F. R. 561. A mortgage is included within the words "grant or conveyance" in § 2262. *Bass v. Buker*, 12 Pac. Rep. (Mont.), 922.

SECT. 2263. — See notes, §§ 2291, 2296. An agreement by a pre-emptor to relinquish his claim is not within the prohibition. *Olson v. Orton*, 28 Minn. 36. It seems that a pre-emptor cannot convey the land which he has entered prior to the issue of a patent, although he holds a certificate of purchase. *Kellom v. Easley*, 1 Dillon, 281, 288. See *Myers v. Croft*, 13 Wall. 291. A pre-emptor can convey no right unless, by an actual entry at the proper office, he has acquired a transferable interest in the land. *Quinby v. Conlan*, 104 U. S. 420. See *Forbes v. Driscoll*, 31 N. W. Rep. 633. The spirit of § 2263 and the general principles of law forbid the purchase by pre-emption of public lands by either receivers or registers within the districts in which they act. 7 A. G. Op. 647. Decisions made by registers and receivers upon the facts offered to prove the right to pre-empt lands are conclusive. 3 A. G. Op. 93, 104.

"*Proof*." — This means that sort of conviction which is produced by legal evidence coming from a competent source. If an entry is allowed by the register and receiver upon other than legal proof, it is erroneous and voidable, not void as against the government. 3 A. G. Op. 126. As to proof of settlement, see *Potter v. United States*, 107 U. S. 126; *Shepley v. Cowan*, 91 Id. 330; *Lytle v. Arkansas*, 9 How. 314.

SECT. 2264. — See notes, §§ 2261, 2267, 5421. When a settler enters in person on land open to pre-emption, with the intention of availing himself of the provisions of the law concerning such land, and does any act in execution of that intention, as by cutting logs to build a house, he is a settler and must give the required notice within thirty days thereafter. 4 A. G. Op. 493.

SECT. 2265. — See note, § 2261. The claim will not be forfeited for failure to make the declaration within three months, if it is made before any adverse claim accrues. *Johnson v. Towsley*, 13 Wall. 72. See *Moore v. Robbins*, 96 U. S. 530. This section authorizes the Secretary of the Interior, in his discretion, to make an allowance for office rent out of the appropriation for incidental expenses. A receiver who rents an office without being thereto authorized, has no legal right to reimbursement out of the fund for the incidental expenses of land offices. *Bane v. United States*, 19 Ct. Cl. 644. Where a settler made a mistake in his declaratory statement as to the tract of land intended to be claimed, and failed for three years to make the necessary proof and payment, and during his lifetime the land was granted away by Congress, it was held that a pre-emption entry by his heirs was not confirmable by the Commissioner of the land office. *Claim of Lutz's Heirs*, 9 A. G. Op. 515.

SECT. 2266. — A statement filed before the plats of the survey are returned into the local land office is premature, and gives the person who files it no right to the land. *Lansdale v. Daniels*, 100 U. S. 113.

SECT. 2267. — Extensions of time for making proof and payment have been granted as follows: — By St. Feb. 11, 1874, ch. 25 (18 St. 15), the time of sale and payment of pre-empted lands in the Bitter-root Valley, Mont., for two years from the expiration of the time allowed by St. June 5, 1872; said lands were also made subject to homestead entry. By St. April 29, 1874, ch. 137 (18 St. 41), the time of proof and payment by settlers on the Cherokee lands, Kansas, to Jan. 1, 1875; five per cent interest to be paid. By St. June 3, 1874, ch. 206 (18 St. 52), the time allowed pre-emptors of Minnesota lands, including the Fort Ridgely and Sioux reservations, for two years.



The statutes noted as follows allow absence from the land without prejudice, or extend the time of proof and payment, where the crops have been destroyed or seriously injured by grasshoppers: St. June 18, 1874, ch. 308 (18 St. 81), to homestead and pre-emption settlers in certain counties in Minnesota and Iowa, if injured in 1874, absence until May 1, 1875. St. Dec. 28, 1874, ch. 10 (18 St. 294), to homestead and pre-emption settlers generally, if injured in 1874, absence until July 1, 1875; if in 1875, absence until July 1, 1876; time of proof and payment in such cases extended for one year after expiration of absence. St. May 23, 1876, ch. 104 (19 St. 55), extended time of proof and payment for two years to pre-emptors generally, where their crops had been destroyed since May 23, 1874. St. June 19, 1876, ch. 134 (19 St. 59), extended the privileges granted by St. Dec. 28, 1874 (noted *supra*), for one year additional, and included timber-culture settlers. St. March 3, 1877, ch. 127 (19 St. 405), to homestead, pre-emption, and timber-culture settlers, if injured in 1877, absence till Oct. 1, 1878; if in 1878, absence till Oct. 1, 1879; with extension of time for proof and payment for one year after expiration of absence. St. June 1, 1878, ch. 148 (20 St. 88), allowed homesteaders, injured in 1876, who left their land in that year, to return, without prejudice, prior to Sept. 1, 1878, if no adverse rights had accrued. St. June 19, 1878, ch. 314 (20 St. 169), extended the provisions of St. March 3, 1877 (noted *supra*), to settlers injured in 1876. St. June 12, 1879, ch. 19 (21 St. 11), extended the time of proof and payment, to pre-emptors in Minnesota and Dakota injured since Oct. 1, 1876, until Oct. 1, 1880; and St. July 1, 1879, ch. 63 (21 St. 48), to homestead, pre-emption, and timber-culture settlers injured at any time, absence not to exceed one year continuously; and to pre-emptors, extension of time for proof and payment, in the discretion of the Commissioner, for one year from expiration of absence.

SECT. 2269. — An administrator or executor cannot complete the entry unless it appears that there are heirs. *Elliott v. Figg*, 59 Cal. 117. The heirs of a mere settler, who died without initiating his claim under the pre-emption law, are not within the statute. *Buxton v. Traver*, 67 Cal. 172. The restriction on alienation of a pre-emptive right does not apply to the right of the heirs. *Coleman v. Allen*, 5 Mo. App. 127; 75 Mo. 332. The land acquired by the heirs under this provision is not subject to the ancestor's debts. *Rogers v. Clemmans*, 26 Kan. 522. Earlier statutes of a somewhat similar nature are construed in *Davenport v. Lamb*, 13 Wall. 418; *Galloway v. Finley*, 12 Pet. 264.

SECT. 2273. — See notes, §§ 2257, 2259, 2267, 2306. St. June 3, 1878, ch. 152 (20 St. 91), provided that notices of contest under the homestead, pre-emption, and tree-culture laws, should be printed in some newspaper printed in the county where the land lies, or in the absence of such paper, then in a paper printed in the nearest county.

The courts will not interfere with the officers of the government while in the discharge of their discretionary, political, or quasi-judicial duties in disposing of the public lands, either by injunction or mandamus. *Marquez v. Frisbie*, 101 U. S. 473; *Litchfield v. Reg. & Rec.* 9 Wall. 575; *Gaines v. Thompson*, 7 Id. 347; *Koehler v. Barin*, 25 F. R. 161; *The Secretary v. McGarrahan*, 9 Wall. 298; *United States v. The Commissioner*, 5 Id. 563. But the execution and delivery of the patent after the right to it has become complete are the mere ministerial acts of the officers charged with that duty. *Simmons v. Wagner*, 101 U. S. 260. And a mandamus will be granted to compel the issue of a patent which has been completed and recorded. *United States v. Schurz*, 102 U. S. 378. Cf. *Houghton v. Hardenberg*, 53 Cal. 181; *Cruz v. Martinez*, Id. 239; *Sands v. Davis*, 40 Mich. 14, all *semble*.

The officers of the Land Department are specially designated by law to receive, consider, and pass upon proofs presented with respect to settlement upon the public land, with a view to secure rights of pre-emption. If they err in the construction of the law



applicable to any case, or if fraud is practised upon them, or they themselves are chargeable with fraudulent practices, their rulings may be reviewed and annulled by the courts, when a controversy arises between private parties founded upon their decisions; but for mere errors of judgment upon the weight of evidence in a contested case before them, the only remedy is by appeal from one officer to another of the Department, and perhaps under special circumstances to the President. It may also be and probably is true that the courts may furnish, in proper cases, relief to a party where new evidence is discovered, which, if possessed and presented in time, would have changed the action of the land officers; but except in such cases, the rulings of the Department on disputed questions of fact, made in a contested case, must be taken, when that ruling is collaterally assailed, as conclusive. *Shepley v. Cowan*, 91 U. S. 330; *Baldwin v. Stark*, 107 Id. 463; *Marquez v. Frisbie*, 101 Id. 473; *Vance v. Burbank*, Id. 514; *Moore v. Robbins*, 96 Id. 530; *Warren v. Van Brunt*, 19 Wall. 646; *Johnson v. Towsley*, 13 Id. 72; *French v. Fyan*, 93 U. S. 169; *Quinby v. Conlan*, 104 Id. 420; *Smelting Co. v. Kemp*, 104 Id. 636; *Steel v. Smelting Co.*, 106 Id. 447; *Rector v. Gibbon*, 111 Id. 276; *Tatro v. French*, 33 Kan. 49; *Van Sant v. Butler*, 19 Neb. 351; *Aiken v. Ferry*, 6 Sawyer, 79; *Kinney v. Degman*, 12 Neb. 237; *Rush v. Valentine*, Id. 513; *Mace v. Merrill*, 56 Cal. 554; *Dilla v. Bohall*, 53 Id. 709; *Powers v. Leith*, Id. 711; *Rutledge v. Murphy*, 51 Id. 388; *Hess v. Bolinger*, 48 Id. 349; *Boyce v. Danz*, 29 Mich. 146; *Bracken v. Parkinson*, 1 Pinn. (Wis.) 685. *Cf.* *Johnson v. Lee*, 47 Mich. 52; and *Wilkinson v. Merrill*, 56 Cal. 559; *Litchfield v. Register*, 9 Wall. 575.

The doctrine as to the conclusiveness of Land Department decisions on matters of fact seems to be limited to contested cases. *Lindsey v. Hawes*, 2 Black, 554; *Minnesota v. Bachelder*, 1 Wall. 109; *United States v. Minor*, 114 U. S. 233; *Butterworth v. Hoe*, 112 Id. 50, 56; *Garland v. Wynn*, 20 How. 8; *Lytle v. Arkansas*, 22 Id. 193, and 9 How. 314; *Barnard v. Ashley*, 18 Id. 43; *Corbett v. Wood*, 32 Minn. 509, *semble*; *Glidden v. U. P. R. Co.*, 30 F. R. 660.

One officer of the Land Department is not competent to cancel or annul the act of his predecessor; that is a judicial act and requires the judgment of a court. *United States v. Stone*, 2 Wall. 525; *Mullan v. United States*, 118 U. S. 271.

SECT. 2275. St. June 22, 1874, ch. 422 (18 St. 202), made special provision for the selection of school lands for all fractional townships in Missouri entitled to the same. Upon the California act of 1853 (10 St. 244), see *Sherman v. Buick*, 93 U. S. 209; *Water Co. v. Bugbey*, 96 Id. 165. Sect. 6 of St. Aug. 9, 1888, ch. 819 (25 St. 393), which authorized the leasing of the school and university lands in Wyoming, &c., provided:—

“SEC. 6. That where lands in the sixteenth and thirty-sixth sections, in the Territory of Wyoming, are found upon survey to be in the occupancy, and covered by the improvements of an actual pre-emption or homestead settler, or where either of them are fractional in quantity, in whole or in part, or wanting because the townships are fractional or have been or shall hereafter be reserved for public purposes, or found to be mineral in character, other lands may be selected by an agent appointed by the governor of the Territory in lieu thereof, from the surveyed public lands within the Territory not otherwise legally claimed or appropriated at the time of selection, in accordance with the principles of adjustment prescribed by Rev. Stats., § 2276, and upon a determination by the Interior Department that a portion of the smallest legal subdivision in a section numbered sixteen, or thirty-six, in Wyoming, is mineral land, such smallest legal subdivision shall be excepted from the reservation for schools, and indemnity allowed for it in its entirety, and such subdivisions, or the portions of them remaining after segregation of the mineral lands or claims, shall be treated as other public lands of the United States.”

SECT. 2277. — By St. Jan. 28, 1879, ch. 30 (20 St. 274), the certificates or scrip issued in adjustment of certain private land claims in Florida, Louisiana, and Missouri were made assignable and receivable from actual settlers only, in payment of pre-emption or commuted homestead claims, to the same extent as military bounty-land warrants.



SECT. 2278. — St. June 20, 1874, ch. 330 (18 St. 111), extended the provisions of §§ 2441, 2442 to agricultural college scrip, lost, cancelled, or destroyed without the fault of the owner.

SECT. 2279. — See notes, § 2257.

SECT. 2280. — The words, "settlers" and "occupants," as used in the pre-emption acts of 1830 and 1834, are defined in 3 A. G. Op. 182, 309.

SECT. 2281. — See notes, §§ 2257, 2289. St. March. 3, 1875, ch. 196 (18 St. 519), provided that where actual settlers had paid for any lands, within the limits of any railroad land grant, the price being fixed at double minimum rates, and such lands had been restored to the public domain, such persons should have the right to locate on any unoccupied lands, an amount equal to their original entry without further cost except the lawful fees in pre-emption cases, provided that only half the amount shall be taken if the location is upon double minimum lands.

SECT. 2282. — 2 A. G. Op. 367, 370.

SECT. 2283. — St. June 23, 1874, ch. 488 (18 St. 283), enacted as follows :—

"That all actual settlers upon the Osage Indian trust and diminished reserve lands in the State of Kansas shall be allowed one year from the passage of this act in which to make proof and payment: *Provided*, That all purchasers who avail themselves of the provisions of this act shall pay interest on the purchase price of their lands at the rate of five per centum from the date when payment was required by previous laws to date of actual payment: *And provided further*, That no further extension of payment shall be granted than that provided for in this act, and that all occupants now upon said Osage lands shall file their application to purchase the lands occupied by them within three months after the passage of this act, or forfeit all right or claim to the same."

St. Aug. 11, 1876, ch. 259 (19 St. 127), enacted as follows :—

"That any bona fide settler, residing at the time of completing his or her entry, as hereinafter provided, upon any portion of the lands sold to the United States, by virtue of the first article of the treaty concluded between the United States and the Great and Little Osage tribe of Indians September 29, 1865, and proclaimed January 21, 1867, who is a citizen of the United States, or shall have declared his intention to become a citizen of the United States, shall be, and hereby is, entitled to purchase the same, in quantity not to exceed 160 acres, at the price of \$1.25 per acre, within one year from the passage of this act, under such rules and regulations as may be prescribed by the Secretary of the Interior, and on the terms hereinafter provided: *Provided*, That no bona fide settler as aforesaid on said land shall be denied the right to purchase land under the provisions of this act on the ground that he or she may heretofore have had the benefit of the homestead or pre-emption laws of the United States.

"SEC. 2. That any person who is a citizen of the United States, or has declared his intention to become such, who in good faith had purchased any portion of said land from either the Leavenworth, Lawrence and Galveston Railroad Company, or the Missouri, Kansas and Texas Railroad Company, prior to the commencement of the two suits in the name of the United States against said companies, in the circuit court of the United States for the district of Kansas, to test the legality of title of said railroad companies to said lands, or portions thereof, to wit, before February 25, 1874, and shall prove to the satisfaction of the register and the receiver of the proper land office that he or she has, in good faith, before the date last aforesaid, paid said railroad companies, or either of them, the consideration-money, or a portion thereof, and also that he or she has in good faith made lasting and valuable improvements thereon, shall be, and hereby is declared to be entitled to purchase said lands, not exceeding 160 acres, to include his or her improvements, on the same terms and conditions that actual settlers are authorized by this act to purchase said lands; that the rights of the said purchasers from said railroad companies shall attach at the date of the payment aforesaid made to said railroads or either of them: *Provided*, That the said improvements are made before the date last aforesaid: *And provided further*, That said claimant actually resides on the land at the time of completing his or her entry thereof at the proper land office: *Provided further*, That the heirs of any deceased purchaser from said railroads shall have the same right to purchase the said lands so purchased from the said railroads as the original purchaser would have had, had he lived.

"SEC. 3. That the parties desiring to make entries under the provisions of this act who will, within twelve months after the passage of the same make payment at the rate of \$1.25 per acre, for the land claimed by said purchaser, under such rules and regulations as the Commissioner of the General Land



Office may prescribe, as follows, that is to say ; said purchaser shall pay for the land he or she is entitled to purchase one-fourth of the price of the land at the time the entry is made, and the remainder in three annual payments, drawing interest at the rate of five per centum per annum, which payment shall be secured by notes of said purchaser, payable to the United States ; and the Secretary of the Interior shall withhold title until the last payment is made ; and the Secretary of the Interior shall cause patents to issue to all parties who shall complete their purchases under the provisions of this act ; and if any claimant fails to complete his or her entry at the proper land office within twelve months from the passage of this act, he or she shall forfeit all right to the land by him or her so claimed, except in cases where the land is in contest : *Provided further*, That nothing in this act shall be construed to prevent any purchaser of said land from making payment at any time of the whole or any portion of the purchase money.

“SEC. 4. That the laws of the United States in relation to the pre-emption of town-sites shall apply to the tract of land first above described, except that the declaratory statement provided by existing laws in such cases shall be filed with the register of the proper land-office within sixty days after the passage of this act, and the occupants of town-sites shall not be allowed to purchase more than three hundred and twenty acres actually occupied as a town-site, except in case where town-site companies have purchased all claim of title of the original settlers, and all titles claimed by any railroad company, in which case said town-site company, by its proper agent, shall have the same right to enter said lands that the original settlers would have had, not exceeding in amount 800 acres, and shall pay therefor the sum of \$1.25 per acre, in the same manner as actual occupants are required to pay.

“SEC. 5. That all lawful entries heretofore made of any of said lands, and set aside or cancelled by the Secretary of the Interior, on the ground that the said railroads had a prior grant of said lands, be reinstated by the said Secretary of the Interior, subject to any valid adverse claim that may have accrued before or since such sale or cancellation.

“SEC. 6. That all declaratory statements made by persons desiring to purchase any portion of said land under the provisions of this act, shall be filed with the register of the proper land office within 60 days after the passage of the same : *Provided, however*, That those who may settle on said land after the passage of this act shall file their declaratory statement within 20 days after settlement, and complete their purchase under the provisions of this act within one year thereafter.

“SEC. 7. That nothing in this act shall be so construed as to prevent said land from being taxed under the laws of the State of Kansas, as other lands are or may be taxed in said State, from and after the time the first payment is made on said land, according to the provisions of this act.

“SEC. 8. That the said railroads or either of them shall have the right to purchase such subdivisions of lands as are located outside of the right of way, heretofore granted to them, and which were occupied by them on said April 10, 1876, for stock-yards, storage-houses, or any other purposes legitimately connected with the operation and business of said roads, whenever the same does not conflict with a settler who in good faith made a settlement prior to the occupation of said lands by said railroad company or companies, in the same manner and at the same price settlers are authorized to purchase under the provisions of this act.”

St. May 28, 1880, ch. 107 (21 St. 143), enacted as follows :—

“SEC. 1. That all actual settlers under existing laws upon the Osage Indian trust and diminished reserve lands in Kansas (any failure to comply with such existing laws notwithstanding) shall be allowed 60 days after a day to be fixed by public notice by advertisement in two newspapers in each of the proper land districts, which day shall not be later than 90 days after the passage of this act, within which to make proof of their claims, and to pay one fourth the purchase price thereof, and the said parties shall pay the balance of said purchase price in three equal annual instalments thereafter : *Provided*, That nothing herein contained shall be construed to prevent an earlier payment of the whole or any instalment of said purchase money as aforesaid. And if default be made by any settler in the payment of any portion or instalment at the time it becomes due under the foregoing provisions, his entire claim, and any money he may have paid thereon, shall be forfeited, and the land shall, after proper notice, be offered for sale according to the terms hereinafter prescribed, unless before the day fixed for such offering, the whole amount of purchase money shall be paid by said claimant, so as to entitle him to receive his patent for the tract embracing his claim.

“SEC. 2. That all the said Indian lands remaining unsold and unappropriated and not embraced in the claims provided for in § 1 of this act, shall be subject to disposal to actual settlers only, having the qualifications of pre-emptors on the public lands. Such settlers shall make due application to the register with proof of settlement and qualifications as aforesaid ; and, upon payment of not less than one-fourth the purchase price shall be permitted to enter not exceeding one quarter section each, the balance to be paid in three equal instalments, with like penalties, liabilities and restrictions as to default and forfeiture as provided in § 1 of this act.



"SEC. 3. All lands upon which such default has continued for 90 days shall be placed upon a list, and the Secretary of the Interior shall cause the same to be duly proclaimed for sale in the manner prescribed for the offering of the public lands, but not exceeding one quarter section shall be sold to any one purchaser, at a price not less than the price fixed by law, but such lands, upon which such default shall be made, shall be offered for sale by advertisement of not less than 30 days in two newspapers in the proper land districts respectively and unless the purchase price be fully paid before the day named in the notice, shall be sold for cash to the highest bidder at not less than the price fixed by law. And all such lands, subject to unpaid overdue instalments, shall be so offered once every year. And if any of said lands shall remain unsold after the offering as aforesaid, they shall be subject to private entry, for cash in tracts not exceeding one quarter section by one purchaser.

"SEC. 4. After the payment of the first instalment as hereinafter provided for, such lands shall be subject to taxation according to the laws of the State of Kansas, as other lands are or may be in said State: *Provided*, That no sale of any such lands for taxes shall operate to deprive the United States, of said lands, or any part of the purchase-price thereof, but if default be made in any instalment of the purchase-price as aforesaid, such tax sale purchaser, or his or her legal representatives, may, upon the day fixed for the public sale, and after such default has become final, under the foregoing provisions, pay so much of said purchase-price as may remain unpaid, and shall thereupon be entitled to receive a patent for the same as though he had made due settlement thereon: *And provided further*, That nothing in this act shall be so construed as to deprive or impair the right of the settler, of the right of redemption under the revenue laws of the State of Kansas.

"SEC. 5. That the register and the receiver shall be allowed the same fees and commissions as are allowed by law for the disposal of the public lands, and the net proceeds of the sales and disposals, after deducting the expenses of such disposals, shall be deposited to the credit of the proper Indian fund, as provided by existing laws; And the Secretary of the Interior shall make all rules and regulations necessary to carry into effect the provisions of this act.

"SEC. 6. That nothing in this act shall be construed to interfere in any manner with the operation of the town-site laws as applicable to these lands: *Provided*, That all claims for entry under said statutes shall be proved up and fully paid for, before the day fixed for the commencement of the public sales provided for in § 3 of this act.

"SEC. 7. In all cases arising under this act interest at the rate of five per cent per annum shall be computed and paid upon all that part of the purchase money in respect to which time is given for the payment of the same."

St. March 3, 1881, ch. 149 (21 St. 509), enacted as follows:—

"That all of the lands known as the Osage Indian trust and diminished reserve lands, lying east of the sixth principal meridian, in the State of Kansas, remaining unsold on June 30, 1881, shall be offered for sale at public auction to the highest bidder for cash at not less than 75 cents per acre; And all of said lands remaining unsold on June 30, 1882, shall be offered for sale to the highest bidder for cash, at not less than 50 cents per acre; and all of said lands remaining unsold on June 30, 1883, shall be offered for sale to the highest bidder for cash, at not less than 25 cents per acre; And all of said lands remaining unsold after the last said public offering shall be subject to be disposed of by cash entry at 25 cents per acre, and the Secretary of the Interior may offer the same as aforesaid, in such quantities as may seem to him best; and may make all needful regulations, including the publication of notice of sale, as he may deem proper to carry out the provisions of this act: *Provided, however*, That no proceeding shall be taken under this act until at least two-thirds of the adult males of said Osage Indian tribe shall assent to the foregoing provisions."

In the case of Charles H. Robey (13 Copp's L. O. 238), the Interior Department reviewed the various statutes and held that an Osage cash entry made under St. 1880 is not subject to the provisions of the general pre-emption laws.

SECT. 2284. — See note, § 2283.

SECT. 2288. — An agreement for any public or private way is within the equity of the statute. *United States v. Reed*, 28 F. R. 482. But a claimant cannot, before fulfilling the requisites for acquisition of title, dedicate a public road and prescription will not run while the land belongs to the United States. *Smith v. Smith*, 34 Kan. 293.



## CHAPTER V.

## HOMESTEADS.

SECT. 2289. — See notes, §§ 2257, 2259, 2267, 2273, 2313, 2319, 2353, 2461, 5508. St. July 24, 1876, ch. 227 (19 St. 101), forfeited all the lands granted to Kansas by St. March 3, 1863, to which the railroad company therein mentioned is not lawfully entitled and made them subject to homestead entry only. St. March 3, 1879, ch. 191 (20 St. 472), provided as follows:—

“That from and after the passage of this act, the even sections within the limits of any grant of public lands to any railroad company, or to any military road company, or to any State in aid of any railroad or military road, shall be open to settlers under the homestead laws to the extent of 160 acres to each settler, and any person who has, under existing laws, taken a homestead on any even section within the limits of any railroad or military road land-grant, and who, by existing laws shall have been restricted to 80 acres, may enter under the homestead laws an additional 80 acres adjoining the land embraced in his original entry, if such additional land be subject to entry; or if such person so elect, he may surrender his entry to the United States for cancellation, and thereupon be entitled to enter lands under the homestead laws the same as if the surrendered entry had not been made. And any person so making additional entry of eighty acres, or new entry after the surrender and cancellation of his original entry, shall be permitted to so do without payment of fees and commissions; and the residence and cultivation of such person upon and of the land embraced in his original entry shall be considered residence and cultivation for the same length of time upon and of the land embraced in his additional or new entry, and shall be deducted from the five years' residence and cultivation required by law: *Provided*, That in no case shall patent issue upon an additional or new homestead entry under this act until the person has actually, and in conformity with the homestead laws, occupied, resided upon, and cultivated the land embraced therein at least one year.”

St. July 1, 1879, ch. 60 (21 St. 46), extended the provisions of St. March 3, 1879, *supra*, to the odd sections within the limits of any grants of even sections to railroads in Missouri and Arkansas, or to those States in aid of railroads, granting the privileges of an additional entry, &c., to homesteaders on any section within said limits. St. March 3, 1881, ch. 143 (21 St. 506), provided that lands within the Fort Ridgely reservation, Minn., and not embracing any government improvements should be open to homestead and timber-culture entries thereafter, giving preference for sixty days to persons then residing on said lands, or who had filed on any of them as *bona fide* settlers and providing that pre-emptors who had paid the purchase-money should be entitled to patents. St. May 6, 1886, ch. 88 (24 St. 22), provided that additional entries under St. March 3, 1879 and St. July 1, 1879, noted *supra*, should be patented without further cost or proof of settlement and cultivation, after final proof had been made under the original entry. St. March 3, 1887, ch. 376 (24 St. 556), provides for the adjustment of land-grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, &c. St. Aug. 13, 1888, ch. 871 (25 St. 439), protects purchasers of lands near Denver, Col., which were withdrawn as lying within the limits of certain railroad grants and afterwards held to lie within such limits.

Land not subject to pre-emption entry is not subject to homestead entry, and a patent issued on a homestead entry of land on which there were situated known salines or mines is void. *United States v. Reed*, 28 F. R. 482; *McLaughlin v. United States*, 107 U. S. 526. The rule appears to be that if the land is worth more for agriculture than for mining, it is not mineral land. *United States v. Reed*, *McLaughlin v. United States*, both *supra*. A tenant in common cannot acquire for himself a right of homestead adverse to his co-tenants. *Reinhart v. Bradshaw*, 9 Pac. Rep. 245 (Nev.). Under St. June 16, 1880, ch. 245 (21 St. 287; see note, § 2353), granting lands to the State of Nevada in lieu of sec-



tions theretofore granted for school purposes, the same to be selected from "any unappropriated non-mineral land" in the State, it was held that lands which had been occupied for years, and on which the occupants had erected valuable improvements prior to this statute, and before a selection was made by the State, were not unappropriated; and that while a contest pending in the land office is undecided, the lands involved are *sub judice*, and not within the terms of the act. *United States v. Williams*, 30 F. R. 309.

SECT. 2290. — See notes, §§ 2296, 2306. St. June 22, 1874, ch. 394 (18 St. 192), confirmed and legalized all homestead affidavits required by this section, which had been made before the county clerk prior to the claimant's having made the required settlement and improvement, saving however valid and permanent adverse rights. An agreement between a homesteader and his neighbor that the latter shall have a roadway over the former's homestead is not in conflict with this law. *United States v. Reed*, 28 F. R. 482. See *Union Pac. R. Co. v. Watts*, 2 Dillon, 310.

SECT. 2291. — See notes, §§ 2248, 2257, 2262, 2306, 2319. St. March 3, 1877, ch. 122 (19 St. 403), provided that the required proof, affidavit and oath might be made before the judge, or in his absence, before the clerk of any court of record of the county and State, or district and Territory, in which the lands are situated; or where the county is unorganized, in any adjacent county, the same to be transmitted by the judge or clerk to the register and receiver, who shall be entitled to the same fees as if it were taken before them; provided that the penalties for false swearing should apply in such cases. St. May 27, 1878, ch. 140 (20 St. 65), and St. June 14, 1878, ch. 189 (20 St. 113.) provided that pre-emptioners who had changed their filings to homestead entries should be entitled to have their time for perfecting homestead title computed from the date of their original pre-emption settlement, "whether heretofore or hereafter made;" extending a similar act, St. March 3, 1877, ch. 123 (19 St. 404). A person entering a homestead acquires a vested right therein at the expiration of five years from the entry, and may sell and convey it precisely the same as if the patent had been issued. *Newkirk v. Marshall*, 10 Pac. Rep. (Kan.) 571. But no estate in the land vests in the homesteader until he has complied with the required conditions. *Thrift v. Delaney*, 69 Cal. 188; *Coleman v. McCormick*, 37 Minn. 179. The patent, when issued, relates back to the date of the patentee's entry, the inception of his title. *Union Mill Co. v. Dangberg*, 2 Sawyer, 450. See *United States v. Ball*, 31 F. R. 667.

Alienation before issue of patent is not prohibited or contrary to the spirit of the law (*Knight v. Leary*, 54 Wis. 459); and an agreement to convey after issue of patent, made subsequently to entry but prior to application for the patent, is not unlawful or void. *Townsend v. Fenton*, 30 Minn. 528.

An agreement with another to use the land jointly and divide the profits arising from the use is not contrary to the statute. *H. S. R. Co. v. Tyler*, 36 Ark. 205; *Mantooth v. Burke*, 35 Id. 540. Where a homestead claimant dies before perfecting his claim and his heir perfects the claim and gets a patent, a judgment in ejectment against the administrator of the decedent does not bar the heir. *Chant v. Reynolds*, 49 Cal. 213.

SECTS. 2292, 2293. — See note, § 2306; *Anderson v. Peterson*, 36 Minn. 547.

SECT. 2294. — See notes, §§ 2291, 2306. If an applicant makes affidavit to the excusatory facts, wilfully and contrary to his oath, not believing them to be true, he is guilty of perjury. *United States v. Hearing*, 26 F. R. 744.

SECT. 2296. — A mortgage executed before the right to a patent is perfected is void; otherwise after the right is perfected. *Webster v. Bowman*, 25 F. R. 889; *Cheney v. White*, 5 Neb. 261; *Jones v. Yoakam*, Id. 265. It is held in *Baldwin v. Boyd*, 25 N. W. Rep. 580 (Neb.), that the land is not liable for debts contracted prior to the actual issue of the patent. See also *McCue v. Smith*, 9 Minn. 252; *Brewster v. Madden*, 15 Kan. 249; *Warren v. Van Brunt*, 19 Wall. 646; *Sorrels v. Self*, 43 Ark. 451. Any



agreement to convey the land, made before final proof by a homesteader or pre-emptor is in violation of law and void and cannot be enforced at law or in equity. *Shorman v. Eakin*, 1 S. W. Rep. 559 (Ark.); *Cox v. Donnelly*, 34 Ark. 762; *Thompson v. Doaksum*, 10 Pac. Rep. 199 (Cal.); *Oaks v. Heaton*, 44 Iowa, 116, and cases *supra*. See *Lamb v. Davenport*, 18 Wall. 314; *Southerland v. Whittington*, 46 Ark. 285. But it has been held by the Land Department that a mortgage given by a pre-emptor, prior to final proof, as security for money loaned to him, wherewith to pay the government for the land, does not invalidate his right to pre-empt. *Larson v. Weisbecker*, Land Dept. Dec. (1883), Vol. 1, p. 422. A mechanic's lien will not attach to the land before the claimant is entitled to a patent. *Kansas Lumber Co. v. Jones*, 32 Kan. 195. A mortgage, by an occupant, of land afterwards taken up under the town-site laws is not void. *Reasoner v. Markley*, 25 Kan. 635. A grantee of a mortgagor, who has taken the land agreeing to pay the mortgage debt, is estopped from showing that the mortgage was void under the pre-emption laws. *Green v. Houston*, 22 Kan. 35. Where an occupant of land subject to pre-emption makes a mortgage, then sells his improvements and the purchaser acquires the land from the government, the mortgage cannot be enforced against the land, because the owner does not deraign his title from the mortgagor. *Bull v. Shaw*, 48 Cal. 455. Sect. 2296 is valid and binding upon the States. *Seymour v. Sanders*, 3 Dillon, 437.

SECT. 2297. — See notes to §§ 2257, 2259, 2267, 2273, 2306. St. March 3, 1881, ch. 153 (21 St. 511), provided that the Commissioner might, for climatic reasons, allow the homestead claimant twelve months from his filing in which to commence his residence. The courts cannot inquire into the question of whether or not a party is entitled to the land, and has been deprived of the title by the fraud and perjury of a contestant, until the title is vested in a party amenable to their jurisdiction. *Empey v. Plugert*, 25 N. W. Rep. 560 (Wis.).

SECT. 2301. — See notes, §§ 2259, 2262, 2273. Where a homesteader avails himself of this privilege, this constitutes a new and original entry of the land, therefore a judgment in ejectment prior to the commutation does not estop him from showing his title under the commutation. *Thrift v. Delaney*, 10 Pac. Rep. 475 (Cal.). The widow of a homestead claimant may commute the entry. *Perry v. Ashby*, 5 Neb. 291. As to settlers upon the Pecan Island, La., reservation, see 25 St. 391, ch. 816. As to the effect of commutation of entry on a prosecution for cutting timber, see *United States v. Freyberg*, 32 F. R. 195. See *Smith v. Ewing*, 23 Id. 744; *Deffebach v. Hawke*, 115 U. S. 392; *Carroll v. Safford*, 3 How. 441; and § 2461.

SECT. 2302. — See note, § 2289.

SECT. 2303. — Repealed by St. July 4, 1876, ch. 165 (19 St. 73), which provided that no complete or inchoate homestead right then existing should be impaired by the repeal and that the lands affected by the act should be offered at public sale. If lands entered and patented on a private entry had not been previously offered at public sale, then the patent is absolutely void. *United States v. Pratt C. & C. Co.*, 18 F. R. 708.

SECT. 2304. — An order disbanding "enrolled Missouri militia" is not "an honorable discharge." 16 A. G. Op. 147.

SECT. 2306. — St. June 16, 1880, ch. 244 (21 St. 287), provided that fees, commissions, and excess payments paid by innocent parties upon the location, under the provisions of this section, of claims afterward found to be fraudulent and void and the entries cancelled, should be repaid upon the surrender of the receipts therefor; provided also that where any entries of public lands had been or should thereafter be cancelled for conflict, or where from any cause the entry had been erroneously allowed and could not be confirmed, but shall have been duly cancelled by the Commissioner, the fees, commissions, purchase money and excesses shall be repaid to the entryman, his heirs or assigns, upon the surrender of the duplicate receipt and a proper relinquishment of all claims to the land, and that where double minimum had been paid for land afterwards found not to be within



the limits of a railroad land-grant, the excess should be repaid to the purchaser, his heirs or assigns.

SECT. 2307. — The right of the children of a deceased soldier to locate an additional homestead is personal property and may be sold and assigned by their guardian. *Mullen v. Wine*, 26 F. R. 206.

SECT. 2313. — St. May 23, 1876, ch. 105 (19 St. 55), superseded the first section of St. March 3, 1875, ch. 188 (18 St. 516), authorized the Secretary to cause patents to be issued to three hundred and twenty members of the Ottawas and Chippewas, for the selections made by them but not regularly reported and recognized, prior to June 10, 1872; and made the remainder of said lands, not disposed of and not valuable mainly for pine timber, subject to homestead entries.

SECT. 2316. — See note, § 2313. St. Feb. 8, 1887, ch. 119 (24 St. 388), provides, —

“That in all cases where any tribe or band of Indians has been, or shall hereafter be, located upon any reservation created for their use, either by treaty stipulation or by virtue of an act of Congress or executive order setting apart the same for their use, the President of the United States be, and he hereby is, authorized, whenever in his opinion any reservation or any part thereof of such Indians is advantageous for agricultural and grazing purposes, to cause said reservation, or any part thereof, to be surveyed, or resurveyed if necessary, and to allot the lands in said reservation in severalty to any Indian located thereon in quantities as follows: To each head of a family, one-quarter of a section; to each single person over eighteen years of age, one-eighth of a section; to each orphan child under eighteen years of age, one-eighth of a section; and to each other single person under eighteen years now living, or who may be born prior to the date of the order of the President directing an allotment of the lands embraced in any reservation, one-sixteenth of a section: *Provided*, That in case there is not sufficient land in any of said reservations to allot lands to each individual of the classes above named in quantities as above provided, the lands embraced in such reservation or reservations shall be allotted to each individual of each of said classes pro rata in accordance with the provisions of this act: *And provided further*, That where the treaty or act of Congress setting apart such reservation provides for the allotment of lands in severalty in quantities in excess of those herein provided, the President, in making allotments upon such reservation, shall allot the lands to each individual Indian belonging thereon in quantity as specified in such treaty or act: *And provided further*, That when the lands allotted are only valuable for grazing purposes, an additional allotment of such grazing lands, in quantities as above provided, shall be made to each individual.

“SEC. 2. That all allotments set apart under the provisions of this act shall be selected by the Indians, heads of families selecting for their minor children, and the agents shall select for each orphan child, and in such manner as to embrace the improvements of the Indians making the selection. Where the improvements of two or more Indians have been made on the same legal subdivision of land, unless they shall otherwise agree, a provisional line may be run dividing said lands between them, and the amount to which each is entitled shall be equalized in the assignment of the remainder of the land to which they are entitled under this act: *Provided*, That if any one entitled to an allotment shall fail to make a selection within four years after the President shall direct that allotments may be made on a particular reservation, the Secretary of the Interior may direct the agent of such tribe or band, if such there be, and if there be no agent, then a special agent appointed for that purpose, to make a selection for such Indian, which election shall be allotted as in cases where selections are made by the Indians, and patents shall issue in like manner.

“SEC. 3. That the allotments provided for in this act shall be made by special agents appointed by the President for such purpose, and the agents in charge of the respective reservations on which the allotments are directed to be made, under such rules and regulations as the Secretary of the Interior may from time to time prescribe, and shall be certified by such agents to the Commissioner of Indian Affairs, in duplicate, one copy to be retained in the Indian Office and the other to be transmitted to the Secretary of the Interior for his action, and to be deposited in the General Land Office.

“SEC. 4. That where any Indian not residing upon a reservation, or for whose tribe no reservation has been provided by treaty, act of Congress, or executive order, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land-office for the district in which the lands are located, to have the same allotted to him or her, and to his or her children, in quantities and manner as provided in this act for Indians residing upon reservations; and when such settlement is made upon unsurveyed lands, the grant to such Indians shall be adjusted upon the survey of the lands so as to conform thereto; and patents shall be issued to them for such lands in the manner and with the restrictions as herein provided. And the



fees to which the officers of such local land-office would have been entitled had such lands been entered under the general laws for the disposition of the public lands shall be paid to them, from any moneys in the Treasury of the United States not otherwise appropriated, upon a statement of an account in their behalf for such fees by the Commissioner of the General Land Office, and a certification of such account to the Secretary of the Treasury by the Secretary of the Interior.

"SEC. 5. That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided*, That the law of descent and partition in force in the State or Territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided; and the laws of the State of Kansas regulating the descent and partition of real estate shall, so far as practicable, apply to all lands in the Indian Territory which may be allotted in severalty under the provisions of this act: *And provided further*, That at any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of its reservation not allotted as such tribe shall, from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress, and the form and manner of executing such release shall also be prescribed by Congress: *Provided, however*, That all lands adapted to agriculture, with or without irrigation so sold or released to the United States by any Indian tribe shall be held by the United States for the sole purpose of securing homes to actual settlers and shall be disposed of by the United States to actual and bona fide settlers only in tracts not exceeding one hundred and sixty acres to any one person, on such terms as Congress shall prescribe, subject to grants which Congress may make in aid of education: *And provided further*, That no patents shall issue therefor except to the person so taking the same as and for a homestead, or his heirs, and after the expiration of five years occupancy thereof as such homestead, and any conveyance of said lands so taken as a homestead, or any contract touching the same, or lien thereon, created prior to the date of such patent, shall be null and void. And the sums agreed to be paid by the United States as purchase money for any portion of any such reservation shall be held in the Treasury of the United States for the sole use of the tribe or tribes of Indians; to whom such reservations belonged; and the same, with interest thereon at three per cent per annum, shall be at all times subject to appropriation by Congress for the education and civilization of such tribe or tribes of Indians or the members thereof. The patents aforesaid shall be recorded in the General Land Office, and afterward delivered, free of charge, to the allottee entitled thereto. And if any religious society or other organization is now occupying any of the public lands to which this act is applicable, for religious or educational work among the Indians, the Secretary of the Interior is hereby authorized to confirm such occupation to such society or organization, in quantity not exceeding one hundred and sixty acres in any one tract, so long as the same shall be so occupied, on such terms as he shall deem just; but nothing herein contained shall change or alter any claim of such society for religious or educational purposes heretofore granted by law. And hereafter in the employment of Indian police, or any other employes in the public service among any of the Indian tribes or bands affected by this act, and where Indians can perform the duties required, those Indians who have availed themselves of the provisions of this act and become citizens of the United States shall be preferred.

"SEC. 6. That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled



to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.

"SEC. 7. That in cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior be, and he is hereby, authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations, and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor.

"SEC. 8. That the provision of this act shall not extend to the territory occupied by the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, and Osage, Miamies and Peorias, and Sac and Foxes, in the Indian Territory, nor to any of the reservations of the Seneca Nation of New York Indians in the State of New York, nor to that strip of territory in the State of Nebraska adjoining the Sioux Nation on the south added by executive order.

"SEC. 9. That for the purpose of making the surveys and resurveys mentioned in section two of this act, there be, and hereby is, appropriated, out of any moneys in the Treasury not otherwise appropriated, the sum of one hundred thousand dollars, to be repaid proportionately out of the proceeds of the sales of such land as may be acquired from the Indians under the provisions of this act.

"SEC. 10. That nothing in this act contained shall be so construed as to affect the right and power of Congress to grant the right of way through any lands granted to an Indian, or a tribe of Indians, for railroads or other highways, or telegraph lines, for the public use, or to condemn such lands to public uses, upon making just compensation.

"SEC. 11. That nothing in this act shall be so construed as to prevent the removal of the Southern Ute Indians from their present reservation in Southwestern Colorado to a new reservation by and with the consent of a majority of the adult male members of said tribe."

St. June 29, 1888, ch. 503 (25 St. 233), provides with respect to the above act of 1887 —

"No allotments shall be ordered or commenced upon any reservation unless the allotments upon such reservation so selected and the delivery of trust patents therein can be completed under this appropriation. . . . The amounts [here] provided for shall be repaid to the Treasury proportionately out of the proceeds of the sales of such lands, if any, as may be acquired from the Indians under the provisions of the aforesaid act. And a report in detail of the expenditures made to December first next, under the appropriations provided by said paragraphs, shall be made to Congress at the commencement of the next session."

SECT. 2317. — This seems to be superseded by St. 1878, printed in full under § 2464. See notes to that section and §§ 2257, 2267. Under 18 St. 21 and 20 St. 113, requiring that a person who enters a quarter section of land must break not less than five acres thereof within one year after he has made his application, and cultivate them in some annual crop the following year, it was held that the requirement concerning cultivation was not satisfied by planting timber or cuttings. *United States v. Shinn*, 14 F. R. 447.

## CHAPTER VI.

### MINERAL LANDS AND MINING RESOURCES.

SECT. 2318. — See notes, §§ 2258, 2289, 2380, 2461. By St. March 3, 1875, ch. 139 (18 St. 474), all mineral lands were excepted from the operation of the act which established the State of Colorado. St. Oct. 1, 1888, ch. 1057, provides for the investigation of the mining debris question in California as conflicting with farming.

Only valuable mineral lands and deposits are reserved from sale. *Merrill v. Dixon*, 15 Nev. 401. Title to lands known at the time to be valuable for minerals were only acquirable after the Revised Statutes took effect under provisions specially authorizing their sale, as found in such statutes, except in Michigan, Wisconsin, and Minnesota; and



after May 5, 1876, in Missouri and Kansas. *Deffeback v. Hawke*, 115 U. S. 392. Land used for agricultural purposes is not "mineral land" because a coal deposit underlies a portion of it. In the sales of public lands in Iowa, Missouri, and Kansas, lands containing coal deposits have not been reserved as "mineral lands." *Stroud v. Missouri, etc. R. Co.*, 4 Dillon, 396. See § 2258. As used in § 2 of St. March 1, 1847, the words "mineral lands" did not include lands containing iron ore merely. 5 A. G. Op. 247. The general requirements to secure the right of possession to a mining claim are discussed in *Gleeson v. Martin White M. Co.*, 13 Nev. 442; *Reynolds v. Iron S. Min. Co.*, 116 U. S. 687; *N. N. Min. Co. v. Orient Min. Co.*, 1 F. R. 522; *Jupiter Min. Co. v. B. C. Min. Co.*, 11 F. R. 666; 420 *Mining Co. v. Bullion Mining Co.*, 3 Sawyer, 634. Neither mining laws nor customs can authorize sending mining débris down the valleys to devastate the lands of private owners. *Woodruff v. N. B. G. Min. Co.*, 18 F. R. 753.

SECT. 2319. — See notes, §§ 2257, 2306, 2318, 2339, 2461. St. June 3, 1878, ch. 150 (20 St. 88), authorized *bona fide* residents of any mineral district to fell and remove for building, agricultural, mining, or other domestic purposes, any timber or other trees on the public lands in such district and subject only to mineral entry, under the regulations prescribed by the Secretary of the Interior; provided that violation of the act or of said regulations should be a misdemeanor punishable by fine not exceeding \$500, to which might be added imprisonment not exceeding six months; registers and receivers to report violations and to be reimbursed necessary expenses of detecting the same. By St. May 5, 1876, ch. 91 (19 St. 52), all mineral deposits, including coal, in Missouri and Kansas, were excepted from the application of the mineral law and made subject to disposal as agricultural lands. St. June 15, 1880, ch. 227 (21 St. 237), enacted as follows:—

"SEC. 1. That when any lands of the United States shall have been entered and the Government price paid therefor in full no criminal suit or proceeding by or in the name of the United States shall thereafter be had or further maintained for any trespasses upon or for or on account of any material taken from said lands and no civil suit or proceeding shall be had or further maintained for or on account of any trespasses upon or material taken from the said lands of the United States in the ordinary clearing of land, in working a mining claim or for agricultural or domestic purposes or for maintaining improvements upon the land of any *bona fide* settler or for or on account of any timber or material taken or used by any person without fault or knowledge of the trespass or for or on account of any timber taken or used without fraud or collusion by any person who in good faith paid the officers or agents of the United States for the same or for or on account of any alleged conspiracy in relation thereto: *Provided*, That the provisions of this section shall apply only to trespasses and acts done or committed and conspiracies entered into prior to March 1, 1879: *And provided further*, That defendants in such suits or proceedings shall exhibit to the proper courts or officer the evidence of such entry and payment and shall pay all costs accrued up to the time of such entry.

"SEC. 2. That persons who have heretofore under any of the homestead laws entered lands properly subject to such entry, or persons to whom the right of those having so entered for homesteads, may have been attempted to be transferred by *bona fide* instrument in writing, may entitle themselves to said lands by paying the government price therefor, and in no case less than \$1.25 per acre, and the amount heretofore paid the government upon said lands shall be taken as part payment of said price: *Provided*, This shall in no wise interfere with the rights or claims of others who may have subsequently entered such lands under the homestead laws.

"SEC. 3. That the price of lands now subject to entry which were raised to \$2.50 per acre, and put in market prior to January, 1861, by reason of the grant of alternate sections for railroad purposes is hereby reduced to \$1.25 per acre.

"SEC. 4. This act shall not apply to any of the mineral lands of the United States; and no person who shall be prosecuted for or proceeded against on account of any trespass committed or material taken from any of the public lands after March 1, 1879, shall be entitled to the benefit thereof."

By St. March 3, 1883, ch. 118 (22 St. 487), all public lands in Alabama, whether mineral or otherwise, were made subject to disposal only as agricultural lands; coal and iron lands to be first offered at public sale. *Bona fide* entries under the homestead law within said State were confirmed, regardless of the mineral laws.



A contract to convey land to be subsequently purchased by a homesteader under St. June 15, 1880, *supra*, is not unlawful or against public policy. *Fideler v. Norton*, 30 N. W. Rep. 128 (Dak.). The moment the mineral deposit is detached from the soil, it becomes personal property and is taxable, as is also the possessory right to the mining claim. *Forbes v. Gracey*, 94 U. S. 762. The person actually in possession of a mining claim and working the same has sufficient title to maintain trespass. *N. N. Min. Co. v. O. Min. Co.*, 11 F. R. 125. A *bona fide* resident of the State, though not a citizen of the United States and not having declared his intention to become such, may acquire and hold the title of the locators of an unpatented mining claim. *Ferguson v. Neville*, 61 Cal. 356. Cutting or removing timber from the public lands in Oregon otherwise than in accordance with St. June 3, 1878, ch. 151, is a trespass for which the party is liable civilly and criminally. *United States v. Smith*, 11 F. R. 487. St. June 3, 1878, ch. 150, noted *supra*, does not apply to California or Oregon. *United States v. Smith*, 11 F. R. 487; *United States v. Benjamin*, 21 Id. 285. Chinamen are excluded from exploration and purchase and therefore cannot hold a claim against a subsequent locator. *Chapman v. Toy Long*, 4 Sawyer, 28.

"*Valuable mineral deposits.*"—These words include diamonds; and the title to public lands containing them may be acquired under the provisions of these statutes. 14 A. G. Op. 115.

"*Local customs or rules.*"—If a mining claim, made, actually possessed, and worked for several years, has been generally recognized as validly made, the claimant's title is good though the mining rules in force when the location was made were not fully observed in making it. This is especially the rule as between co-claimants and those claiming through them. *Kinney v. Consolidated V. M. Co.*, 4 Sawyer, 382; *Mt. Diablo Mill & M. Co. v. Callison*, 5 Id. 439. Where the only question involved in an action to determine the right to mining claims is as to what are the local laws, rules and regulations which govern the parties' rights, and whether or not such laws have been conformed to, the Federal courts have no jurisdiction as of a case arising under the Constitution and laws of the United States. *Trafton v. Nougues*, 4 Sawyer, 178. All mineral locations made before the enactment by Congress of any law governing the subject are to be regulated by the local rules and customs in force when the locations were made. *Glacier M. Co. v. Willis*, 127 U. S. 471.

In general, a "mining claim" is a parcel of land containing precious metals in its soil or rock; a "location" is the act of appropriating such parcel, according to certain established rules. *Smelting Co. v. Kemp*, 104 U. S. 636, 648; *Mt. Diablo Mill & M. Co. v. Callison*, 5 Sawyer, 439; *Fuller v. Harris*, 29 F. R. 814.

SECT. 2320.—See notes, § 2322. A valid location, duly made and kept up, has the effect of a grant of the right of present and exclusive possession. *Gwillim v. Donnellan*, 115 U. S. 45; *Belk v. Meagher*, 104 Id. 279. The locator must place his end lines so that they will define his right to the exterior parts of his lode, and if he fails to do so, the defect will not be remedied by judicial construction. *E. Min. and Smelt. Co. v. I. S. Min. Co.*, 14 F. R. 377. One who asserts title to a full claim of 1500 feet long and 300 feet wide must prove a lode extending throughout the claim. *Zollars v. Evans*, 5 F. R. 172. Prior occupation of mineral land without compliance with any law, does not preclude a peaceable location. *Horswell v. Ruiz*, 67 Cal. 111. The provision that the end lines must be parallel is directory merely. *Eureka Case*, 4 Sawyer, 302; *Horswell v. Ruiz*, *supra*. Boundaries beyond the maximum limit of a location are equivalent to no boundaries at all. *Hauswirth v. Butcher*, 4 Mont. 299; *Leggatt v. Stewart*, 5 Id. 107. A mining claim perfected according to law is property which may be bought, sold, and conveyed, and will pass by descent. *Forbes v. Gracey*, 94 U. S. 762. Possession is not necessary for the protection of the title acquired by a valid location. A claim is not open to reloca-



tion until the rights of the original locator have terminated by an abandonment of it. *Belk v. Meagher*, 104 U. S. 279. See *Heydenfeldt v. Daney G. & S. M. Co.*, 93 U. S. 634.

SECT. 2321. — The affidavit of citizenship may be made on information and belief and is evidence in judicial proceedings as well as in the land office. *N. N. Min. Co. v. O. Min. Co.*, 11 F. R. 125.

SECT. 2322. — See notes, § 2320. When a junior location crosses a senior location and the veins therein are cross veins, the junior locator is entitled to all the ore found on his vein within the side lines of the senior location, except at the space of intersection of the two veins. In such a case a junior locator has a right of way for the purpose of excavating and taking away the mineral contained in the cross vein. *Lee v. Stahl*, 11 Pac. Rep. 77 (Col.); *Branagan v. Dulaney*, 8 Id. 669 (Col.). The discoverer of any part of the apex gets the right to its entire width, despite the fact that a portion of the width may be outside of the surface side lines of his claim extended downwards vertically; not a right to extra lateral surface, but to extra lateral lode beneath the surface. *Bullion B. & C. Min. Co. v. Eureka Hill Min. Co.*, 11 Pac. Rep. 515 (Utah); *Iron S. M. Co. v. Tarbet*, 98 U. S. 463; *North Noon Min. Co. v. Orient Min. Co.*, 6 Sawyer, 299; *Rose v. Richmond Min. Co.*, 17 Nev. 25 (*Hall v. Eq. Min. & Smelt Co.*, U. S. Circ. Ct., Col. *contra*). And see *McCormick v. Varnes*, 2 Utah, 355, as to the right to follow the lode under St. 1866. It is held, in *Wolfley v. Leb. Mining Co.*, 4 Col. 112, and *Johnson v. Buell*, Id. 557, that a patentee under St. 1866, is not entitled to the possession of his lode beyond the lateral boundaries of his location. The locator can only assert a lateral right to so much of his vein as lies between vertical planes drawn through the end lines of his claim. *Iron Silver Min. Co. v. Elgin Min. & Smelt. Co.*, 118 U. S. 196; *Iron S. M. Co. v. Cheesman*, 116 Id. 529. Discovery and appropriation are the source of the title to mining claims, and development by working is the condition of their continued possession. *O'Reilly v. Campbell*, 116 U. S. 418; *Jennison v. Kirk*, 98 U. S. 453; *Jackson v. Roby*, 109 Id. 440; *Belk v. Meagher*, 3 Mont. 65. It is said in *Hyman v. Wheeler*, 29 F. R. 347, that an impregnation, to the extent to which it may be traced as a body of ore, is a lode or vein, whether or not the ore is separated from the country rock by planes or strata of that rock visible to the eye. A surface location will not be defeated by secret underground workings. *Eilers v. Boatman*, 3 Utah, 159. It is not required that the apex shall be on, or near, or within any given distance of the surface; it is the terminal point of the lode nearest the surface, and the location must be made at the apex to entitle the locator to follow the lode beyond his surface lines. *Iron Mine v. Loella Mine*, 2 McCrary, 121. A location so laid that its greatest length crosses a vein, will secure only so much of the vein as it actually crosses at the surface. *Iron S. M. Co. v. Tarbet*, 98 U. S. 463. No clear definition of a lode or vein has ever been given by the United States Supreme Court, although on the circuit it has been often attempted. In general, a lode or vein is a zone or belt of mineralized rock, lying within boundaries clearly separating it from the neighboring rock. *Iron S. M. Co. v. Cheesman*, 116 U. S. 529; *Eureka Case*, 4 Sawyer, 302; *Stevens v. Williams*, 1 McCrary, 480. A lode is whatever the miners could follow and find ore. *Eureka Case*, *supra*; *Harrington v. Chambers*, 3 Utah, 94. A broad metalliferous zone, having within its limits true fissure veins, plainly bounded, cannot be regarded as a single "vein" or "lode," although such zone may have boundaries of its own which can be traced. *Mt. Diablo Mill & M. Co. v. Callison*, 5 Sawyer, 439. A lode may and often does contain more than one vein; and, under the statutes, the amount of land which may be taken up as a placer claim and the amount as a lode claim, the price to be paid per acre in such case, when the patents are obtained, the rights conferred by the respective patents, and the conditions upon which they are held, are all different. *United States v. Iron S. M. Co.*, 128 U. S. 680; *Iron S. M. Co. v. Reynolds*, 124 Id. 374; *Smelting Co. v.*



Kemp, 104 Id. 651. The statute contemplates that the location of a lode or vein shall be along the course of the lode or vein. *Argentine M. Co. v. Terrible M. Co.*, 122 U. S. 478. If the location covers more than is allowed by law or by the local laws of the mining district, the whole claim is not thereby rendered void, but the excess may be rejected and the claim be held good for the remainder. *Richmond M. Co. v. Rose*, 114 U. S. 576. If a claim originally informally located is subsequently re-located by the same person according to law, his title dates back by relation to the first location. *Fuller v. Harris*, 29 F. R. 814. The clause in St. 1872 requiring the end lines to be parallel is merely directory, and no importance is attached to a deviation therefrom. "End lines" were not named in St. 1866, but were necessarily implied therein. The *Eureka Case*, 4 Sawyer, 302. The parallelism of the end lines is essential to the existence of any right in the locator or patentee to follow his vein outside the vertical planes drawn through the side lines. His lateral right is confined to such portion of the vein as lies between such planes drawn through the end lines and extended in their own direction, that is, between parallel vertical planes. *Iron S. M. Co. v. Elgin M. Co.*, 118 U. S. 196. When a patent to lands is issued, it carries all mines in the lands patented to which no right has attached at the date of the entry. *Pac. C. M. & M. Co. v. Spargo*, 16 F. R. 348. Locations made prior to May 10, 1872, are excluded from grants on locations subsequent to that date, and claims under such locations need not be notified under § 2326. *E. G. & S. Min. Co. v. Spring*, 59 Cal. 304.

SECT. 2323. — The "line" of the tunnel designates a width marked by its exterior lines or sides. *Corning Tunnel Co. v. Pell*, 4 Col. 507. If a tunnel is more than 3000 feet in length the location would be good to the extent of that length at least. *Glacier M. Co. v. Willis*, 127 U. S. 471, 481.

SECT. 2324. — See notes, § 2318. By St. June 6, 1874, ch. 220 (18 St. 61), the time for the first annual expenditure on claims located prior to May 10, 1872, was extended to Jan. 1, 1875. St. Feb. 11, 1875, ch. 41 (18 St. 315), provided that money expended in running a tunnel to develop any lode should be taken as expended on said lode, and work on the surface should not in such case be required in order to hold the lode. St. Jan. 22, 1880, ch. 9 (21 St. 61), provided, as to all mineral claims located since May 10, 1872, that the first year within which labor must be performed should commence on the first day of January next succeeding the location. The amendment of 1875 does not affect the character of other work or improvements to be made according to the law as it stood before, except as it gives a special value to making a tunnel. *Chambers v. Harrington*, 111 U. S. 350, 355.

An original location may be amended, and the amendment will take effect as of the date of the original. *McEvoy v. Hyman*, 25 F. R. 596. Rules defining the extent of mining claims and the modes of developing and working them may be established by miners or by Territorial legislatures. *Jackson v. Roby*, 109 U. S. 440; *Territory v. Lee*, 2 Mont. 124; *Orr v. Haskell*, Id. 225; *English v. Johnson*, 17 Cal. 107. A local regulation that work shall be done on the claim every sixty days is inoperative, because in conflict with the law. *Orig. Co. of the W. & K. v. W. M. Co.*, 60 Cal. 631. All local usages or regulations are subordinate to the act of Congress. *Wolfley v. Leb. Min. Co.*, 4 Col. 112; *G. F. Min. Co. v. Cable & c. Mining Co.*, 12 Nev. 312. A notice that the discoverer claims 1,500 feet on the vein, lode, or deposit, is a sufficient notice to hold 750 feet on the course of the vein on each side of the discovery point. *Erhardt v. Board*, 113 U. S. 527. Placer claims may be located by two or more persons jointly. *Chapman v. Toy Long*, 4 Sawyer, 28. Work done on one of several contiguous claims to an amount equal to the requirement for all the claims will keep them all alive. *Chambers v. Harrington*, 111 U. S. 350; *Harrington v. Chambers*, 3 Utah, 94; *Mt. Diablo M. & M. Co. v. Callison*, 5 Sawyer, 439; *Jackson v. Roby*, 109 U. S. 440; *Kramer v. Settle*, 1 Idaho (N. S.), 485. St. Jan. 22, 1880, noted *supra*, does not save a claim from a forfeiture incurred before its



passage, but a relocation before forfeiture is a nullity. *S. Min. Co. v. Perasich*, 7 F. R. 331; *S. Min. Co. v. Vacavich*, 7 Sawyer, 217; *Gonu v. Russell*, 3 Mont. 358. A relocation can be made after the failure to perform the work, although the original locator is in possession. *Du Prat v. James*, 65 Cal. 555; *Russell v. Brosseau*, Id. 605. But a resumption of work after failure and before relocation prevents a forfeiture. *B. C. G. Min. Co. v. Deferrari*, 62 Cal. 160. A mining regulation is void whenever it falls into disuse or is generally disregarded. *N. N. Min. Co. v. O. Min. Co.*, 1 F. R. 522. The requirement as to annual work applies to placer claims. *Carney v. A. G. Min. Co.*, 65 Cal. 40. So also do the other provisions of this section. *Sweet v. Webber*, 7 Col. 443. See also *Jackson v. Roby*, 109 U. S. 440; *Smelting Co. v. Kemp*, 104 Id. 636. The first annual expenditure required by St. May 10, 1872, on prior locations, must be made after that date and before Jan. 1, 1875. *Thompson v. Jacobs*, 3 Utah, 246. A certificate of location which does not define the subject of the grant with reasonable certainty is void. *Faxon v. Barnard*, 2 McCrary, 44; 4 F. R. 702. But as soon as there is an adequate and sufficient description, with convenient certainty, an erroneous addition will not vitiate it. *Duryea v. Boucher*, 67 Cal. 141. For cases where the facts were held to show insufficient notice of the location, see *Holland v. Mt. Auburn & Co.*, 53 Cal. 149; *Gelcich v. Moriarty*, Id. 217. Whether or not there has been an abandonment of a mining claim is a question of intent. *Stone v. G. Q. Min. Co.*, 52 Cal. 315; *Morenhaut v. Wilson*, Id. 263; *Bell v. B. R. T. & M. Co.*, 36 Id. 215; *Richardson v. McNulty*, 24 Id. 345; *Weill v. Lucerne Min. Co.*, 11 Nev. 200. Cf. *Murley v. Ennis*, 2 Col. 300.

A claimant of mining ground, until he has secured a patent therefor, must annually perform, within the year, the work required thereon. *Bay State S. M. Co. v. Brown*, 21 F. R. 167; 10 Sawyer, 243; *Mt. Diablo Mill & M. Co. v. Callison*, 5 Id. 439; *Belk v. Meagher*, 104 U. S. 279; *Jackson v. Roby*, 109 Id. 440; *Smelting Co. v. Kemp*, 104 Id. 636; *Aurora Hill C. M. Co. v. 85 M. Co.*, 34 F. R. 515. When several claims are held in common, the expenditure of money or labor must equal in value that which would be required on all the claims if they were separate or independent. In such case the claims must be contiguous, so that each claim thus associated may in some way be benefited by the work done on one of them. *Chambers v. Harrington*, 111 U. S. 350.

SECT. 2325. — See notes, §§ 2306, 2326. St. Jan. 22, 1880, ch. 9 (21 St. 61), provided that in all pending applications for patents to mineral lands, where the claimant is not a resident within the land district, the application for the patent and the required affidavits may be made by an authorized agent, where said agent is conversant with the facts.

Publication of notice is process bringing all adverse claimants into court, and if no adverse claims are presented, it is conclusively presumed that none exist, and that no third parties have any rights in the land; thereafter the only right of third parties is that of protest, filed with the Land Department and cognizable only there. *Wight v. Dubois*, 21 F. R. 693. The interest acquired under a judicial sale made before the expiration of the period provided for publication, is an adverse claim within this section. *Hamilton v. Southern Nevada G. & S. M. Co.*, 33 F. R. 562. The location of a mining claim must be made by taking up "a piece of land" to include the vein. *Gleeson v. M. W. Min. Co.*, 13 Nev. 442.

SECT. 2326. — See notes, §§ 2306, 2322, 2325. St. March 3, 1881, ch. 140 (21 St. 505), provided that where the title should not be established by either party, the jury should so find, and judgment should be entered accordingly, without costs, and that the claimant should not proceed in the land office or be entitled to a patent, until he perfected his title.

St. April 26, 1882, ch. 106 (22 St. 49), enacted as follows:—

"That the adverse claim required by § 2326 of the Revised Statutes may be verified by the oath of any duly-authorized agent or attorney-in-fact of the adverse claimant cognizant of the facts stated; and



the adverse claimant, if residing or at the time being beyond the limits of the district wherein the claim is situated, may make oath to the adverse claim before the clerk of any court of record of the United States or of the State or Territory where the adverse claimant may then be, or before any notary public of such State or Territory.

"SEC. 2. That applicants for mineral patents, if residing beyond the limits of the district wherein the claim is situated, may make any oath or affidavit required for proof of citizenship before the clerk of any court of record or before any notary public of any State or Territory."

The adverse claimant, who is plaintiff, must show a location which entitles him to possession against the United States as well as against the other claimant. *Gwillim v. Donnellan*, 115 U. S. 45. The judgment may be carried to the United States Supreme Court for review, under the usual limitations. *Chambers v. Harrington*, 111 U. S. 350; *Belk v. Meagher*, 104 Id. 279. A patent, issued while an adverse claim to the subject matter is duly pending in court, is void. *R. Min. Co. v. Rose*, 114 U. S. 576. In a suit to determine the right of possession to a mining claim, the title of each party is brought in question; each must prove his title, and the better will prevail; but if neither establishes title, the suit must be dismissed without judgment for either. *B. S. Sil. Min. Co. v. Brown*, 21 F. R. 167. No party can intervene who has not filed a claim to the land in the land office. *M. B. Con. G. Min. Co. v. Debour*, 61 Cal. 364. The action must be according to the forms and practice of the jurisdiction where the suit is begun. *Wolverton v. Nichols*, 5 Mont. 89. But one who has made an agreement to convey, and has given possession to the party to whom conveyance is to be made, can maintain an action under this section, although there is a State law limiting actions to determine adverse claims to real property to parties in possession by themselves or their tenants. *Wolverton v. Nichols*, 119 U. S. 485. The statute of limitations in force in a State is a part of the local laws by which parties' rights are to be determined. *420 Mining Co. v. Bullion M. Co.*, 3 Sawyer, 634. Where there are specific limitations concerning placer mines and quartz lodes, these control the general provisions relating to real estate. *Davis v. Clark*, 2 Mont., 310. A local statute of limitations in force before the enactment of the law concerning mining claims, and repugnant thereto, is repealed so far as it is inconsistent with such law. *Belk v. Meagher*, 104 U. S. 279. If neither party to a suit under § 2326 shows that he has performed the work required, the finding should be against both. *Jackson v. Roby*, 109 U. S. 440. Filing a complaint is the commencement of proceedings within the meaning of § 2326. The non-compliance with any conditions of the State law is waived by demurring or answering to the merits. *R. Min. Co. v. Rose*, 114 U. S. 576. "Court of competent jurisdiction" here means a court of general jurisdiction, whether it be a State Court or a Federal court. *Chambers v. Harrington*, 111 U. S. 350. See also *Hoyt v. Russell*, 117 U. S. 401; *McEvoy v. Russell*, 25 F. R. 539.

The acts of 1868, 1870, 1872, relating to locating mining claims, confer no additional jurisdiction on the State courts, but merely require parties contesting the issuance of patents to go to those courts to determine their controversy, governed by the same rules, principles, and statutes which apply to other controversies. *Mining Co. v. B. Min. Co.*, 9 Nev. 240.

SECT. 2330.—Neither this section nor § 2331 put a limitation upon a sale of the ground located, nor upon the number of locations which may be acquired by purchase, nor upon the number which may be included in a patent. *Smelting Co. v. Kemp*, 104 U. S. 636. Placer claims may be located and occupied jointly. *Chapman v. Toy Long*, 4 Sawyer, 28.

SECT. 2332.—If all the requirements of this section have been satisfied, the title is held in trust by the government for those who are entitled to a patent; the ground itself is not thereafter for sale. *Noyes v. Mantle*, 127 U. S. 348. A re-locator cannot entitle himself to a patent until the rights of a former locator have come to an end, and he has



abandoned his claim and left the property open for another. *Belk v. Meagher*, 104 U. S. 279. See *Maine Boys' Tunnel Co. v. Boston Tunnel Co.*, 37 Cal. 40.

SECT. 2333. — See note, § 2318. The holder of a placer claim cannot dispossess persons in possession of a lode within the boundaries of the placer claim, whether the latter have any title or not, if the lode was known to exist when the placer patent was applied for, and was not included in the application. *Reynolds v. Iron S. Min. Co.*, 116 U. S. 687; 124 Id. 348. A vein or lode, to be excluded, must have been located, have boundaries, a locality, and some sort of development. *Iron S. Min. Co. v. Sullivan*, 16 F. R. 829; 5 McCrary, 274; 109 U. S. 550; *United States v. Iron S. M. Co.*, 128 Id., 673. If the claimant has no right of possession of a lode, his patent does not cover it. *Clary v. Hazlitt*, 67 Cal. 286. A location made without a valid right of entry is void. *Aurora Hill Con. M. Co. v. 85 Mining Co.*, 34 F. R. 515. Unless one who seeks the aid of equity to protect his interest in a mining claim has substantially complied with the laws providing for its location, equity will not aid him. *Chapman v. Toy Long*, 4 Sawyer, 28. A written conveyance is not essential to the validity of the transfer of a mining claim. *Mining Co. v. Taylor*, 100 U. S. 37; *Campbell v. Rankin*, 99 Id. 261; *Kinney v. Con. V. M. Co.*, 4 Sawyer, 382, 451. Parol partition of a mining claim is good. 420 *Mining Co. v. Bullion M. Co.*, 3 Sawyer, 634.

SECT. 2336. — See notes, § 2322. A cross lode is excluded from a junior grant except at the point of lode intersection, but the rights of the senior locator as to the space of lode intersection are lost unless duly asserted, for all prior rights are waived by a failure to assert and secure them by adversary proceedings. *Lee v. Stahl*, 11 Pac. Rep. 77 (Col.); *Branagan v. Dulaney*, 8 Id. 669 (Col.). See *Omar v. Soper*, 18 Id. 443.

SECT. 2339. — See notes, §§ 2316, 2324, 2326, 2461. The United States, as the original proprietor of the public lands, has the rights of an ordinary riparian owner in streams flowing through them; and its patents granting the fee of the soil, invest the grantees, in the absence of Congressional legislation limiting the effect of the patent, with the rights incident to any condition of riparian ownership. *Union Mill Co. v. Ferris*, 2 Sawyer, 176; *Vansickle v. Haines*, 7 Nev. 249; *Pope v. Kinman*, 54 Cal. 3; *Los Angeles v. Baldwin*, 53 Id. 469. This section is a voluntary recognition of a pre-existing right of possession, authorizing its continued use rather than the establishment of a new one. *Broder v. Water Co.*, 101 U. S. 276; 50 Cal. 621; *Sparrow v. Strong*, 3 Wall. 97, 777. The priority secured by the statute (§ 9 of St. 1866), exists, although the three conditions named therein may not all be present. *Basey v. Gallagher*, 20 Wall. 670; *Barnes v. Sabron*, 10 Nev. 217. The rights allowed by this statute belong to real estate, and if not barred by limitation, are not lost by a non-user not amounting to an abandonment. *Dodge v. Marden*, 7 Oregon, 456. It does not give rights of way not recognized by the customary law of the State or Territory; and the proviso to the ninth section of St. 1866 conferred no additional rights upon the owners of ditches subsequently constructed. *Jennison v. Kirk*, 98 U. S. 453; *Noteware v. Sterns*, 1 Mont. 311; *Robertson v. Smith*, Id. 410. The statute does not affect a patent issued before its passage, and its effect is to preserve, against those who have received patents to the land since its enactment, the rights acquired previously by appropriation. *Union Mill Co. v. Ferris*, 2 Sawyer, 176, 185; *Union Mill Co. v. Dangberg*, Id. 450; *Vansickle v. Haines*, 7 Nev. 249; *Hobart v. Ford*, 6 Id. 77; *Hobart v. Wicks*, 15 Id. 418; *Broder v. Natoma Water Co.*, 50 Cal. 621; *Titcomb v. Kirk*, 51 Id. 288; *Cave v. Crafts*, 53 Id. 135; *Osgood v. Eldorado Water Co.*, 56 Id. 571; *Atchison v. Peterson*, 20 Wall. 507. See *Gest v. Packwood*, 34 F. R. 368.

An occupant of public lands who has taken no steps toward procuring title is not entitled to compensation for injury to, or the taking of, the land. *Knoth v. Barclay*, 8 Col. 300. The constructor of a ditch is not liable for damages caused by digging the



ditch, to parties coming subsequently into possession of the lands crossed. *Shoemaker v. Hatch*, 13 Nev. 261; *Rivers v. Burbank*, Id. 398, *semble*.

Whenever rights to the use of water by priority of possession have become vested and are recognized by the local customs, laws and decisions of the courts, the owners and possessors are protected in them, and the right of way for ditches and canals incident to such water-rights, being recognized in the same manner, are acknowledged and confirmed. *Jennison v. Kirk*, 98 U. S. 453. The prior rights of ditch-owners will be protected against municipal corporations seeking to proceed against the ditches as nuisances. *Denver v. Mullen*, 7 Col. 345; *Broder v. Water Co.*, 101 U. S. 274.

SECT. 2341. — See note § 2461. A patentee under this section has a better title than an elder patentee from the State of Nevada under St. 1864, where his settlement was prior to the survey. *Heydenfeldt v. D. G. & S. Min. Co.*, 93 U. S. 634.

SECT. 2344. — See note, § 2336.

SECT. 2347. — See note, § 2319. *Colorado Coal Co. v. United States*, 123 U. S. 325.

## CHAPTER VII.

### SALE AND DISPOSAL OF THE PUBLIC LANDS.

SECT. 2353. — See notes, §§ 2257, 2258, 2283, 2289, 2303, 2306, 2319, 2357, 2387, 2461, 2464. Special dispositions of tracts of public lands, not noted elsewhere, have been made as follows: —

Military reservations authorized to be disposed of at public sale: 18 St. 85, Fort Reynolds, Col.; 18 St. 201, parts of Fort Yuma, Fort Whipple, and Camp Date Creek, Arizona; 19 St. 406, Fort Dalles, Oregon; St. July 5, 1884, ch. 214 (23 St. 103), provided for the disposal of useless military reservations generally, saving the rights of actual occupants, entitled to make homestead entry, and confirmed valid claims to lands within the old Fort Lyons, Col., reservation; St. July 8, 1886, ch. 747 (24 St. 128), Fort Brady, Mich.

Military reservations authorized to be disposed of to settlers: 18 St. 47, part of Fort Randall, Dakota; 21 St. 69, Fort Ripley, Minn.; 21 St. 198, Fort Harker, Kansas; 21 St. 311, Fort Dodge, Kansas; 21 St. 325, Forts Reading and Crook, Cal.; St. July 15, 1882, ch. 293 (22 St. 168), Fort Abercrombie, Minn., subjected to "town-site homestead entry;" St. Aug. 4, 1882, ch. 384, (22 St. 217), Fort Larned, Kansas; St. Aug. 4, 1882, ch. 386 (22 St. 218), Fort Benton, Mont.

Military reservations donated: 18 St. 29, part of Fort Steilacoom, Wash., to Washington Territory; 18 St. 303, part of Fort Yuma, Ariz., to the town of Yuma; St. May 13, 1884, ch. 43 (23 St. 19), part of Fort Smith, Ark., to the city of Fort Smith; St. July 12, 1886, ch. 765 (24 St. 144), the barracks at Baton Rouge, La., to the Louisiana State University and certain land in Michigan to the city of Marquette.

Miscellaneous dispositions: 18 St. 16 granted certain swamp lands in Holt county, Mo., for school purposes. 18 St. 25 reserved for the use of the city of Cheyenne certain lands in Laramie county, Wyo. 18 St. 31 authorized the Secretary of the Interior to patent to the D. & F. M. Soc. of the P. E. Church certain land in White Earth reservation, Minn. 18 St. 80 authorized the issue of patents for railroad grants in Oregon on completion of the roads. 18 St. 129 provided for the rights of British subjects in lands within the limits of the award under the treaty of Washington. 18 St. 194 provided for the selection by railroads of other lands in lieu of lands relinquished. 18 St. 198 relinquished certain land in Saginaw River to the riparian owners. 18 St. 252, extending the time for the redemption of lands sold for taxes due the United States to June 1, 1876,



and 18 St. 307, § 26, providing for extension to June 8, 1875, seem to be in conflict. 18 St. 272, 19 St. 74, and 21 St. 68, provided for the sale to actual settlers, of the Kansas Indian lands, Kansas. 18 St. 273 provided for deferred payments by purchasers of the Miami and the New York Indian lands, Kansas. 18 St. 295 and 21 St. 377 relieved certain settlers upon the absentee Shawnee lands, Kansas, and provided for the ultimate sale of the remaining lands at public or private sale. 18 St. 305 relinquished a part of certain lands in Arizona to the *bona fide* occupants, and subjected the remainder to homestead or pre-emption entries. 18 St. 291 confirmed the cession of certain lands in Wyoming to the United States by the Shoshone Indians. 18 St. 293 released certain reclaimed swamp lands in Sheboygan Co., Wis., to adjoining owners. 18 St. 306 granted the right of way through the public lands to the Oregon Cent. Pac. R. R. Co. 18 St. 482 granted the right of way through the public lands to railroads generally; and 25 St. 473, ch. 999 (amended by St. Jan. 30, 1889), declares certain water reserve lands in Wisconsin subject to that act. 19 St. 28 authorized the sale of the Pawnee reservation, Nebraska. 19 St. 208 and 21 St. 380, authorized the sale of the Otoe and Missouri and the Sac and Fox reservations in Kansas and Nebraska. See also notes, § 2257. 19 St. 265 provided for the sale of the Cherokee strip in Kansas to actual settlers. 19 St. 395 confirmed to Missouri the title to swamp selections. 20 St. 133 restored to settlement, under the pre-emption and homestead laws, certain vacant, unappropriated lands withdrawn for the Miss. & Mo. R. R. in Iowa, and provided for entry and proof by actual settlers. 20 St. 165 provided for the restoration to the public domain of the Indian reservation in Utah. 20 St. 172 relieved the claimants to certain lands situated in Santa Barbara Co., Cal. 20 St. 274 provided for certain features of the adjustment of private land claims in Florida, Louisiana, and Missouri. 20 St. 352 granted lands to Minnesota in lieu of lands theretofore granted to which the United States cannot make title. 20 St. 490 released to Michigan certain lands granted to aid the railroad from Grand Haven to Port Huron. 21 St. 142 defined the prior cession to Ohio of unsold lands in the Virginia military district in Ohio. See 22 St. 348. 21 St. 169 confirmed to Baker Co., Oregon, the title to certain lands. 21 St. 171, 323, conveyed to Council Bluffs, Iowa, certain lakes. 21 St. 287 granted to Nevada 2,000,000 acres of land in said State in lieu of the 16th and 36th sections. 21 St. 290 granted to Dakota a tract of land in Yankton Co. 21 St. 310 confirmed to Kansas certain lands selected by that State. St. Jan. 13, 1881 (21 St. 315), provided for the purchase, at \$2.50 per acre, by actual settlers, who had made valuable improvements on odd sections of railroad lands with the consent of the railroad and with intent to purchase, of not to exceed 160 acres of the same, if restored to the public domain. 21 St. 505 authorized the sale of certain lands near Vincennes, Ind. 21 St. 326 granted to Dakota, Montana, Arizona, Idaho, and Wyoming certain lands for universities. 21 St. 508 confirmed the title of certain land in Burlington, Iowa. 18 St. 29 established a reservation for certain Indians in Montana. 18 St. 72 forfeited the land grant of the Stockton and Copperopolis R. R. in California, and subjected the land to sale under the land laws. 18 St. 474 granted lands to Colorado for schools, public buildings, penitentiary, and university. 21 St. 199 and St. July 28, 1882, ch. 357 (22 St. 178), subjected to cash entry only, certain portions of the Ute reservation, Col. St. June 20, 1884, ch. 104 (23 St. 49), authorized claimants to the Rancho de Napa, Cal., to prove up their title. St. June 28, 1884, ch. 131 (23 St. 61), restored to the public domain certain lands in Missouri theretofore granted in aid of the Iron Mountain Railroad. St. Aug. 7, 1882, ch. 434 (22 St. 341), authorized the Secretary of the Interior to sell a portion of the Omaha reservation in Nebraska. St. June 11, 1884, ch. 74 (23 St. 40), authorized the sale of a part of the Fort Hays, Kansas, reservation. St. Jan. 31, 1885, ch. 45 (23 St. 295), released certain lands in Detroit, Mich., to the Detroit board of education. St. Jan. 31, 1885, ch. 46 (23 St. 296), forfeited certain lands in Oregon granted to aid a railroad from



Portland to McMinnville. St. Feb. 28, 1885, ch. 265 (23 St. 337), forfeited the Texas Pacific land grant. St. March 3, 1885, ch. 319 (23 St. 340), provided for the disposition of the Umatilla, Oregon, reservation. St. March 3, 1885, ch. 324 (23 St. 345), donated a quarter section to Kirwin, Kansas. St. March 3, 1885, ch. 337 (23 St. 351), provided for the sale of the Sac and Fox and Iowa reservations in Nebraska and Kansas. St. July 2, 1886, ch. 608 (24 St. 121), provided for the sale of the Cherokee, Ark., reservation. St. July 6, 1886, ch. 637 (24 St. 123), forfeited the Atlantic and Pacific land grant. St. Aug. 2, 1886, ch. 844 (24 St. 214), extended for two years the time of the payments for sales made under 21 St. 380 and St. Aug. 7, 1882, ch. 434, noted *supra*. St. July 10, 1886, ch. 760 (24 St. 140), forfeited certain grants of land to Mississippi, Alabama, and Louisiana in aid of railroads. St. March 2, 1889, provides for the forfeiture of certain wagon-road grants in Oregon. St. March 3, 1877, ch. 107 (19 St. 377), made general the privilege of reclaiming desert lands, given by 18 St. 497, specially as to certain lands in Cal., and enacted as follows:—

“That it shall be lawful for any citizen of the United States, or any person of requisite age ‘who may be entitled to become a citizen, and who has filed his declaration to become such’ and upon payment of 25 cents per acre—to file a declaration under oath with the register and the receiver of the land district in which any desert land is situated, that he intends to reclaim a tract of desert land not exceeding one section, by conducting water upon the same, within the period of three years thereafter, *Provided however* that the right to the use of water by the person so conducting the same, on or to any tract of desert land of 640 acres shall depend upon bona fide prior appropriation: and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation: and all surplus water over and above such actual appropriation and use, together with the water of all, lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights. Said declaration shall describe particularly said section of land if surveyed, and, if unsurveyed, shall describe the same as nearly as possible without a survey. At any time within the period of three years after filing said declaration, upon making satisfactory proof to the register and receiver of the reclamation of said tract of land in the manner aforesaid, and upon the payment to the receiver of the additional sum of one dollar per acre for a tract of land not exceeding 640 acres to any one person, a patent for the same shall be issued to him. *Provided*, that no person shall be permitted to enter more than one tract of land and not to exceed 640 acres which shall be in compact form.

“SEC. 2. That all lands exclusive of timber lands and mineral lands which will not, without irrigation, produce some agricultural crop, shall be deemed desert lands, within the meaning of this act, which fact shall be ascertained by proof of two or more credible witnesses under oath, whose affidavits shall be filed in the land office in which said tract of land may be situated—

“SEC. 3. That this act shall only apply to and take effect in the States of California, Oregon and Nevada, and the Territories of Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico, and Dakota, and the determination of what may be considered desert land shall be subject to the decision and regulation of the Commissioner of the General Land Office.”

The right of the United States to dispose of the fee of lands occupied by them has always been upheld by the Supreme Court from the foundation of the government. *Buttz v. N. Pac. R. R. Co.*, 119 U. S. 55, citing *Beecher v. Wetherby*, 95 U. S. 517. This right is founded on discovery and the grant of the United States is subject only to the Indian right of occupancy. *Johnson v. McIntosh*, 8 Wheat. 575; *Thompson v. Doaksum*, 10 Pac. Rep. (Cal.) 199. The government of the United States has a perfect title to the public land and an absolute and unqualified right of disposal, and neither State nor Territorial legislation can in any way modify or affect this right. *Union M. & Min. Co. v. Ferris*, 2 Sawyer, 176; *Gibson v. Chouteau*, 13 Wall. 92; *Vansickle v. Haines*, 7 Nev. 249, and cases cited. The ultimate fee was originally in the Crown and passed to the States of the Union after the Revolution, and if a grant is made before the extinguishment of the Indian right, the title becomes absolute in the grantee whenever the Indian right is extinguished. *Clark v. Smith*, 13 Pet. 195. And no valid adverse rights under the land laws can inter-



vene. *Buttz v. N. Pac. R. R. Co.*, *supra*. Lands granted by Congress to aid in the construction of railroads do not revert after condition broken until a forfeiture has been asserted by the United States, either through judicial proceedings instituted under authority of law for that purpose, or through some legislative action legally equivalent to a judgment of office found at common law. *St. L. I. M. & S. R. R. Co. v. McGee*, 115 U. S. 469; *United States v. Repentigny*, 5 Wall. 211; *Schulenberg v. Harriman*, 21 Id. 44; *Farnsworth v. M. & P. R. R. Co.*, 92 U. S. 49; *McMicken v. United States*, 97 Id. 217; *Van Wyck v. Knevals*, 106 Id. 360.

In the construction of railroad land grants, "granted lands" are those falling within the limits specially designated, as to which the title attaches when the lands are duly located, and "indemnity lands" are those selected in lieu of parcels lost by prior disposition, and the title to these accrues only from the selection. *Barney v. Win. & St. P. R. Co.*, 117 U. S. 228. Where there are conflicting railroad grants, the lands to accrue to the roads on location, the conflicting rights are determined by the dates of the grants. *Misouri &c. Ry. Co. v. K. P. Ry. Co.*, 97 U. S. 491.

It is a fundamental principle underlying the land system of this country that private entries are never permitted until after the lands have been exposed to public auction, at the price for which they are afterwards subject to entry. *Johnson v. Towsley*, 13 Wall. 88; *Chotard v. Pope*, 12 Wheat. 588; 2 A. G. Op. 200; 3 Id. 274; 4 Id. 167; 5 Id. 476. Therefore where land, offered at public sale at \$2.50 per acre, is afterwards ordered by Congress to be sold at \$1.25, a private entry at \$1.25 is invalid if made before it is offered at public sale at the reduced price. *Eldred v. Sexton*, 19 Wall. 189; 30 Wis. 193.

A State statute allowing occupants of the public lands to remove improvements which have become a part of the realty, is void as to the United States, and a purchaser from them takes the improvements. *Collins v. Bartlett*, 44 Cal. 371.

The right of eminent domain in the States extends to the public lands, so that a State can give to a public road a right of way through the public lands. *United States v. Railroad Bridge Co.*, 6 McLean, 517. It is the duty of the Surveyor-General to lay out a fractional section so that as much as possible of it may be offered in half quarter sections. *Brown v. Clements*, 3 How. 650. But this case was overruled in *Gazzam v. Phillips*, 20 How. 372. Congress may, in its discretion, authorize the leasing of mines on the public lands, in the Territories. *United States v. Gratiot*, 14 Pet. 526.

SECT. 2354. — See notes, §§ 2257, 2258, 2303, 2353.

SECT. 2356. — "Entry" means that act by which an individual acquires an inceptive right to a portion of the unappropriated soil of the country. *Chotard v. Pope*, 12 Wheat. 586. If a receiver purchases, he must place the required amount of his own money with the moneys which he holds in trust for the government. *United States v. Boyd*, 5 How. 29. Payment is indispensable. *Matthews v. Zane*, 7 Wheat. 164, 205. The mistake of the officers in inserting a wrong name in one of the certificates of purchase cannot affect the rights of the purchaser. Such mistake may be corrected by the Commissioner of the land office. *Bell v. Hearne*, 19 How. 252. Sales of land excepted from sale by act of Congress are void. 2 A. G. Op. 186. Lands struck off on the last day of a public sale, and not paid for, cannot be entered until they have been again offered for sale. Such lands are not unsold lands, but are reverted lands. 2 A. G. Op. 200. See Id. 150; 3 Id. 448.

SECT. 2357. — See notes, §§ 2306, 2319, 2353. St. March 3, 1883, ch. 122 (22 St. 526), enacted as follows: —

"That in all cases where lands reduced in price to \$1.25 per acre by the act of June 15, 1880, but which have not been offered at public sale at such reduced price, were inadvertently sold at private entry by the officers of the Land Department between the date of the passage of said act and the date of the receipt at the local offices of the instructions of the Commissioner of the General Land Office relative



thereto of October 10, 1881, the entries so inadvertently permitted to be made by innocent purchasers, and which are regular in all respects except as to time of entry, shall be confirmed as of the dates of entry, respectively: *Provided, however*, That no valid adverse claim to any of such lands had attached prior to the date of such entry."

SECT. 2359. — St. Jan. 12, 1877, ch. 18 (19 St. 221), provided that executive proclamations of sales of lands should be published in only one newspaper, which should be printed or published within the State or Territory wherein the lands are situated, and should be designated by the Secretary of the Interior.

SECT. 2362. — The purchase money should be repaid in cases where a previous sale of the land has been made, or where a grant by a foreign country has been confirmed, or where the title in the government fails from any cause. Leases in which there is a deficiency in the land sold are within this act. 4 Id. 227, 253.

SECT. 2365. — 3 A. G. Op. 240.

SECT. 2367. — See note, § 2353.

SECT. 2369. — *Widdicombe v. Childers*, 124 U. S. 404.

SECTS. 2373, 2374, 2375, 2376. — These sections are intended to protect the government and punish all persons who enter into combinations or conspiracies to prevent others from bidding at the sales, and also for the protection of those who propose to purchase from the extortions of those who have formed the unlawful combinations; but as it is no part of the policy of the law to encourage frauds by releasing the fraudulent party from the obligation of his contract, specific performance will be enforced of an agreement to convey lands to be purchased at a subsequent sale. *Fackler v. Ford*, 24 How. 322. An agreement among settlers on unsurveyed public lands to purchase them as soon as they are surveyed and offered for sale and then mortgage them to a creditor to secure a debt is not in contravention of §§ 2373, 2374. *Wright v. Shumway*, 1 Biss. 23. The objection that there was a combination to prevent bidding at a sale ordered by the government can only be taken by the government. *Easley v. Kellom*, 14 Wall. 279. One who is not injured thereby cannot defeat the title of a purchaser at a sale of public land by auction by showing that a combination to prevent bidding was formed. *Root v. Shields*, Woolw. 340.

SECT. 2376. — A bill brought pursuant to this section must allege and show that the contract sought to be rescinded is within the statute, and that the party who brought it has no legal evidence of the contract. *Gale v. Cutler*, 1 Pinn. (Wis.), 253.

SECT. 2378. — The original act of 1841 was worded "there shall be granted," and it was held, before the Revision, that the words did not import a grant *in presenti*, and therefore did not convey the fee. *Foley v. Harrison*, 15 How. 433. See *Shepley v. Cowan*, 91 U. S. 330; *Patterson v. Tatum*, 3 Sawyer, 164. As to Ohio, see 21 St. 142.

## CHAPTER VIII.

### RESERVATION AND SALE OF TOWN SITES ON THE PUBLIC LANDS.

SECT. 2380. — See notes, §§ 2257, 2283, 2353. Lands known to be mineral cannot be taken up under the town-site laws. *Deffebach v. Hawke*, 115 U. S. 392; *Sparks v. Pierce*, Id. 408. As to the relation of the early town-site laws to Oregon, see *Stark v. Starrs*, 6 Wall. 402; *Chapman v. School District*, *Deady*, 108.

SECT. 2381. — See note, § 2380.

SECT. 2382. — See notes, §§ 2257, 2353, 2380. St. March 3, 1877, ch. 113 (12 St. 392), enacted as follows:—

"That the existence or incorporation of any town upon the public lands of the United States shall not be held to exclude from pre-emption or homestead entry a greater quantity than 2560 acres of land,



or the maximum area which may be entered as a town-site under existing laws, unless the entire tract claimed or incorporated as such town-site shall, including and in excess of the area above specified, be actually settled upon, inhabited, improved, and used for business and municipal purposes.

"SEC. 2. That where entries have been heretofore allowed upon lands afterward ascertained to have been embraced in the corporate limits of any town, but which entries are or shall be shown, to the satisfaction of the Commissioner of the General Land Office, to include only vacant unoccupied lands of the United States, not settled upon or used for municipal purposes, nor devoted to any public use of such town, said entries, if regular in all respects, are hereby confirmed and may be carried into patent: *Provided*, That this confirmation shall not operate to restrict the entry of any town-site to a smaller area than the maximum quantity of land which, by reason of present population, it may be entitled to enter under § 2389 of the Revised Statutes.

"SEC. 3. That whenever the corporate limits of any town upon the public domain are shown or alleged to include lands in excess of the maximum area specified in section one of this act, the Commissioner of the General Land Office may require the authorities of such town, and it shall be lawful for them, to elect what portion of said lands, in compact form and embracing the actual site of the municipal occupation and improvement, shall be withheld from pre-emption and homestead entry; and thereafter the residue of such lands shall be open to disposal under the homestead and pre-emption laws. And upon default of said town authorities to make such selection within 60 days after notification by the Commissioner, he may direct testimony respecting the actual location and extent of said improvements, to be taken by the register and receiver of the district in which such town may be situated; and, upon receipt of the same, he may determine and set off the proper site according to section one of this act, and declare the remaining lands open to settlement and entry under the homestead and pre-emption laws; and it shall be the duty of the secretary of each of the Territories of the United States to furnish the surveyor-general of the Territory for the use of the United States a copy duly certified of every act of the legislature of the Territory incorporating any city or town, the same to be forwarded by such secretary to the surveyor-general within one month from date of its approval.

"SEC. 4. It shall be lawful for any town which has made, or may hereafter make entry of less than the maximum quantity of land named in § 2389 of the Revised Statutes to make such additional entry, or entries, of contiguous tracts, which may be occupied for town purposes as when added to the entry or entries therefore made will not exceed 2560 acres: *Provided*, That such additional entry shall not, together with all prior entries, be in excess of the area to which the town may be entitled at date of the additional entry by virtue of its population as prescribed by said § 2389."

One in possession with an accrued right of pre-emption cannot be ousted by a subsequent platting. *V. & I. R. Co. v. Lynch*, 13 Nev. 92. Title to known valuable mineral lands cannot be acquired under the town-site laws. *Deffebach v. Hawke*, 115 U. S. 392. But the entry and patent, it seems, would not be invalid as to other lands included in them. *Id.*; *Steel v. Smelting Co.*, 106 Id. 447, 449.

SECT. 2387. — St. June 23, 1874 (18 St. 253), confirmed all judgments and decrees theretofore rendered by the probate courts of Utah, under this section, where the time for appeal had expired. St. Aug. 4, 1882, ch. 386 (22 St. 218), provided that a certain portion of the Fort Benton, Mont., reservation should be disposed of under the provisions of this section.

The lands entered are held in trust for occupants only, and there is no power in the trustees to convey to any one else. A statute of the State allowing conveyance to other than occupants is void. *Clark v. Titus*, 11 Pac. Rep. (Ariz.) 312; *Winfield Town Co. v. Maris*, 11 Kansas, 128; *Ind. Town Co. v. De Long*, Id. 152; *Schnepel v. Mellen*, 3 Mont. 118; *Cash*, Appellant, 6 Mich. 193; *Rathbone v. Sterling*, 25 Kansas, 444. The trustee cannot have a vendor's lien; he should collect anything due, before conveying to the occupant. *Berry v. Ginaca*, 5 F. R. 475; 6 Sawyer, 390. The title of the trustee is in effect the title of the occupants. *Mallard v. Anderson*, 36 La. Ann. 834; *Burbank v. Ellis*, 7 Neb. 156, *semble*. Rights of way and all appurtenances to the lots held by the occupants prior to the entry, continue after the entry and are confirmed by it. *Ashby v. Hall*, 119 U. S. 526. To entitle an applicant to a deed, he must be an actual occupant; that is, he must have the actual use or possession of the land. *Lechler v. Chapin*, 12 Nev. 65; *Hussey v. Smith*, 1 Utah, 129; *Pratt v. Young*, Id. 347; *Cain v. Young*, Id. 361.



In Kansas it is the duty of the probate judge to make the entry, if duly applied to, and a contract between an occupant and a third party that the judge shall not enter the land is illegal and void. *McTaggart v. Harrison*, 12 Kansas, 62. As to the trust, and legislative and corporate authority, see also *Ashby v. Hall*, 119 U. S. 526; *Hussey v. Smith*, 99 Id. 20; *Stringfellow v. Cain*, Id. 610; *Cannon v. Pratt*, Id. 619; *Cofield v. McClelland*, 16 Wall. 331; 9 A. G. Op. 308; 7 Id. 733; *Whittlesey v. Hoppenyan*, 72 Wis. 140; *Mallard v. Anderson*, 36 La. An. 834.

SECT. 2389. — See note, § 2382.

SECT. 2392. — See note, § 2380.

SECT. 2393. — St. Feb. 28, 1877 (19 St. 264), provided for patenting the claims of *bona fide* settlers upon lands in Oregon and Washington Territory, which were included in military reservations afterward abandoned. St. July 5, 1884, ch. 214 (23 St. 104), provides —

“SEC. 5. Whenever any lands containing valuable mineral deposits shall be vacated by the reduction or abandonment of any military reservation under the provisions of this act, the same shall be disposed of exclusively under the mineral land laws of the United States.

“SEC. 6. The Secretary of War shall have authority, in his discretion, to permit the extension of State, county, and Territorial roads across military reservations; to permit the landing of ferries, the erection of bridges thereon; and permit cattle, sheep or other stock animals to be driven across such reservation, whenever in his judgment the same can be done without injury to the reservation or inconvenience to the military forces stationed thereon.”

## CHAPTER IX.

### SURVEY OF THE PUBLIC LANDS.

SECT. 2395. — See note, § 2353. The system of survey by base and meridian lines established under the acts of Congress is part of the public law, of which judicial notice is taken by the courts in those States carved out of the public territory. *Murphy v. Hendricks*, 57 Ind. 593; *Bannister v. G. F. Ditch. Assoc.* 52 Id. 178; *J. Ditch. Assoc. v. Wagoner*, 33 Id. 50; *Turpin v. The E. Creek Co.*, 48 Id. 45; *Dickenson v. Breeden*, 30 Ill. 279; *Gooding v. Morgan*, 70 Id. 275; *Prieger v. Exchange Ins. Co.*, 6 Wis. 89; *Atwater v. Schenck*, 9 Id. 160; *Bittle v. Stuart*, 34 Ark. 224. The fact that the plats have been filed without designating the lands as mineral is *prima facie* evidence that they are not mineral. *Cowell v. Lammers*, 21 F. R. 200.

SECT. 2396. — The meander-lines, run in surveying fractional portions of the public lands bordering on navigable rivers, are not run as boundaries of the tract, but for the purpose of ascertaining the quantity of land to be paid for by the purchaser, and the purchaser has the ordinary riparian rights of proprietors bordering on navigable waters. *Railroad Co. v. Schurmeir*, 7 Wall. 272; 10 Minn. 82; *Houck v. Yates*, 82 Ill. 179; *Hills v. Houston*, 4 Sawyer, 195, *semble*; *Q. Min. Co. v. Hicks*, 4 Id. 688, *semble*. In the construction of a government grant, the government survey is conclusive as to the river boundary. *Bates v. Ill. Cent. R. Co.*, 1 Black, 204. See *Lammers v. Nisson*, 4 Neb. 245. All subdivisional lines of a section must be straight lines running from the proper corner in one exterior line to its corresponding corner in the opposite boundary of the section. *Wilson v. Hoffman*, 54 Mich. 246. The true corner of a subdivision is where the surveyors located it, whether the location was right or wrong. *Nesselrode v. Parish*, 59 Iowa, 570; *Boorman v. Sunnucks*, 42 Wis. 233, *semble*. See *Lindsey v. Hawes*, 2 Black, 554; *Cragin v. Powell*, 128 U. S. 697; *Lente v. Clarke*, 22 Fla. 525.

SECT. 2397. — Under St. 1820 some discretion was allowed to the Surveyor-General, in the subdivision of fractional sections containing more than 160 acres. He was not



always obliged to lay off a full quarter or half quarter section, though this might be done. *Gazzam v. Phillips*, 20 How. 372; modifying, *Brown v. Clements*, 3 Id. 650. See 3 A. G. Op. 281, 284.

SECT. 2398. — It is not fatal to a grant that the survey was made before the order to survey. Any preliminary defects are cured by the patent. *Spencer v. Lapsley*, 20 How. 264.

SECT. 2400. — St. March 3, 1875, ch. 130, § 10 (18 St. 371), repealed the provision as to private land claims; but it was re-enacted by St. July 31, 1876 (noted *ante*, § 2223), and again by St. March 3, 1885, ch. 360 (23 St. 499).

SECT. 2401. — See note, § 2403.

SECT. 2403. — St. March 3, 1879, ch. 170 (20 St. 352), provided for the assignment by endorsement of certificates for deposits and the receipt of them in payment for pre-emption and homestead claims. St. April 27, 1876, ch. 84 (19 St. 38), substituted "one" for "seven" in the second line. St. Aug. 7, 1882, ch. 433 (22 St. 327), provided —

"That no certificate issued for a deposit of money for the survey of lands under § 2403 of the Revised Statutes, and the act approved March 3, 1879, amendatory thereof, shall be received in payment for lands except at the land office in which the lands surveyed for which the deposit was made are subject to entry, and not elsewhere; but this section shall not be held to impair, prejudice, or affect in any manner certificates issued or deposits and contracts made under the provisions of said act prior to the passage of this act."

SECT. 2406. — St. March 3, 1879, ch. 182, § 9 (20 St. 377), established the office of Director of the Geological Survey, prescribed his duties, discontinued the geological and geographical survey of the Territories and of the Rocky Mountain Region and the geographical surveys west of the one hundredth meridian, after June 30, 1879, and provided for the publication of such surveys. See also 24 St. 255; St. March 20, 1888; and note, § 441.

## CHAPTER X.

### BOUNTY LANDS.

SECT. 2414. — See notes, §§ 2257, 2277. A certificate of entry or location under a military land warrant vests in the holder an equitable title to the land, and if he assigns the certificate before the patent issues he becomes a trustee for the assignee. *Gray v. Jones*, 14 F. R. 83; *Key v. Jennings*, 66 Mo. 356, *semble*. An assignment prior to the issue of the warrant is absolutely void under St. Feb. 11, 1847. *Week v. Bosworth*, 61 Wis. 78. An assignee for value takes no better right against the United States than his assignor had. *Bronson v. Kukuk*, 3 Dillon, 490. See 5 A. G. Op. 237, 387; 7 Id. 657.

SECT. 2415. — 5 A. G. Op. 609.

SECT. 2416. — The statutes affecting this section and the next ran back to 1812 with innumerable continuances and provisions, and these sections being submitted to the officers having charge of such matters in the General Land Office, were recommended as fitly disposing of the whole subject. 1 Com. D. 1143.

SECT. 2418. — 4 A. G. Op. 642, 718; 5 Id. 147, 155, 617.

SECT. 2423. — *Wirth v. Branson*, 98 U. S. 118.

SECT. 2426. — 7 A. G. Op. 606.

SECT. 2428. — 5 A. G. Op. 237.

SECT. 2436. — *Wright v. Taylor*, 2 Dillon, 23.

SECT. 2441. — See note, § 2278. The provisions of this section and of § 2442 were extended, by 18 St. 111, ch. 330, —

"so as to include the reissue of agricultural-college land scrip lost, cancelled or destroyed without the fault of the owner thereof, under such rules and regulations as the Secretary of the Interior may prescribe."



## CHAPTER XI.

## MISCELLANEOUS PROVISIONS RELATING TO THE PUBLIC LANDS.

SECT. 2447. — St. Feb. 25, 1885, ch. 149 (23 St. 321), enacted as follows : —

“ That all inclosures of any public lands in any State or Territory of the United States, heretofore or to be hereafter made, erected, or constructed by any person, party, association, or corporation, to any of which land included within the inclosure the person, party, association, or corporation making or controlling the enclosure had no claim or color of title made or acquired in good faith, or an asserted right thereto by or under claim, made in good faith with a view to entry thereof at the proper land-office under the general laws of the United States at the time any such inclosure was or shall be made, are hereby declared to be unlawful, and the maintenance, erection, construction, or control of any such inclosure is hereby forbidden and prohibited ; and the assertion of a right to the exclusive use and occupancy of any part of the public lands of the United States in any State or any of the Territories of the United States, without claim, color of title, or asserted right as above specified as to inclosure, is likewise declared unlawful, and hereby prohibited.

“ SEC. 2. That it shall be the duty of the district attorney of the United States for the proper district, on affidavit filed with him by any citizen of the United States that section one of this act is being violated showing a description of the land inclosed with reasonable certainty, not necessarily by metes and bounds nor by Governmental sub-divisions of surveyed lands, but only so that the inclosure may be identified, and the persons guilty of the violation as nearly as may be, and by description, if the name cannot on reasonable inquiry be ascertained, to institute a civil suit in the proper United States district or circuit court, or territorial district court, in the name of the United States, and against the parties named or described who shall be in charge of or controlling the inclosure complained of as defendants ; and jurisdiction is also hereby conferred on any United States district or circuit court or territorial district court having jurisdiction over the locality where the land inclosed, or any part thereof, shall be situated, to hear and determine proceedings in equity, by writ of injunction, to restrain violations of the provisions of this act ; and it shall be sufficient to give the court jurisdiction if service of original process be had in any civil proceeding on any agent or employee having charge or control of the inclosure ; and any suit brought under the provisions of this section shall have precedence for hearing and trial over other cases on the civil docket of the court, and shall be tried and determined at the earliest practicable day. In any case if the enclosure shall be found to be unlawful, the court shall make the proper order, judgment, or decree for the destruction of the inclosure, in a summary way, unless the inclosure shall be removed by the defendant within five days after the order of the court.

“ SEC. 3. That no person, by force, threats, intimidation, or by any fencing or inclosing, or any other unlawful means, shall prevent or obstruct, or shall combine and confederate with others to prevent or obstruct, any person from peaceably entering upon or establishing a settlement or residence on any tract of public land subject to settlement or entry under the public land laws of the United States, or shall prevent or obstruct free passage or transit over or through the public lands : *Provided*, This section shall not be held to affect the right or title of persons, who have gone upon, improved or occupied said lands under the land laws of the United States, claiming title thereto, in good faith.

“ SEC. 4. That any person violating any of the provisions hereof, whether as owner, part owner, agent, or who shall aid, abet, counsel, advise, or assist in any violation hereof, shall be deemed guilty of a misdemeanor, and fined in a sum not exceeding \$1000 and be imprisoned not exceeding one year for each offence.

“ SEC. 5. That the President is hereby authorized to take such measures as shall be necessary to remove and destroy any unlawful inclosure of any of said lands, and to employ civil or military force as may be necessary for that purpose.

“ SEC. 6. That where the alleged unlawful inclosure includes less than 160 acres of land, no suit shall be brought under the provisions of this act without authority from the Secretary of the Interior.

“ SEC. 7. That nothing herein shall affect any pending suits to work their discontinuance, but as to them hereafter they shall be prosecuted and determined under the provisions of this act.”

The United States may maintain an action in equity to compel by mandatory injunction the removal of a fence from government land. *United States v. Brighton Ranch Co.*, 26 F. R. 218. Where the patent is issued for a larger tract than was granted, by error of



the government officials, the government is not concluded as to the excess. *United States v. M. Land Grant Co.*, 21 F. R. 22. See *Brazee v. Schofield*, 124 U. S. 500. A patent issued upon a survey not approved by the Surveyor-General is void. *Dalles City v. Miss. Society*, 6 F. R. 356. An indictment for fencing public lands in violation of § 3 of the above act of 1885 need not allege that the defendant went upon, improved, or occupied the lands under the United States laws, *bona fide* claiming title thereto, as this is a matter of defence. *United States v. Cook*, 36 F. R. 896.

SECT. 2449. — See note, § 2353. The list, certified by the Commissioner, of lands selected by California, in lieu of school selections covered by Mexican grants, conveys the title to the State; no patent is necessary. The list takes effect as of the date when the selection was notified to the local land office and cuts off all subsequent claims. A patent issued on a subsequent settlement conveys no title as against the State. *McCreery v. Haskell*, 119 U. S. 327. All questions of mere irregularity in the selection are conclusively settled by the issue of the list. *Mower v. Fletcher*, 116 U. S. 380.

SECT. 2450. — St. Feb. 27, 1877, ch. 69, §§ 49, 50 (19 St. 240), substituted the Secretary of the Interior for the Secretary of the Treasury in this and the succeeding section.

SECT. 2451. — See note, § 2450.

SECT. 2461. — See notes, §§ 2319, 2339, 2357, 2464. St. March 3, 1875, ch. 151 (18 St. 481), enacted as follows:—

“SEC. 1. That if any person or persons shall knowingly and unlawfully cut, or shall knowingly aid, assist, or be employed in unlawfully cutting, or shall wantonly destroy or injure, or procure to be wantonly destroyed or injured, any timber-tree or any shade or ornamental tree, or any other kind of tree, standing, growing, or being upon any land of the United States, which, in pursuance of law, have been reserved, or which have been purchased by the United States for any public use, every such person or persons so offending, on conviction thereof before any circuit or district court of the United States, shall, for every such offence, pay a fine not exceeding \$500, or shall be imprisoned not exceeding twelve months.

“SEC. 2. That if any person or persons shall knowingly and unlawfully break or destroy any fence, wall, hedge, or gate inclosing any lands of the United States, which have, in pursuance of any law, been reserved or purchased by the United States for any public use, every such person so offending, on conviction, shall, for every such offence, pay a fine not exceeding \$200, or be imprisoned not exceeding six months.

“SEC. 3. That if any person or persons shall knowingly and unlawfully break, open, or destroy any gate, fence, hedge, or wall inclosing any lands of the United States, reserved or purchased as aforesaid, and shall drive any cattle, horses, or hogs upon the lands aforesaid for the purpose of destroying the grass or trees on the said grounds, or where they may destroy the said grass or trees, or if any such person or persons shall knowingly permit his or their cattle, horses, or hogs to enter through any of said inclosures upon the lands of the United States aforesaid, where the said cattle, horses, or hogs may or can destroy the grass or trees or other property of the United States on the said land, every such person or persons so offending, on conviction, shall pay a fine not exceeding \$500, or be imprisoned not exceeding twelve months:

“*Provided*, That nothing in this act shall be construed to apply to unsurveyed public lands and to public lands subject to pre-emption and homestead laws, or to public lands subject to an act to promote the development of the mining resources of the United States, approved May 10, 1872.

St. April 30, 1878, ch. 76 (20 St. 46), provided for the seizure, wherever found, of timber cut on the public lands and exported from the Territories. St. June 3, 1878, ch. 151 (20 St. 89), enacted as follows:—

“That surveyed public lands of the United States within the States of California, Oregon and Nevada and in Washington Territory, not included within military, Indian, or other reservations of the United States, valuable chiefly for timber, but unfit for cultivation, and which have not been offered at public sale according to law, may be sold to citizens of the United States, or persons who have declared their intention to become such, in quantities not exceeding 160 acres to any one person or association of persons, at the minimum price of \$250 per acre; and lands valuable chiefly for stone may be sold on the same terms as timber lands: *Provided*, That nothing herein contained shall defeat or impair any bona-fide claim.



under any law of the United States, or authorize the sale of any mining claim, or the improvements of any bona-fide settler, or lands containing gold, silver, cinnabar, copper, or coal, or lands selected by the said States under any law of the United States donating lands for internal improvements, education, or other purposes: *And provided further*, That none of the rights conferred by the act approved July 26, 1866, entitled 'An act granting the right of way to ditch and canal owners over the public lands, and for other purposes,' shall be abrogated by this act; and all patents granted shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under and by the provisions of said act; and such rights shall be expressly reserved in any patent issued under this act.

"SEC. 2. That any person desiring to avail himself of the provisions of this act shall file with the register of the proper district a written statement in duplicate, one of which is to be transmitted to the General Land Office, designating by legal subdivisions the particular tract of land he desires to purchase, setting forth that the same is unfit for cultivation, and valuable chiefly for its timber or stone; that it is uninhabited; contains no mining or other improvements, except for ditch or canal purposes, where any such do exist, save such as were made by or belong to the applicant, nor, as deponent verily believes, any valuable deposit of gold, silver, cinnabar, copper, or coal; that deponent has made no other application under this act; that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except himself; which statement must be verified by the oath of the applicant before the register or the receiver of the land office, within the district where the land is situated; and if any person taking such oath shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury, and shall forfeit the money which he may have paid for said lands, and all right and title to the same; and any grant or conveyance which he may have made, except in the hands of bona-fide purchasers, shall be null and void.

"SEC. 3. That upon the filing of said statement, as provided in the second section of this act, the register of the land office shall post a notice of such application, embracing a description of the land by legal subdivisions, in his office, for a period of 60 days, and shall furnish the applicant a copy of the same for publication, at the expense of such applicant, in a newspaper published nearest the location of the premises, for a like period of time; and after the expiration of said 60 days, if no adverse claim shall have been filed, the person desiring to purchase shall furnish to the register of the land-office satisfactory evidence, first, that said notice of the application prepared by the register as aforesaid was duly published in a newspaper as herein required; secondly, that the land is of the character contemplated in this act, unoccupied and without improvements, other than those excepted, either mining or agricultural, and that it apparently contains no valuable deposits of gold, silver, cinnabar, copper, or coal: and upon payment to the proper officer of the purchase-money of said land, together with the fees of the register and the receiver, as provided for in case of mining claims in the twelfth section of the act approved May 10, 1872, the applicant may be permitted to enter said tract, and, on the transmission to the General Land Office of the papers and testimony in the case, a patent shall issue thereon: *Provided*, That any person having a valid claim to any portion of the land may object, in writing, to the issuance of a patent to lands so held by him, stating the nature of his claims thereto: and evidence shall be taken, and the merits of said objection shall be determined by the officers of the land-office, subject to appeal, as in other land cases. Effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the Commissioner of the General Land Office.

"SEC. 4. That after the passage of this act it shall be unlawful to cut, or cause or procure to be cut, or wantonly destroy, any timber growing on any lands of the United States, in said States and Territory, or remove, or cause to be removed, any timber from said public lands, with intent to export or dispose of the same; and no owner, master, or consignee of any vessel, or owner, director, or agent of any railroad, shall knowingly transport the same, or any lumber manufactured therefrom; and any person violating the provisions of this section shall be guilty of a misdemeanor, and, on conviction, shall be fined for every such offence a sum not less than one hundred nor more than one thousand dollars: *Provided*, That nothing herein contained shall prevent any miner or agriculturist from clearing his land in the ordinary working of his mining claim, or preparing his farm for tillage, or from taking the timber necessary to support his improvements, or the taking of timber for the use of the United States; and the penalties herein provided shall not take effect until 90 days after the passage of this act.

"SEC. 5. That any person prosecuted in said States and Territory for violating § 2461 of the Revised Statutes of the United States who is not prosecuted for cutting timber for export from the United States, may be relieved from further prosecution and liability therefor upon payment, into the court wherein said action is pending, of the sum of \$2.50 per acre for all lands on which he shall have cut or caused to be cut



timber, or removed or caused to be removed the same : *Provided*, That nothing contained in this section shall be construed as granting to the person hereby relieved the title to said lands for said payment ; but he shall have the right to purchase the same upon the same terms and conditions as other persons, as provided hereinbefore in this act : *And further provided*, That all moneys collected under this act shall be covered into the Treasury of the United States. And § 4751 of the Revised Statutes is hereby repealed, so far as it relates to the States and Territory herein named."

Boxing and chipping trees for turpentine is not a violation of the Statute. *United States v. Leatherbury*, 27 F. R. 606 ; 32 Id. 780. The term "timber" is here used for live, growing trees of a useful class. *United States v. Stores*, 14 F. R. 824 ; 4 Woods, 641. While it is lawful for a settler to cut timber for the purpose of clearing his claim, the cutting must be incidental to the mining or cultivation ; the latter must not be used as a cloak or pretext for the former. *United States v. Smith*, 8 Sawyer, 107 ; 11 F. R. 487 ; *United States v. Young*, 8 Sawyer, 108 ; *United States v. Nelson*, 5 Id. 68 ; *United States v. Williams*, 18 F. R. 475 ; *United States v. Murphy*, 32 Id. 376. If the timber is cut by the settler on his claim for purposes of cultivation, he may sell any surplus over what he needs for his improvements. The Timber Cases, 3 McCrary, 519 ; 11 F. R. 81. But a contract to permit another to cut timber for purposes other than would be lawful for the settler is void and no recovery can be had under it. *Ladda v. Hawley*, 57 Cal. 51. See also *United States v. Lane*, 19 F. R. 910 ; *United States v. Williams*, 18 Id. 475 ; *United States v. Yoder*, Id. 372 ; *United States v. Ball*, 31 Id. 667 ; *Cotton v. United States*, 11 How. 229. As to the measure of damage, see *United States v. Williams*, 18 F. R. 475 ; *United States v. Heilner*, 26 Id. 80 ; *Wooden Ware Co. v. United States*, 106 U. S. 432 ; *Bly v. United States*, 4 Dillon, 464. See 16 A. G. Op. 189, as to St. 1878.

SECT. 2462. — 4 A. G. Op. 403.

SECT. 2464. — See notes, §§ 2257, 2289, 2461. This section was superseded by St. June 14, 1878, ch. 190 (20 St. 113), printed below, which superseded St. March 13, 1874, ch. 55, which had been amended by St. May 20, 1876, ch. 102 (19 St. 54). The act of 1878 is as follows :—

"That any person who is the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States, or who shall have filed his declaration of intention to become such, as required by the naturalization laws of the United States, who shall plant, protect, and keep in a healthy, growing condition for eight years ten acres of timber, on any quarter-section of any of the public lands of the United States, or five acres on any legal subdivision of 80 acres, or two and one half acres on any legal subdivision of 40 acres or less, shall be entitled to a patent for the whole of said quarter-section, or of such legal subdivision of 80 or 40 acres, or fractional subdivision of less than 40 acres, as the case may be, at the expiration of said eight years, on making proof of such fact by not less than two credible witnesses, and a full compliance of the further conditions as provided in § 2 : *Provided further*, That not more than one quarter of any section shall be thus granted, and that no person shall make more than one entry under the provisions of this act.

"SEC. 2. That the person applying for the benefits of this act shall, upon application to the register of the land-district in which he or she is about to make such entry, make affidavit, before the register or the receiver, or the clerk of some court of record, or officer authorized to administer oaths in the district where the land is situated ; which affidavit shall be as follows, to wit : I, ———, having filed my application, number —, for an entry under the provisions of an act entitled 'An act to amend an act entitled "An act to encourage the growth of timber on the Western prairies"' approved ——— 187—, do solemnly swear (or affirm) that I am the head of a family (or over 21 years of age), and a citizen of the United States (or have declared my intention to become such) ; that the section of land specified in my said application is composed exclusively of prairie lands, or other lands devoid of timber ; that this filing and entry is made for the cultivation of timber, and for my own exclusive use and benefit ; that I have made the said application in good faith, and not for the purpose of speculation, or directly or indirectly for the use or benefit of any other person or persons whomsoever ; that I intend to hold and cultivate the land, and to fully comply with the provisions of this said act ; and that I have not heretofore made an entry under this act, or the acts of which this is amendatory. And upon filing said affidavit with said register and said receiver and on payment of \$10 if the tract applied for is more than 80 acres ; and \$5 if it is 80 acres or less, he or she shall thereupon be permitted to enter the quantity of land specified ;



and the party making an entry of a quarter-section under the provisions of this act shall be required to break or plow five acres covered thereby the first year, five acres the second year, and to cultivate to crop or otherwise the five acres broken or plowed the first year; the third year he or she shall cultivate to crop or otherwise the five acres broken the second year, and to plant in timber, seeds or cuttings the five acres first broken or plowed, and to cultivate and put in crop or otherwise the remaining five acres, and the fourth year to plant in timber, seeds, or cuttings the remaining five acres. All entries of less quantity than one quarter-section shall be plowed, planted, cultivated and planted to trees, tree-seeds, or cuttings, in the same manner and in the same proportion as hereinbefore provided for a quarter section. *Provided, however,* That in case such trees, seeds, or cuttings shall be destroyed by grasshoppers, or by extreme and unusual drouth, for any year or term of years, the time for planting such trees, seeds, or cuttings shall be extended one year for every such year that they are so destroyed: *Provided further,* That the person making such entry shall, before he or she shall be entitled to such extension of time, file with the register and the receiver of the proper land-office an affidavit, corroborated by two witnesses, setting forth the destruction of such trees, and that, in consequence of such destruction, he or she is compelled to ask an extension of time, in accordance with the provisions of this act: *And provided further,* That no final certificate shall be given, or patent issued, for the land so entered until the expiration of eight years from the date of such entry; and if, at the expiration of such time, or at any time within five years thereafter, the person making such entry, or, if he or she be dead, his or her heirs or legal representatives, shall prove by two credible witnesses that he or she or they have planted, and, for not less than eight years, have cultivated and protected such quantity and character of trees as aforesaid; that not less than 2700 trees were planted on each acre and that at the time of making such proof that there shall be then growing at least 675 living and thrifty trees to each acre, they shall receive a patent for such tract of land.

"SEC. 3. That if at any time after the filing of said affidavit, and prior to the issuing of the patent for said land, the claimant shall fail to comply with any of the requirements of this act, then and in that event such land shall be subject to entry under the homestead laws, or by some other person under the provisions of this act. *Provided,* That the party making claim to said land, either as a homestead-settler, or under this act, shall give at the time of filing his application such notice to the original claimant as shall be prescribed by the rules established by the Commissioner of the General Land Office; and the rights of the parties shall be determined as in other contested cases.

"SEC. 4. That no land acquired under the provisions of this act shall, in any event, become liable to the satisfaction of any debt or debts contracted prior to the issuing of the final certificate therefor.

"SEC. 5. That the Commissioner of the General Land Office is hereby required to prepare and issue such rules and regulations, consistent with this act, as shall be necessary and proper to carry its provisions into effect; and that the registers and receivers of the several land-offices shall each be entitled to receive \$2 at the time of entry, and the like sum when the claim is finally established and the final certificate issued.

"SEC. 6. That the fifth section of the act entitled 'An act in addition to an act to punish crimes against the United States, and for other purposes,' approved March 3, 1857, shall extend to all oaths, affirmations, and affidavits required or authorized by this act.

"SEC. 7. That parties who have already made entries under the acts approved March 3, 1873, and March 13, 1874, of which this is amendatory shall be permitted to complete the same upon full compliance with the provisions of this act; that is, they shall, at the time of making their final proof, have had under cultivation, as required by this act, an amount of timber sufficient to make the number of acres required by this act.

"SEC. 8. All acts and parts of acts in conflict with this act are hereby repealed."

The provisions of "the timber culture act" are reviewed and discussed in *United States v. Shinn*, 14 F. R. 447.

SECT. 2465. — See notes, §§ 2257, 2306, 2464.

SECT. 2466. — See notes, §§ 2248, 2257, 2262, 2464.

SECT. 2467. — See notes, §§ 2257, 2267, 2273, 2306, 2464.

SECT. 2468. — See notes, §§ 2296, 2464.

SECT. 2474. — St. June 15, 1880, ch. 223 (21 St. 199), withdrew from sale the hot springs in the Uncompahgre Park and four square miles of the surrounding land and made this and the succeeding section applicable to said tract, but this provision was repealed by St. May 14, 1884, ch. 50 (23 St. 22).

SECT. 2475. — See note, § 2474.

SECT. 2477. — See note, § 2464. The location of a railroad is excluded from a subsequent grant by the United States. *Verdier v. P. R. R. Co.*, 15 S. C. 476; *Sams v. P. R. &*



A. R. Co., Id. 484; *Flint, &c. Ry. Co. v. Gordon*, 41 Mich. 420. See *Van Brocklin v. Tennessee*, 117 U. S. 161. While "highways," as here used, may never have included railroads, yet 18 St. 482 covered the subject-matter, and prescribed the only rule governing the right of way for railroads over public lands. *Red River R. Co. v. Sture*, 32 Minn. 95; *United States v. Chaplin*, 31 F. R. 890.

SECT. 2478. — *Cragin v. Powell*, 128 U. S. 691; *United States v. Waitz*, 3 Sawyer, 473; *Thompson v. Hanson*, 11 N. W. Rep. 86.

SECTS. 2479-2481. — See notes, §§ 2257, 2353, 2485. St. Sept. 28, 1850, effected an immediate grant to the States of the interest of the United States in these lands, which cannot be impaired by the delay or refusal of the Secretary to have the list made. *San F. Sav. Union v. Irwin*, 28 F. R. 708; *Owens v. Jackson*, 9 Cal. 322; *Summers v. Dickinson*, 9 Id. 554; *Kernan v. Griffith*, 27 Id. 87; *Edmondson v. Corn*, 62 Ind. 17; *Masterson v. Marshall*, 65 Mo. 94; *Ringo v. Rotan*, 29 Ark. 56; *Keller v. Brickey*, 78 Ill. 133; *Chic. &c. R. R. Co. v. Brown*, 40 Iowa, 333; *Daniel v. Purvis*, 50 Miss. 261; *Campbell v. Wortman*, 58 Mo. 258; *Grantham v. Atkins*, 63 Ill. 359; *La Pointe v. Ashland*, 47 Wis. 259. Cf. *Sac. Sav. Bk. v. Hynes*, 50 Cal. 195; *Thompson v. Prince*, 67 Ill. 281. See *Wright v. Roseberry*, 121 U. S. 488; 63 Cal. 252. When the Secretary has acted, his determination as to the character of the land cannot be collaterally attacked; but where he has not acted, the character of the land may be shown by parol. *R. R. Co. v. Smith*, 9 Wall. 95; *French v. Fyan*, 93 U. S. 169; *B. V. Co. v. I. F. & S. C. R. R. Co.*, 112 Id. 165; *San F. Sav. Union v. Irwin*, *supra*; *Smith v. Hollis*, 46 Ark. 23; *S. V. Rec. Co. v. Cook*, 61 Cal. 341; *Hendry v. Willis*, 33 Ark. 833. Title under St. 1850 does not vest until the admission of a Territory into the Union. *St. P. & S. C. R. R. Co. v. Rice*, 9 F. R. 368. The title to the bed of a pond or non-navigable lake passed by St. 1850. *Indiana v. Milk*, 11 F. R. 389. In an action of ejectment based on a railroad grant, it is competent for the defendant to show that the land was swamp and overflowed, and therefore excepted from the grant. *S. P. R. Co. v. McCusker*, 67 Cal. 67; but *Iowa R. R. Land Co. v. Antoine*, 52 Iowa, 429, is *contra*, where the question arises at law. Lands listed to the State are thereby vested in the State, whether in fact swamp lands or not. *Bristol v. Carroll Co.*, 95 Ill. 84. Congress alone has the power to enforce the conditions of the swamp-land grant, either by a revocation thereof, or other suitable action in a clear case of violation of the conditions. *Emigrant Co. v. Adams County*, 100 U. S. 61. To render lands swamp and overflowed, they must have been usually made unfit for cultivation by reason of the overflow. *Thompson v. Thornton*, 50 Cal. 142. But it is not necessary that they should be overflowed annually. *Keller v. Brickey*, 78 Ill. 133. The grant of swamp-lands to each of the States by St. 1850 did not confer a similar grant upon the Territories. *Rice v. Sioux City R. Co.*, 110 U. S. 695. St. Sept. 28, 1850, relates only to lands which were in fact swamp and overflowed. *Sac. Sav. Bk. v. Hynes*, 50 Cal. 195. See also *Hamilton v. Shoaff*, 99 Ind. 63.

SECT. 2484. — The right of the State to indemnity for swamp land disposed of by the United States is not affected by the omission of the indemnity clause of St. March 3, 1857, ch. 117, from the Revision. 15 A. G. Op. 340. After the passage of St. March 3, 1857, the approval of the selections and the issue of patents were mere ministerial acts; the statute completed and perfected the title. *Martin v. Marks*, 97 U. S. 345; *Amer. Em. Co. v. Chicago, &c. Ry. Co.*, 47 Iowa, 515.

SECTS. 2485, 2486, 2487, 2488, 2489. — See notes, § 2479. St. March 1, 1877, ch. 81 (19 St. 267), enacted as follows: —

"That the title to the lands certified to the State of California, known as indemnity school selections, which lands were selected in lieu of sixteenth and thirty-sixth sections, lying within Mexican grants, of which grants the final survey had not been made at the date of such selection by said State, is hereby confirmed to said State in lieu of the sixteenth and thirty-sixth sections, for which the selections were made.



"SEC. 2. That where indemnity school selections have been made and certified to said State, and said selection shall fail by reason of the land in lieu of which they were taken not being included within such final survey of a Mexican grant, or are otherwise defective or invalid, the same are hereby confirmed, and the sixteenth or thirty-sixth section in lieu of which the selection was made shall, upon being excluded from such final survey, be disposed of as other public lands of the United States: *Provided*, That if there be no such sixteenth or thirty-sixth section, and the land certified therefor shall be held by an innocent purchaser for a valuable consideration, such purchaser shall be allowed to prove such facts before the proper land-office, and shall be allowed to purchase the same at one dollar and twenty-five cents per acre, not to exceed three hundred and twenty acres for any one person: *Provided*, That if such person shall neglect or refuse, after knowledge of such facts, to furnish such proof and make payment for such land, it shall be subject to the general land-laws of the United States.

"SEC. 3. That the foregoing confirmation shall not extend to the lands settled upon by any actual settler claiming the right to enter not exceeding the prescribed legal quantity under the homestead or pre-emption laws: *Provided*, That such settlement was made in good faith upon lands not occupied by the settler or improvement of any other person, and prior to the date of certification of said lands to the State of California by the Department of the Interior: *And provided further*, That the claim of such settler shall be presented to the register and receiver of the district land-office, together with the proper proof of his settlement and residence, within twelve months after the passage of this act, under such rules and regulations as may be established by the Commissioner of the General Land-Office.

"SEC. 4. That this act shall not apply to any mineral lands, nor to any lands in the city and county of San Francisco, nor to any incorporated city or town, nor to any tide, swamp, or overflowed lands."

"Land subject to periodical overflow" is not equivalent to "swamp and overflowed land," and such description on the plat is not sufficient to vest the title in the State. Surveys and plats made under the State statutes of 1863 and 1868 are not "the segregation maps and surveys" referred to in the second clause of § 2488. *Heath v. Wallace*, 11 Pac. Rep. (Cal.) 842. The question of whether or not *bona fide* settlers' rights have been acquired is one of mixed law and fact, and the decision of the Interior Department thereon is final under the rule in *Marquez v. Frisbie*, 101 U. S. 476, and *Quinby v. Conlan*, 104 Id. 426. *Green v. Hayes*, 11 Pac. Rep. (Cal.) 716. Land known to be coal land is not open to selection by the State as lieu school land. *Mullan v. United States*, 118 U. S. 271; 10 F. R. 785. The question whether the lands are held or claimed under a valid grant must be determined as of the date when the claimant duly undertakes to prove up his claim. *Huff v. Doyle*, 93 U. S. 558. A selection of lieu-land made and certified to the State prior to St. March 1, 1877, *supra*, is confirmed by that act, although the land was at the time within a claimed Mexican grant, but was afterwards excluded therefrom. *Martin v. Durand*, 63 Cal. 39. The confirmation of title under St. 1866 extended only to lands previously sold. *Laughlin v. McGarvey*, 50 Cal. 169. See *Colorado v. Commissioners*, 95 U. S. 259.



## TITLE XXXIII.

## DUTIES UPON IMPORTS.

A PLACE in a newly acquired country, to be recognized as a domestic port, must be first made so by act of Congress. *Fleming v. Page*, 9 How. 603, 617; see *Calkin v. Cocke*, 14 Id. 227; *Cross v. Harrison*, 16 Id. 164. The President cannot collect the revenues at other places, by different officers, or in other ways than those provided. But the functions of the collector may be exercised anywhere at or within the port. 9 A. G. Op. 516, 519. A port, which is a place for importing and exporting merchandise, may be a harbor, or any place where vessels arrive and discharge or take in cargoes. It comprehends the city or town occupied by those engaged in importing and exporting goods, navigating, and provisioning ships. It includes so much of the adjacent water as is usually occupied by vessels discharging or receiving cargoes, or at anchor waiting for that purpose. 9 A. G. Op. 520. The right to duties accrues when the goods have arrived at the proper port of entry. *Meredith v. United States*, 13 Pet. 486, 494; *McAndrew v. Robertson*, 24 Blatch. 170; 29 F. R. 246; *United States v. Cobb*, 11 F. R. 76, 79. Names mean what they were understood to mean at the time of the passage of the laws, and not subsequently. *Ross v. Fuller*, 17 F. R. 224. But legislation may show that Congress did not intend to include a particular article under a name including it in commerce. *De Forest v. Lawrence*, 13 How. 274, 282. "A thing may be within the letter of a statute and not within its meaning, and within its meaning, though not within its letter. The intention of the law-maker is the law." *Smythe v. Fiske*, 23 Wall. 374, 380; *Atkins v. The Fibre Co.*, 18 Wall. 272, 301. In case of ambiguity in the language or doubtful classification of articles, the construction is to be in favor of the importer. *Powers v. Barney*, 5 Blatch. 202; *Adams v. Bancroft*, 3 Sumner, 384. "When Congress has designated an article by a specific name, and by such name imposed a duty upon it, general terms in a subsequent act, or in a later part of the same act, although sufficiently broad to comprehend such article, are not applicable to it." *Homer v. The Collector*, 1 Wall. 486; *Reiche v. Smythe*, 13 Id. 162; *Smythe v. Fiske*, 23 Id. 374; *Movius v. Arthur*, 95 U. S. 144; *Arthur v. Lahey*, 96 Id. 112; *Arthur v. Rheims*, Id. 143. Fraudulent practices are not legalized by being treated as legal by customs officers. *United States v. 2,117 Bushels of Malt*, 8 F. R. 224. Instructions of the Treasury do not justify the collector in imposing illegal duties. *Lennig v. Maxwell*, 3 Blatch. 125; see *Munsell v. Maxwell*, Id. 364. "The importation of foreign goods is not complete, as between the importer and the government, so long as the goods remain in the custody of the officers of the customs, and until they are delivered to the importer, whether on shipboard or in warehouse, they are subject to any duties on imports which Congress may see fit to impose." *United States v. Benzon*, 2 Cliff. 525, 526. See 14 A. G. Op. 542; *Gardner v. Collector*, 6 Wall. 499. And see generally, as to the time when duty laws take effect, *Arnold v. United States*, 9 Cranch, 104; 1 Gall. 348; *Fabbri v. Murphy*, 95 U. S. 191; *Newman v. Arthur*, 109 Id. 132; *Hartranft v. Oliver*, 125 Id. 525. Prize goods brought in by United States war ships pay duty on the moiety of the officers and owners, but not on that of the United States. *The Liverpool Hero*, 2 Gall. 184. Goods imported by the United States are not subject to duty. *United States v. Lutz*, 2 Blatch. 383. "The term 'revenue law,' when used in connection with the jurisdiction of the courts of the United States, means a law imposing



duties on imports or tonnage, or a law providing in terms for revenue; that is to say, a law which is directly traceable to the power granted to Congress by § 8, Art. I., of the Constitution, 'to lay and collect taxes, duties, imposts, and excises.' " *United States v. Hill*, 123 U. S. 686. The language of tariff acts is to be construed according to its commercial signification, but it will always be understood to have the same meaning in commerce that it has in the community at large, unless the contrary is shown. *Swan v. Arthur*, 103 U. S. 597, 598; *Schmieder v. Barney*, 113 Id. 645; 13 Blatch. 37; 6 F. R. 150. "It would not be safe for the court to draw any inference from the apparent tautology of those parts of a revenue law describing the subjects of duty. In most cases, the terms used, being addressed to merchants, are to be understood in their mercantile sense, the ascertainment of which is matter of fact, depending on evidence." *Stuart v. Maxwell*, 16 How. 163. In construing a tariff revenue system which combines different enactments, the whole system must be regarded in interpreting each alteration, and no disturbance allowed of existing legislative rules of general application beyond the clear intention of Congress. *Saxonville Mills v. Russell*, 116 U. S. 13. The duties due upon all goods imported constitute a personal debt due to the United States from the importer. *United States v. Cobb*, 11 F. R. 79; *United States v. Phelps*, 17 Blatch. 312; see *United States v. Koblitz*, 15 F. R. 900. "The number of specifications *ad valorem* in the present tariff act is 703, against 590 specific and 86 mixed; during the year ending June 30, 1886, the *ad valorem* duties collected amounted to nearly seventy millions of dollars, and the specific duties to somewhat over one hundred and fourteen millions of dollars." See Report, Bureau of Statistics, 1886, and *Elmes on Law of Customs*, § 485. As to when duties accrue, where the phrase is used "from and after the passing" of an act, see *Arnold v. United States*, 9 Cranch, 104; 14 A. G. Op. 542. As to removal ending the collector's power to collect outstanding duties, see *Sthresley v. United States*, 4 Cranch, 169; *Johnson v. United States*, 5 Mason, 425; *Cutts v. United States*, 1 Gall. 74. As to property salvaged on the high seas, see *Merritt v. One Package*, 30 F. R. 195; 32 Id. 111; *The Concord*, 9 Cranch, 387. "Article" in tariff acts is used in a broad sense. *Junge v. Hedden*, 37 F. R. 197.

By St. March 3, 1883, ch. 121, § 6 (22 St. 489), substitute provisions are given for all this Title, including the prior amendments to this Title contained in 18 St. 307, ch. 36; Id. 316, ch. 80; Id. 339, ch. 127; 19 St. 240, ch. 69; 22 St. 301. In the act of 1883 are repeated the following sections without change of phraseology: viz., §§ 2491, 2492 (there § 2493), 2493 (there § 2494), 2497, 2498, 2500, 2502 (there § 2501), 2507 (there § 2504), 2508 (there § 2505), 2509 (there § 2506), 2511 (there § 2507), 2512 (there § 2508), 2514 (there § 2511), 2516 (there § 1513). It omits §§ 2494, 2501, 2503, 2506, 2510. In § 2495 it substitutes the words "preceding section" for "two preceding sections." In § 2496 it inserts the words "or any other articles" after "movements" in the second line, and omits "of watches" in the seventh line. In § 2499, it omits "of duty" in the eighth line, substitutes in the last two lines, for "any of its component parts," the words "the component material of chief value," and adds the following at the end of the section:—

"If two or more rates of duty should be applicable to any imported article, it shall be classified for duty under the highest of such rates: *Provided*, That non-enumerated articles similar in material and quality and texture, and the use to which they may be applied, to articles on the free list, and in the manufacture of which no dutiable materials are used, shall be free."

SECT. 2491.—The forfeiture of articles *not* obscene in the same invoice or package with such as are prohibited cannot be remitted. S. T. D. 7616. The pleadings should be carefully drawn, and there can be no condemnation if the verdict does not find facts enough to warrant it. *United States v. One Case*, 1 Sprague, 467. Pictures, to come within the statute, must be so indecent as to corrupt public morals; they must be something more than coarse and vulgar. 12 Pittsb. L. J. 220. See note. § 3893.



In 22 St. 490, the provision following § 2491 is as follows:—

"**SEC. 2492.** Whoever, being an officer, agent, or employee of the Government of the United States, shall knowingly aid or abet any person engaged in any violation of any of the provisions of law prohibiting importing, advertising, dealing in, exhibiting, or sending or receiving by mail obscene or indecent publications or representations, or means for preventing conception or procuring abortion, or other articles of indecent or immoral use or tendency, shall be deemed guilty of a misdemeanor, and shall for every offence be punishable by a fine of not more than \$5000 or by imprisonment at hard labor for not more than ten years, or both."

**SECT. 2494.** — Rev. Stats. 2493. See note, § 520, as to the Bureau of Animal Industry. See note just before § 2491. The Secretary may revoke, in whole or in part, the suspension of the operation of the act previously made by him; but the revocation should be made in as formal a manner as is required for a suspension. 13 A. G. Op. 158.

**SECTS. 2495, 2496.** — See note just before § 2491.

**SECTS. 2497, 2498.** — The origin of this law is commented upon in *United States v. The Ship Recorder*, 1 Blatch. 223, *et seq.* The word "country" means the entire nation. Goods, the growth, production, or manufacture of the British East Indies, may be imported from London into New York in a vessel owned by British subjects residing in England. *United States v. The Ship Recorder*, *supra*; 2 Blatch. 119. These sections do not authorize an indirect carrying trade by foreign ships. 4 A. G. Op. 69. "Import" means to bring from a foreign into this jurisdiction merchandise not the product of the country. *The Steamboat Forrester*, Newb. 94. A vessel built in Canada and owned wholly by United States citizens, comes within this section if she transports the products of Canada into ports of the United States. *The Merritt*, 17 Wall. 582. Exemption under § 2498 is a matter of defence. *The Merritt*, 2 Biss. 381. If foreign goods once lawfully admitted are re-exported and then re-imported, the re-importation must be according to the law of these sections. *Ten Cases of Opium*, Deady, 62. Under the non-intercourse act of 1809, it was held that the forfeiture takes place on the commission of the offence and avoids a subsequent sale to an innocent purchaser, although there may have been a regular permit for landing and the duties may have been paid. *United States v. 1960 Bags of Coffee*, 8 Cranch, 398; see *Id.* 417; 1 Gall. 191. Under the same act it was held that a violation vested the title immediately in the United States, and owners no longer had an insurable interest. *Fontaine v. Phoenix Ins. Co.*, 11 Johns. 293; see *Kennedy v. Strong*, 14 *Id.* 128. *The Merritt*, 17 Wall. 582, further holds that, assuming that neither Great Britain nor Canada has adopted "a similar regulation" the vessel could not, in the absence of all documents such as establish nationality, be taken to be a British or Canadian vessel within § 2498. See further on these sections 1 A. G. Op. 460; 4 *Id.* 188; § 4172.

**SECT. 2499.** — This statute is designed to afford rules to guide those employed in the collection of revenue in certain cases likely to occur, not within the letter, but within the real intent and meaning of the laws imposing duties, and thus to prevent evasions of those laws. *Stuart v. Maxwell*, 16 How. 150, 160. If an article is found not enumerated, the first inquiry is whether it bears a similitude, &c., and if it does, and the similitude is substantial, it is to be deemed the same and charged accordingly; if it does not, an inquiry is to be instituted as to its component materials, and a duty assessed at the highest rates chargeable on any of the materials. *Id.* 162; *Arthur v. Fox*, 108 U. S. 125; *Cohen v. Phelps*, 2 Sawyer, 530; *Lloyd v. McWilliams*, 31 F. R. 261; *Mason v. Robertson*, 29 *Id.* 684; *Biddle v. Hartranft*, *Id.* 90; *Weilbacher v. Merritt*, 37 *Id.* 85. But see *Hermann v. Robertson*, 33 *Id.* 654. The question of similitude is one of fact. See *Hermann v. Arthur*, 127 U. S. 363. See further on this section, *Ross v. Peaslee*, 2 Curtis, 499; *Morlot v. Lawrence*, 1 Blatch. 608; *Lottimer v. Lawrence*, *Id.* 613; *Field v. Schell*, 5 *Id.* 1; *Gamble v. Mason*, 7 Am. Law Reg. 178; *United States v. United States Telegraph Co.*, 2 Ben. 362; *Smythe v. Fiske*, 23 Wall. 374; *Wilkinson v. Greely*, 1 Curtis, 439. "To place articles



among those designated as enumerated, it is not necessary that they should be specifically mentioned. It is sufficient that they are designated in any way to distinguish them from other articles." *Arthur v. Butterfield*, 125 U. S. 70, 76; 16 Bl. 216. This section applies only to non-enumerated articles. *Arthur v. Sussfield*, 96 U. S. 128. See *Hartranft v. Langfeld*, 125 Id. 128, 135; *Hartranft v. Sheppard*, Id. 337; *Benziger v. Robertson*, 122 Id. 211; *United States v. Cobb*, 11 F. R. 76; *Rossman v. Hedden*, 37 Id. 99; 16 A. G. Op. 648. A case falls short of the requisition which states that the article resembles an enumerated article in the uses to which it is put as a marketable commodity more than anything else. *Murphy v. Arnson*, 96 U. S. 131, 133. The term "similar description" in a former tariff act was held to be used not commercially, but to mean similarity in product and adaptation to uses and to its uses, and not merely to the process by which it was produced. *Schmieder v. Barney*, 113 U. S. 645; 6 F. R. 150; *Greenleaf v. Goodrich*, 101 Id. 278; 1 Haskell, 586. Where two rates of duty are applicable, the higher should be selected. See A. G. Op. Nov. 29, 1884, in S. T. D. 7377. But see the proviso to this section in the act of 1883, and also *Liebenroth v. Robertson*, 33 F. R. 457. See note at beginning of this title.

SECT. 2500. — This is identical with 14 St. 330, § 12. It makes no exception on account of the condition of the produce, and the provisions in the free list, § 2505 of Rev. Stats. (§ 2503 of St. 1883), — viz., "articles, the growth, produce, and manufacture of the United States," &c., — were not intended to reach "cases of ordinary or even extraordinary damage by sea voyage or shipwreck, whereby the character, nature, or possibility of use might not be changed, but were intended rather to apply to those raw products, the character of which may have been entirely altered as to their value and use." *Cargo from Wreck*, 12 F. R. 510. For a case in which it was held that rum was dutiable under this section, see A. G. Op. Nov. 29, 1884, in S. T. D. 6671.

SECT. 2501. — Rev. Stats. § 2502. Repealed from and after Jan. 1, 1883, by 22 St. 58, ch. 120. And see note just before § 2491. 22 St. 398, ch. 6, amends the repealing act by adding, —

"and all such goods as may be in public store or warehouse on January 1, 1883, or on shipboard in port, shall be subject to no other duty than if imported after that day."

Sect. 8 of the cited act of 1872 was omitted from the Revision as being temporary in its operation, but not as repealed. 1 Com. D. 1178. By the President's proclamation of Sept. 22, 1873, discriminating duties on merchandise imported in French vessels were discontinued. See *Stalker v. Maxwell*, 3 Blatch. 138. See note just before § 2491.

Rev. Stats. § 2503 was omitted in 22 St. 489. See note just before § 2491. By 18 St. 339, ch. 127, §§ 4, 5, the ten per cent reduction of duties here provided for is repealed, and the rates in Rev. Stats. § 2504 are to be without such abatement; and the increase of duties thereby provided for shall not apply to goods, wares, or merchandise actually on shipboard and bound to the United States on or before Feb. 10, 1875, or then on deposit in warehouses or public stores. See 15 A. G. Op. 7, 13; Id. 660. 19 St. 200, 625, 666, admit certain products of the Hawaiian or Sandwich Islands free of duty. "The treaty with Denmark does not bind the United States to extend to that country, without compensation, privileges which they have conceded to the Hawaiian Islands in exchange for valuable concessions." *Bartram v. Robertson*, 122 U. S. 116; 21 Blatch. 211; 15 F. R. 212. As to the treaty with the Dominican Republic, see *Whitney v. Robertson*, 124 U. S. 190; 21 F. R. 566; *Kelly v. Hedden*, 124 U. S. 196; 31 F. R. 607; *Netherclift v. Robertson*, 27 Id. 737; 23 Blatch. 546. See *Taylor v. Morton*, 2 Curtis, 454.

The schedules are amended by 22 St. 491, *supra*, to read as follows: earlier amendments to the free list being 21 St. 48, ch. 64, exempting salts of quinine and sulphate of quinine; 21 St. 66, ch. 33, exempting contributions for colored emigrants from one



State to another; 18 St. 307, ch. 36, § 9, exempting American barrels and grain bags returned empty.

SECT. 2502. — There shall be levied, collected, and paid upon all articles imported from foreign countries, and mentioned in the schedules herein contained, the rates of duty which are, by the schedules, respectively prescribed, namely (the authorities cited in brackets being here added): —

#### SCHEDULE A — CHEMICAL PRODUCTS.

“Glue, twenty per centum ad valorem. Beeswax, twenty per centum ad valorem. Gelatine and all similar preparations, thirty per centum ad valorem. Glycerine, crude, brown, or yellow, of the specific gravity of one and twenty-five hundredths or less at a temperature of sixty degrees Fahrenheit, not purified by refining or distilling, two cents per pound. Glycerine, refined, five cents per pound ad valorem. Fish-glue or isinglass, twenty-five per centum ad valorem. Phosphorus, ten cents per pound. Soap, hard and soft, all which are not otherwise specially enumerated or provided for in this act, and castile soap, twenty per centum ad valorem. Fancy, perfumed, and all descriptions of toilet soap, fifteen cents per pound. Sponges, twenty per centum ad valorem. Sumac, ground, three-tenths of one cent per pound, and sumac extract, twenty per centum ad valorem. Acid, acetic, acetous, or pyroligneous acid, not exceeding the specific gravity of one and forty-seven one-thousandths, two cents per pound; exceeding the specific gravity of one and forty-seven one-thousandths, ten cents per pound. Acid, citric, ten cents per pound. Acid, tartaric, ten cents per pound. Camphor, refined, five cents per pound. Castor beans, or seeds, fifty cents per bushel of fifty pounds. Castor oil, eighty cents per gallon. [See *Lloyd v. McWilliams*, 31 F. R. 261.] Cream of tartar, six cents per pound. Dextrine, burnt starch, gum substitute, or British gum, one cent per pound. Extract of hemlock, and other bark used for tanning, not otherwise enumerated or provided for in this act, twenty per centum ad valorem. Glucose, or grape sugar, twenty per centum ad valorem. Indigo, extracts of, and carmined, ten per centum ad valorem. [See *United States v. Wigglesworth*, 2 Story, 369.] Iodine, resublimed, forty cents per pound. Licorice, paste or roll, seven and one-half cents per pound; licorice juice, three cents per pound. Oil of bay-leaves, essential, or bay rum essence or oil, two dollars and fifty cents per pound. Oil, croton, fifty cents per pound. Oil, flaxseed or linseed, and cotton-seed oil, twenty-five cents per gallon, seven and one-half pounds weight to be estimated as a gallon. Hemp-seed oil and rape-seed oil, ten cents per gallon. [See *Murphy v. Arnson*, 96 U. S. 131.] Soda and potassa, tartrate, or rochelle salt, three cents per pound. Strychnia, or strychnine, and all salts thereof, fifty cents per ounce. Tartars, partly refined, including lees crystals, four cents per pound. Alumina, alum, patent alum, alum substitute, sulphate of alumina, and aluminous cake, and alum in crystals or ground, sixty cents per hundred pounds. Ammonia, anhydrous, liquefied by pressure, twenty per centum ad valorem. Ammonia aqua, or water of ammonia, twenty per centum ad valorem. Ammonia, muriate of, or sal-ammoniac, ten per centum ad valorem. Ammonia, carbonate of, twenty per centum ad valorem. Ammonia, sulphate of, twenty per centum ad valorem. All imitations of natural mineral waters and all artificial mineral waters, thirty per centum ad valorem. Asbestos, manufactured, twenty-five per centum ad valorem. Baryta, sulphate of, or barytes, unmanufactured, ten per centum ad valorem. Baryta, sulphate of, or barytes, manufactured, one-fourth of one cent per pound. Refined borax, five cents per pound. Pure boracic acid, five cents per pound; commercial boracic acid, four cents per pound; borate of lime, three cents per pound; crude borax, three cents per pound. Cement, Roman, Portland, and all others, twenty per centum ad valorem. Whiting and Paris white, dry, one-half cent per pound; ground in oil, or putty, one cent per pound. Prepared chalk, precipitated chalk, French chalk, red chalk, and all other chalk preparations which are not specially enumerated or provided for in this act, twenty per centum ad valorem. Chromic acid, fifteen per centum ad valorem. Chromate of potash, three cents per pound. Bi-chromate of potash, three cents per pound. [See *Biddle v. Hartranft*, 29 F. R. 90; *Mason v. Robertson*, Id. 684.] Cobalt, oxide of, twenty per centum ad valorem. Copper, sulphate of, or blue vitriol, three cents per pound. Iron, sulphate of, or copperas, three-tenths of one cent per pound. Acetate of lead, brown, four cents per pound. Acetate of lead, white, six cents per pound. White lead, when dry or in pulp, three cents per pound; when ground or mixed in oil, three cents per pound. Litharge, three cents per pound. Orange mineral, and red lead, three cents per pound. Nitrate of lead, three cents per pound. Magnesia, medicinal, carbonate of, five cents per pound. [See *Ferguson v. Arthur*, 117 U. S. 482.] Magnesia, calcined, ten cents per pound. Id. Magnesia, sulphate of, or Epsom salts, one-half of one cent per pound. Potash: Crude, carbonate of, or fused, and caustic potash, twenty per centum ad valorem. Chlorate of, three cents per pound. Hydriodate, iodide, and iodate of, fifty cents per pound. Prussiate of, red, ten cents per pound. Prussiate of, yellow, five cents per pound. Nitrate of, or saltpetre, crude, one cent per pound. Nitrate of, or refined saltpetre, one and one-half cents per pound. Sulphate of, twenty per centum ad valorem.



Soda: Soda-ash, one-quarter of one cent per pound. Soda, sal, or soda crystals, one-quarter of one cent per pound. Bi-carbonate of, or super-carbonate of, and saleratus, calcined or pearl ash, one and one-half cents per pound. Hydrate or caustic, one cent per pound. Sulphate, known as salt cake, crude or refined, or nitre cake, crude or refined, and Glauber's salt, twenty per centum ad valorem. Soda, silicate of, or other alkaline silicate, one-half of one cent per pound. Sulphur. Refined, in rolls, ten dollars per ton. Sublimed, or flowers of, twenty dollars per ton. Wood-tar, ten per centum ad valorem. Coal-tar, crude, ten per centum ad valorem. Coal-tar, products of, such as naphtha, benzine, benzole, dead oil, and pitch, twenty per centum ad valorem. All coal-tar colors or dyes, by whatever name known, and not specially enumerated or provided for in this act, thirty-five per centum ad valorem. All preparations of coal-tar, not colors or dye, not specially enumerated or provided for in this act, twenty per centum ad valorem. Logwood and other dyewoods, extracts and decoctions of, ten per centum ad valorem. Ultramarine, five cents per pound. Turpentine, spirits of, twenty cents per gallon. Colors and paints, including lakes, whether dry or mixed, or ground with water or oil, and not specially enumerated or provided for in this act, twenty-five per centum ad valorem. [See *Thayer v. Seeburger*, 31 F. R. 883.] The pigment known as bone black, and ivory-drop black, and bone char, twenty-five per centum ad valorem. [See *Schriefer v. Wood*, 5 Blatch. 215; *Peters v. Robertson*, 29 F. R. 818; *Harrison v. Merritt*, 115 U. S. 577; 23 F. R. 653.] Ochre, and ochrey earths, umber, and umber earths, and sienna, and sienna earths, when dry, one-half of one cent per pound; when ground in oil, one and one-half cents per pound. Zinc, oxide of, when dry, one and one-fourth cent per pound. Zinc, oxide of, when ground in oil, one and three-fourths cent per pound. All preparations known as essential oils, expressed oils, distilled oils, rendered oils, alkalis, alkaloids, and all combinations of any of the foregoing, and all chemical compounds and salts, by whatever name known, and not specially enumerated or provided for in this act, twenty-five per centum ad valorem. [See *Mason v. Robertson*, 29 F. R. 684; *Murphy v. Arnson*, 96 U. S. 131; S. T. D. 6758.] Preparations: all medicinal preparations known as cerates, conserves, decoctions, emulsions, extracts, solid or fluid; infusions, juices, liniments, lozenges, mixtures, mucilages, ointments, oleo-resins, pills, plasters, powders, resins, suppositories, syrups, vinegars, and waters, of any of which alcohol is not a component part, and which are not specially enumerated or provided for in this act, twenty-five per centum ad valorem. All barks, beans, berries, balsams, buds, bulbs, and bulbous roots, and excrescences, such as nutgalls, fruits, flowers, dried fibres, grains, gums, and gum-resins, herbs, leaves, lichens, mosses, nuts, roots and stems, spices, vegetables, seeds (aromatic, not garden seeds), and seeds of morbid growth, weeds, woods used expressly for dyeing, and dried insects, any of the foregoing of which are not edible, but which have been advanced in value or condition by refining or grinding, or by other process of manufacture, and not specially enumerated or provided for in this act, ten per centum ad valorem. All non-dutiable crude minerals, but which have been advanced in value or condition by refining or grinding, or by other process of manufacture, not specially enumerated or provided for in this act, ten per centum ad valorem. All ground or powdered spices not specially enumerated or provided for in this act, five cents per pound. All earth or clays, unwrought or unmanufactured, not specially enumerated or provided for in this act, one dollar and fifty cents per ton. All earths or clays, wrought or manufactured, not specially enumerated or provided for in this act, three dollars per ton; china clay, or kaoline, three dollars per ton. Proprietary preparations, to wit: All cosmetics, pills, powders, troches, or lozenges, syrups, cordials, bitters, anodynes, tonics, plasters, liniments, salves, ointments, pastes, drops, waters, essences, spirits, oils or preparations or compositions recommended to the public as proprietary articles, or prepared according to some private formula, as remedies or specifics for any disease or diseases, or affections whatever, affecting the human or animal body, including all toilet preparations whatever, used as applications to the hair, mouth, teeth, or skin, not specially enumerated or provided for in this act, fifty per centum ad valorem. [See *Ferguson v. Arthur*, 117 U. S. 482; *Dallet v. Smythe*, 6 Blatch. 419; S. T. D. 6837.] Alcoholic preparations: Alcoholic perfumery, including cologne water, two dollars per gallon and fifty per centum ad valorem. Distilled spirits, containing fifty per centum of anhydrous alcohol, one dollar per gallon. Alcohol, containing ninety-four per cent. anhydrous alcohol, two dollars per gallon. Alcoholic compounds, not otherwise specially enumerated or provided for, two dollars per gallon for the alcohol contained and twenty-five per centum ad valorem. Chloroform, fifty cents per pound. Collodion, and all compounds of pyroxyline, by whatever name known, fifty cents per pound; rolled or in sheets, but not made up into articles, sixty cents per pound, and when in finished or partly finished articles, sixty cents per pound and twenty-five per centum ad valorem. Ether, sulphuric, fifty cents per pound. Hoffman's anodyne, thirty cents per pound. Iodoform, two dollars per pound. Acid, tannic, and tannin, one dollar per pound. Ether, nitrous, spirits of, thirty cents per pound. Santonine, three dollars per pound. Amylic alcohol, or fusel oil, ten per centum ad valorem. Oil of Cognac, or oenantic ether, four dollars per ounce. Fruit ethers, oils, or essences, two dollars and fifty cents per pound. Oil or essence of rum, fifty cents per ounce. Ethers of all kinds, not specially enumerated or provided for in this act, one dollar per pound. Coloring for brandy, fifty per centum ad valorem.



Preparations: All medicinal preparations known as essences, ethers, extracts, mixtures, spirits, tinctures, and medicated wines, of which alcohol is a component part, not specially enumerated or provided for in this act, fifty cents per pound. Varnishes of all kinds, forty per centum ad valorem; and on spirit varnishes, one dollar and thirty-two cents additional per gallon. Opium, crude, containing nine per cent. and over of morphia, one dollar per pound. The importation of opium, containing less than nine per cent. morphia is hereby prohibited. Opium, prepared for smoking, and all other preparations of opium not specially enumerated or provided for in this act, ten dollars per pound; but opium prepared for smoking, and other preparations of opium deposited in bonded warehouses shall not be removed therefrom for exportation without payment of duties, and such duties shall not be refunded. Opium, aqueous extract of, for medicinal uses, and tincture of, as laudanum, and all other liquid preparations of opium, not specially enumerated or provided for in this act, forty per centum ad valorem. [See 24 St. 409.] Morphia or morphine, and all salts thereof, one dollar per ounce.

#### SCHEDULE B. — EARTHENWARE AND GLASSWARE.

Brown earthenware, common stoneware, gas-retorts, and stoneware not ornamented, twenty-five per centum ad valorem. China, porcelain, parian, and bisque, earthen, stone, and crockery ware, including plaques, ornaments, charms, vases, and statuettes, painted, printed, or gilded, or otherwise decorated or ornamented in any manner, sixty per centum ad valorem. [See *Arthur v. Jacoby*, 103 U. S. 677; *Tutton v. Viti*, 108 Id. 312; 14 F. R. 241.] China, porcelain, parian, and bisque ware, plain white, and not ornamented or decorated in any manner, fifty-five per centum ad valorem. All other earthen, stone, and crockery ware, white, glazed, or edged, composed of earthy or mineral substances, not specially enumerated or provided for in this act, fifty-five per centum ad valorem. [See *Rossman v. Hedden*, 37 F. R. 99.] Stoneware, above the capacity of ten gallons, twenty per centum ad valorem. Encaustic tiles, thirty-five per centum ad valorem. [See *Rossman v. Hedden*, 37 F. R. 99.] Brick, fire brick, and roofing and paving tile, not specially enumerated or provided for in this act, twenty per centum ad valorem. [See *Rossman v. Hedden*, 37 F. R. 99.] Slates, slate pencils, slate chimney-pieces, mantels, slabs for tables, and all other manufactures of slate, thirty per centum ad valorem. Roofing-slates, twenty-five per centum ad valorem. Green and colored glass bottles, vials, demijohns and carboys (covered or uncovered), pickle or preserve jars, and other plain, molded, or pressed green and colored bottle glass, not cut, engraved, or painted, and not specially enumerated or provided for in this act, one cent per pound; if filled, and not otherwise in this act provided for, said articles shall pay thirty per centum ad valorem in addition to the duty on the contents. [See 16 A. G. Op. 269; *Merritt v. Stephani*, 108 U. S. 106; *Merritt v. Park*, Id. 109; *Schmidt v. Badger*, 107 Id. 85.] Flint and lime glass bottles and vials, and other plain, molded, or pressed flint or lime glassware, not specially enumerated or provided for in this act, forty per centum ad valorem; if filled, and not otherwise in this act provided for, said articles shall pay, exclusive of contents, forty per centum ad valorem in addition to the duty on the contents. Articles of glass, cut, engraved, painted, colored, printed, stained, silvered, or gilded, not including plate-glass, silvered, or looking-glass plates, forty-five per centum ad valorem. [See *Binns v. Lawrence*, 12 How. 9.] All glass bottles, and decanters, and other like vessels of glass, shall, if filled, pay the same rates of duty, in addition to any duty chargeable on the contents, as if not filled, except as in this act otherwise specially provided for. [See S. T. D. 5706, 7642.] Cylinder and crowned glass, polished, not exceeding ten by fifteen inches square, two and one half cents per square foot; above that, and not exceeding sixteen by twenty-four inches square, four cents per square foot; above that, and not exceeding twenty-four by thirty inches square, six cents per square foot; above that, and not exceeding twenty-four by sixty inches square, twenty cents per square foot; all above that, forty cents per square foot. Unpolished cylinder, crown, and common window-glass, not exceeding ten by fifteen inches square, one and three-eighths cents per pound; above that, and not exceeding sixteen by twenty-four inches square, one and seven-eighths cents per pound; above that, and not exceeding twenty-four by thirty inches square, two and three-eighths cents per pound; all above that, two and seven-eighths cents per pound: *Provided*, That unpolished cylinder, crown, and common window-glass, imported in boxes containing fifty square feet, as nearly as sizes will permit, now known and commercially designated as fifty feet of glass, single thick and weighing not to exceed fifty-five pounds of glass per box, shall be entered and computed as fifty pounds of glass only; and that said kinds of glass imported in boxes containing, as nearly as sizes will permit, fifty feet of glass, now known and commercially designated as fifty feet of glass, double thick and not exceeding ninety pounds in weight, shall be entered and computed as eighty pounds of glass only; but in all other cases the duty shall be computed according to the actual weight of glass. Fluted, rolled, or rough plate-glass, not including crown, cylinder, or common window-glass, not exceeding ten by fifteen inches square, seventy-five cents per one hundred square feet; above that, and not exceeding sixteen by twenty-four inches square, one cent per square foot; above that, and not exceeding twenty-four by thirty inches square, one cent



and a half per square foot; all above that, two cents per square foot. And all fluted, rolled, or rough plate-glass, weighing over one hundred pounds per one hundred square feet, shall pay an additional duty on the excess at the same rates herein imposed. Cast polished plate glass, unsilvered, not exceeding ten by fifteen inches square, three cents per square foot; above that, and not exceeding sixteen by twenty-four inches square, five cents per square foot; above that, and not exceeding twenty-four by thirty inches square, eight cents per square foot; above that, and not exceeding twenty-four by sixty inches square, twenty-five cents per square foot; all above that, fifty cents per square foot. Cast polished plate-glass, silvered, or looking-glass plates, not exceeding ten by fifteen inches square, four cents per square foot; above that, and not exceeding sixteen by twenty-four inches square, six cents per square foot; above that, and not exceeding twenty-four by thirty inches square, ten cents per square foot; above that, and not exceeding twenty-four by sixty inches square, thirty-five cents per square foot; all above that, sixty cents per square foot. But no looking-glass plates, or plate-glass, silvered, when framed, shall pay a less rate of duty than that imposed upon similar glass of like description not framed, but shall be liable to pay, in addition thereto, thirty per centum ad valorem upon such frames. Porcelain and Bohemian glass, chemical glassware, painted glassware, stained glass, and all other manufactures of glass or of which glass shall be the component material of chief value, not specially enumerated or provided for in this act, forty-five per centum ad valorem. [See 15 A. G. Op. 200; *Arthur v. Sussfield*, 96 U. S. 128; *Elgin Watch Company v. Spaulding*, 19 F. R. 411; *Young v. Spaulding*, 24 Id. 22; *Roosevelt v. Maxwell*, 3 Blatch. 391.]

## SCHEDULE C. — METALS.

(Moisic iron was provided for in 18 St. 307, ch. 36, § 6).

"Iron ore, including manganiferous iron ore, also the dross or residuum from burnt pyrites, seventy-five cents per ton. Sulphur ore, as pyrites, or sulphuret of iron in its natural state, containing not more than three and one-half per centum of copper, seventy-five cents per ton: *Provided*, That ore containing more than two per centum of copper, shall pay, in addition thereto, two and one-half cents per pound for the copper contained therein. Iron in pigs, iron kentledge, spiegeleisen, wrought and cast scrap-iron, and scrap-steel, three tenths of one cent per pound; but nothing shall be deemed scrap-iron or scrap-steel except waste or refuse iron or steel that has been in actual use and is fit only to be remanufactured. Iron railway-bars, weighing more than twenty-five pounds to the yard, seven-tenths of one cent per pound. Steel railway-bars and railway-bars made in part of steel, weighing more than twenty-five pounds to the yard, seventeen dollars per ton. Bar-iron, rolled or hammered, comprising flats not less than one inch wide, nor less than three-eighths of one inch thick, eight-tenths of one cent per pound; comprising round iron not less than three-fourths of one inch in diameter, and square iron not less than three-fourths of one inch square, one cent per pound; comprising flats less than one inch wide, or less than three-eighths of one inch thick; round iron less than three-fourths of one inch and not less than seven-sixteenths of one inch in diameter, and square iron less than three-fourths of one inch square, one and one-tenth of one cent per pound: *Provided*, That all iron in slabs, blooms, loops, or other forms less finished than iron in bars, and more advanced than pig-iron, except castings, shall be rated as iron in bars, and pay a duty accordingly: and none of the above iron shall pay a less rate of duty than thirty-five per centum ad valorem: *Provided further*, That all iron bars, blooms, billets, or sizes or shapes of any kind, in the manufacture of which charcoal is used as fuel, shall be subject to a duty of twenty-two dollars per ton. [See *Worthington v. Abbott*, 124 U. S. 434; 20 F. R. 495; *Schlesinger v. Beard*, 129 U. S. 264; 14 F. R. 687; 16 A. G. Op. 445.] Iron or steel tee rails, weighing not over twenty-five pounds to the yard, nine-tenths of one cent per pound; iron or steel flat rails, punched, eight-tenths of one cent per pound. Round iron, in coils or rods, less than seven-sixteenths of one inch in diameter, and bars or shapes of rolled iron not specially enumerated or provided for in this act, one and two-tenths of one cent per pound. Boiler or other plate iron, sheared or unsheared, skelp-iron, sheared or rolled in grooves, one and one-fourth cents per pound; sheet iron, common or black, thinner than one inch and one-half and not thinner than number twenty wire gauge, one and one-tenth of one cent per pound; thinner than number twenty wire gauge and not thinner than number twenty-five wire gauge, one and two-tenths of one cent per pound; thinner than number twenty-five wire gauge and not thinner than number twenty-nine wire gauge, one and five-tenths of one cent per pound; thinner than number twenty-nine wire gauge, and all iron commercially known as common or black taggers iron, whether put up in boxes or bundles or not, thirty per centum ad valorem: *And provided*, That on all such iron and steel sheets or plates aforesaid excepting on what are known commercially as tin plates,terne-plates, and taggers-tin, and hereafter provided for, when galvanized or coated with zinc or spelter, or other metals, or any alloy of those metals, three-fourths of one cent per pound additional. Polished, planished, or glanced sheet-iron, or sheet-steel, by whatever name designated, two and one-half cents per pound:



*Provided*, That plate or sheet or taggers iron, by whatever name designated, other than the polished, planished, or glanced herein provided for, which has been pickled or cleaned by acid, or by any other material or process, and which is cold rolled, shall pay one-quarter cent per pound more duty than the corresponding gauges of common or black sheet or taggers iron. Iron or steel sheets, or plates, or taggers iron, coated with tin or lead, or with a mixture of which these metals is a component part, by the dipping or any other process, and commercially known as tin plates, terne plates, and taggers tin, one cent per pound; corrugated or crimped sheet-iron or steel, one and four-tenths of one cent per pound. Hoop, or band, or scroll, or other iron, eight inches or less in width, and not thinner than number ten wire gauge, one cent per pound; thinner than number ten wire gauge and not thinner than number twenty wire gauge, one and two-tenths of one cent per pound; thinner than number twenty wire gauge, one and four-tenths of one cent per pound: *Provided*, That all articles not specially enumerated or provided for in this act, whether wholly or partly manufactured, made from sheet, plate, hoop, band, or scroll iron herein provided for, or of which such sheet, plate, hoop, band, or scroll iron shall be the material of chief value, shall pay one-fourth of one cent per pound more duty than that imposed on the iron from which they are made, or which shall be such material of chief value. [See *Badger v. Ranlett*, 106 U. S. 255; 16 A. G. Op. 660; *Kennedy v. Hartranft*, 9 F. R. 18.] Iron and steel cotton-ties, or hoops for baling purposes, not thinner than number twenty wire gauge, thirty-five per centum ad valorem. Cast-iron pipe of every description, one cent per pound. Cast-iron vessels, plates, stove-plates, andirons, sadirons, tailors' irons, hatters' irons, and castings of iron, not specially enumerated or provided for in this act, one and one-quarter of one cent per pound. [See *Wolff v. Spalding*, 26 F. R. 609]. Cut nails and spikes, of iron or steel, one and one-quarter of one cent per pound. Cut tacks, brads, or sprigs, not exceeding sixteen ounces to the thousand, two and one-half cents per thousand; exceeding sixteen ounces to the thousand, three cents per pound. Iron or steel railway fish-plates, or splice-bars, one and one-fourth of one cent per pound. [Cohen v. Phelps, 2 Sawyer, 530.] Malleable iron castings, not specially enumerated or provided for in this act, two cents per pound. Wrought iron or steel spikes, nuts, and washers, and horse, mule, or ox shoes, two cents per pound. Anvils, anchors or parts thereof, mill-irons and mill-cranks, of wrought iron and wrought-iron for ships, and forgings of iron and steel, for vessels, steam-engines, and locomotives, or parts thereof, weighing each twenty-five pounds or more, two cents per pound. Iron or steel rivets, bolts, with or without threads or nuts, or bolt-blanks, and finished hinges or hinge-blanks, two and one-half of one cent per pound. Iron or steel blacksmiths' hammers and sledges, track-tools, wedges, and crow-bars, two and one-half of one cent per pound. [See *Procter v. Spalding*, 26 F. R. 610.] Iron or steel axles, parts thereof, axle-bars, axle-blanks, or forgings for axles, without reference to the stage or state of manufacture, two and one-half of one cent per pound. [See *Ross v. Fuller*, 17 F. R. 224.] Forgings of iron and steel, or forged iron, of whatever shape, or in whatever stage of manufacture, not specially enumerated or provided for in this act, two and one-half cents per pound. Horseshoe-nails, hob-nails, and wire-nails, and all other wrought-iron or steel nails, not specially enumerated or provided for in this act, four cents per pound. Boiler tubes, or flues, or stays, of wrought-iron or steel, three cents per pound. Other wrought iron or steel tubes or pipes, two and one-quarter cents per pound. Chain or chains of all kinds, made of iron or steel, not less than three-fourths of one inch in diameter, one and three-quarter cents per pound; less than three-fourths of one inch and not less than three-eighths of one inch in diameter, two cents per pound; less than three-eighths of one inch in diameter, two and one-half cents per pound. Cross-cut saws, eight cents per linear foot. Mill, pit, and drag saws, not over nine inches wide, ten cents per linear foot; over nine inches wide, fifteen cents per linear foot. Circular saws, thirty per centum ad valorem. Hand, back, and all other saws, not specially enumerated or provided for in this act, forty per centum ad valorem. Files, file blanks, rasps, and floats of all cuts and kinds, four inches in length and under, thirty-five cents per dozen; over four inches in length and under nine inches, seventy-five cents per dozen; nine inches in length and under fourteen inches, one dollar and fifty cents per dozen; fourteen inches in length and over, two dollars and fifty cents per dozen. Steel ingots, cogged ingots, blooms, and slabs, by whatever process made; die blocks or blanks; billets and bars and tapered or beveled bars; bands, hoops, strips, and sheets of all gauges and widths; plates of all thicknesses and widths; steamer, crank, and other shafts; wrist or crank pins; connecting-rods and piston-rods; pressed, sheared, or stamped shapes, or blanks of sheet or plate steel, or combination of steel and iron, punched or not punched; hammer-molds or swaged steel; gun-molds, not in bars; alloys used as substitutes for steel tools; all descriptions and shapes of dry sand, loam, or iron-molded steel castings, all of the above classes of steel not otherwise specially provided for in this act, valued at four cents a pound or less, forty-five per centum ad valorem; above four cents per pound and not above seven cents per pound, two cents per pound; valued above seven cents and not above ten cents per pound, two and three-fourths cents per pound; valued at above ten cents per pound, three and one-fourth cents per pound: *Provided*, That on all iron or steel bars, rods, strips, or steel sheets, of whatever shape, and on



all iron or steel bars of irregular shape or section, cold-rolled, cold-hammered, or polished in any way in addition to the ordinary process of hot-rolling or hammering, there shall be paid one-fourth cent per pound, in addition to the rates provided in this act; and on steel circular saw plates there shall be paid one cent per pound in addition to the rate provided in this act. Iron or steel beams, girders, joists, angles, channels, car-truck channels, **T T**, columns and posts, or parts or sections of columns and posts, deck and bulb beams, and building forms, together with all other structural shapes of iron or steel, one and one-fourth of one cent per pound. [See A. G. Op. Sept. 22, 1886, in S. T. D. 7773.] Steel wheels and steel-tired wheels for railway purposes, whether wholly or partly finished, and iron or steel locomotive, car, and other railway tires, or parts thereof, wholly or partly manufactured, two and one-half of one cent per pound; iron or steel ingots, cogged ingots, blooms or blanks for the same, without regard to the degree of manufacture, two cents per pound. Iron or steel rivet, screw, nail, and fence, wire rods, round, in coils and loops, not lighter than number five wire gauge, valued at three and one-half cents or less per pound, six-tenths of one cent per pound. Iron or steel, flat with longitudinal ribs for the manufacture of fencing, six-tenths of a cent per pound. [16 A. G. Op. 315.] Screws, commonly called wood screws, two inches or over in length, six cents per pound; one inch and less than two inches in length, eight cents per pound; over one half inch and less than one inch in length, ten cents per pound; one half inch and less in length, twelve cents per pound. Iron or steel wire, smaller than number five and not smaller than number ten wire gauge, one and one-half cents per pound; smaller than number ten and not smaller than number sixteen wire gauge, two cents per pound; smaller than number sixteen and not smaller than number twenty-six wire gauge, two and one-half cents per pound; smaller than number twenty-six wire gauge, three cents per pound: *Provided*, That iron or steel wire covered with cotton, silk, or other material, and wire commonly known as crinoline, corset, and hat wire, shall pay four cents per pound in addition to the foregoing rates: *And provided further*, That no article made from iron or steel wire, or of which iron or steel wire is a component part of chief value, shall pay a less rate of duty than the iron or steel wire from which it is made either wholly or in part: *And provided further*, That iron or steel wire-cloths, and iron or steel wire-nettings, made in meshes of any form, shall pay a duty equal in amount to that imposed on iron or steel wire of the same gauge, and two cents per pound in addition thereto. There shall be paid on galvanized iron or steel wire (except fence wire), one half of one cent per pound in addition to the rate imposed on the wire of which it is made. On iron wire rope and wire strand, one cent per pound in addition to the rates imposed on the wire of which it is made. On steel wire rope and wire strand, two cents per pound in addition to the rates imposed on the wire of which it is made. Steel, not specially enumerated or provided for in this act, forty-five per centum ad valorem: *Provided*, That all metal produced from iron or its ores, which is cast and malleable, of whatever description or form, without regard to the percentage of carbon contained therein, whether produced by cementation, or converted, cast, or made from iron or its ores, by the crucible, Bessemer, pneumatic, Thomas-Gilchrist, basic, Siemens-Martin, or open-hearth process, or by the equivalent of either, or by the combination of two or more of the processes, or their equivalents, or by any fusion or other process which produces from iron or its ores a metal either granular or fibrous in structure, which is cast and malleable, excepting what is known as malleable iron castings, shall be classed and denominated as steel. [See Tyre Works Co. v. Spalding, 116 U. S. 541; 19 F. R. 412; 15 A. G. Op. 629; Robertson v. Perkins, 129 U. S. 233; 29 F. R. 842.] No allowance or reduction of duties for partial loss or damage in consequence of rust or of discoloration shall be made upon any description of iron or steel, or upon any partly manufactured article of iron or steel, or upon any manufacture of iron and steel. Argentine, albata, or German silver, unmanufactured, twenty-five per centum ad valorem. Copper, imported in the form of ores, two and one-half cents on each pound of fine copper contained therein; regulus of and black or coarse copper, and copper cement, three and one-half cents on each pound of fine copper contained therein; old copper, fit only for remanufacture, clippings from new copper, and all composition metal of which copper is a component material of chief value not specially enumerated or provided for in this act, three cents per pound; copper in plates, bars, ingots, Chili or other pigs, and in other forms, not manufactured, or enumerated in this act, four cents per pound; in rolled plates, called brazier's copper, sheets, rods, pipes, and copper bottoms, and all manufactures of copper, or of which copper shall be a component of chief value, not specially enumerated or provided for in this act, thirty-five per centum ad valorem. [See Young v. Spalding, 24 F. R. 87; United States v. Potts, 5 Cranch, 284; United States v. Kid, 4 Id. 1.] Brass, in bars or pig, old brass, and clippings from brass or Dutch metal, one and one-half cent per pound. Lead ore, and lead dross, one and one-half cent per pound. Lead, in pigs and bars, molten and old refuse lead run into blocks and bars, and old scrap lead, fit only to be remanufactured, two cents per pound. Lead, in sheets, pipes, or shot, three cents per pound. Nickel, in ore, matte, or other crude form not ready for consumption in the arts, fifteen cents per pound on the nickel contained therein. Nickel, nickel oxide, alloy of any kind in which nickel is the element of chief value, fifteen cents per pound. Zinc, spelter, or tutenague, in blocks or pigs, and old worn-out zinc, fit only to be remanufac-



tured, one and one-half cent per pound; zinc, spelter, or tuttenegue in sheets, two and one-half cents per pound. Sheathing, or yellow metal, not wholly of copper, nor wholly nor in part of iron, ungalvanized, in sheets, forty-eight inches long and fourteen inches wide, and weighing from fourteen to thirty-four ounces per square foot, thirty-five per centum ad valorem. [See 18 St. 307, ch. 36, § 5.] Antimony, as regulus or metal, ten per centum ad valorem. Bronze powder, fifteen per centum ad valorem. Cutlery, not specially enumerated or provided for in this act, thirty-five per centum ad valorem. [See *Koch v. Seeberger*, 30 F. R. 424; *Simmons Hardware Co. v. Lancaster*, 31 F. R. 445.] Dutch or bronze metal, in leaf, ten per centum ad valorem. Steel plates, engraved, stereotype plates, and new types, twenty-five per centum ad valorem. Gold-leaf, one dollar and fifty cents per package of five hundred leaves. Hollow-ware, coated, glazed, or tinned, three cents per pound. Muskets, rifles, and other fire-arms, not specially enumerated or provided for in this act, twenty-five per centum ad valorem. All sporting breech-loading shot-guns, and pistols of all kinds, thirty-five per centum ad valorem. Forged shot-gun barrels, rough-bored, ten per centum ad valorem. Needles for knitting or sewing machines, thirty-five per centum ad valorem. Needles, sewing, darning, knitting, and all others not specially enumerated or provided for in this act, twenty-five per centum ad valorem. Pen-knives, pocket-knives, of all kinds, and razors, fifty per centum ad valorem; swords, sword-blades, and side-arms, thirty-five per centum ad valorem. Pens, metallic, twelve cents per gross; pen-holder-tips and pen-holders, or parts thereof, thirty per centum ad valorem. Pins, solid-head or other, thirty per centum ad valorem. Britannia ware, and plated and gilt articles and wares of all kinds, thirty-five per centum ad valorem. Quicksilver, ten per centum ad valorem. Silver leaf, seventy-five cents per package of five hundred leaves. Type-metal, twenty per centum ad valorem. Chromate of iron, of chromic ore, fifteen per centum ad valorem. Mineral substances in a crude state and metals unwrought, not specially enumerated or provided for in this act, twenty per centum ad valorem. [Robertson v. Perkins, 129 U. S. 233; 29 F. R. 842; Marvel v. Merritt, 116 U. S. 11.] Manufactures, articles, or wares, not specially enumerated or provided for in this act, composed wholly or in part of iron, steel, copper, lead, nickel, pewter, tin, zinc, gold, silver, platinum, or any other metal, and whether partly or wholly manufactured, forty-five per centum ad valorem. [See *Badger v. Ranlett*, 106 U. S. 255; *Young v. Spalding*, 24 F. R. 87; *Manasse v. Spalding*, Id. 86; *Wolff v. Spalding*, 26 Id. 609; *Tyre Works v. Spalding*, 116 U. S. 541; 19 F. R. 412; *Forbes v. Worthington*, 25 Id. 899; *Roundy v. Spaulding*, 20 Id. 43. See *May v. Simmons*, 4 Id. 499; *Myer v. Arthur*, 91 U. S. 570; *United States v. U. S. Tel. Co.*, 2 Ben. 362; *Bruce v. Murphy*, 10 Blatch. 229; *Arthur v. Dodge*, 101 U. S. 34; *United States v. Ullman*, 4 Ben. 547; *Winkelmeyer Co. v. Whitney*, 29 F. R. 780.]

#### SCHEDULE D. — WOOD AND WOODEN WARES.

Timber, hewn and sawed, and timber used for spars and in building wharves, twenty per centum ad valorem. [15 A. G. Op. 32, 492.] Timber, squared or sided, not specially enumerated or provided for in this act, one cent per cubic foot. Sawed boards, plank, deals, and other lumber of hemlock, white-wood, sycamore, and bass-wood, one dollar per one thousand feet, board measure; all other articles of sawed lumber, two dollars per one thousand feet, board measure. But when lumber of any sort is planed or finished, in addition to the rates herein provided, there shall be levied and paid for each side so planed or finished, fifty cents per one thousand feet, board measure. And if planed on one side and tongued and grooved, one dollar per one thousand feet, board measure. And if planed on two sides, and tongued and grooved, one dollar and fifty cents per one thousand feet, board measure. Hubs for wheels, posts, last-blocks, wagon-blocks, ore-blocks, gun-blocks, heading-blocks, and all like blocks or sticks, rough-hewn or sawed only, twenty per centum ad valorem. Staves of wood of all kinds, ten per centum ad valorem. Pickets and palings, twenty per centum ad valorem. Laths, fifteen cents per one thousand pieces. Shingles, thirty-five cents per one thousand. [See *Stockwell v. United States*, 3 Cliff. 284; 13 Wall. 531.] Pine clapboards, two dollars per one thousand. Spruce clapboards, one dollar and fifty cents per one thousand. House or cabinet furniture, in piece or rough, and not finished, thirty per centum ad valorem. Cabinet ware and house furniture, finished, thirty-five per cent ad valorem. Casks and barrels, empty, sugar-box shoeks, and packing-boxes, and packing-box shoeks, of wood, not specially enumerated or provided for in this act thirty per centum ad valorem. Manufactures of cedar-wood, granadilla, ebony, mahogany, rose wood, and satin wood, thirty-five per centum ad valorem. [See *Sill v. Lawrence*, 1 Blatch. 605.] Manufactures of wood, or of which wood is the chief component part, not specially enumerated or provided for in this act, thirty-five per centum ad valorem. [See *United States v. Hathaway*, 4 Wall. 404; *United States v. Quimby*, Id. 408.] Wood, unmanufactured, not specially enumerated or provided for in this act, twenty per centum ad valorem.



## SCHEDULE E. — SUGAR.

All sugars not above No. 13 Dutch Standard in color shall pay duty on their polariscopic test as follows, viz : All sugars not above No. 13 Dutch standard in color, all tank bottoms, syrups of cane juice or of beet juice, melada, concentrated melada, concrete and concentrated molasses, testing by the polariscope not above seventy-five degrees, shall pay a duty of one and forty-hundredths cent per pound, and for every additional degree or fraction of a degree shown by the polariscopic test, they shall pay four-hundredths of a cent per pound additional. The following provisos in 18 St. 339, ch. 127, § 3, are held by the Treasury Department to be still in force. *Provided*, That concentrated melada, or concrete, shall hereafter be classed as sugar dutiable according to color by the Dutch standard : and melada shall be known and defined as an article made in the process of sugar-making, being the cane juice boiled down to the sugar point and containing all the sugar and molasses resulting from the boiling-process and without any process of purging or clarification, And any and all products of the sugar-cane imported in bags, mats, baskets or other than tight packages shall be considered sugar and dutiable as such. *And provided further*, That of the drawback on refined sugars exported allowed by R. S. § 3019 of the United States, only one per centum of the amount so allowed shall be retained by the United States. [See *Elmes on Customs*, p. 424 ; *Merritt v. Welch*, 104 U. S. 694, notes, §§ 2914, 2915, 3019, 14 A. G. Op. 378.] All sugars above No. 13 Dutch standard in color shall be classified by the Dutch standard of color, and pay duty as follows, namely : All sugar above No. 13 and not above No. 16 Dutch standard, two and seventy-five hundredths cents per pound. All sugar above No. 16 and not above No. 20 Dutch standard, three cents per pound. All sugars above No. 20 Dutch standard, three and fifty-hundredths cents per pound. Molasses testing not above fifty-six degrees by the polariscope, shall pay a duty of four cents per gallon ; molasses testing above fifty-six degrees, shall pay a duty of eight cents per gallon. Sugar candy, not colored, five cents per pound. All other confectionery, not specially enumerated or provided for in this act, made wholly or in part of sugar, and on sugars after being refined, when tintured, colored, or in any way adulterated, valued at thirty cents per pound or less, ten cents per pound. [See *United States v. Breed*, 1 Sumner, 159.] Confectionery valued above thirty cents per pound, or when sold by the box, package, or otherwise than by the pound, fifty per centum ad valorem.

## SCHEDULE F. — TOBACCO.

Cigars, cigarettes, and cheroots of all kinds, two dollars and fifty cents per pound and twenty-five per centum ad valorem ; but paper cigars and cigarettes, including wrappers, shall be subject to the same duties as are herein imposed upon cigars. Leaf tobacco, of which eighty-five per cent. is of the requisite size and of the necessary fineness of texture to be suitable for wrappers, and of which more than one hundred leaves are required to weigh a pound, if not stemmed, seventy-five cents per pound ; if stemmed, one dollar per pound. [See *Fulk v. Robertson*, 25 F. R. 897.] All other tobacco in leaf, unmanufactured, and not stemmed, thirty-five cents per pound. Tobacco stems, fifteen cents per pound. Tobacco, manufactured, of all descriptions, and stemmed tobacco, not specially enumerated or provided for in this act, forty cents per pound. Snuff and snuff-flour, manufactured of tobacco, ground, dry, or damp, and pickled, scented or otherwise, of all descriptions, fifty cents per pound. Tobacco, unmanufactured, not specially enumerated or provided for in this act, thirty per centum ad valorem. [*Cohn v. Spalding*, 24 F. R. 19.]

## SCHEDULE G. — PROVISIONS.

Animals, live, twenty per centum ad valorem. [See *Reiche v. Smythe*, 13 Wall. 162. *United States v. Eleven Horses*, 30 F. R. 916.] Beef and pork, one cent per pound. Hams and bacon, two cents per pound. Meat, extract of, twenty per centum ad valorem. Cheese, four cents per pound. Butter, and substitutes therefor, four cents per pound. [See 24 St. 209, § 1, 2, 10, 14.] Lard, two cents per pound. Wheat, twenty cents per bushel. Rye and barley, ten cents per bushel. Barley, pearled, patent, or hulled, one half cent per pound. Barley malt, per bushel of thirty-four pounds, twenty cents. Indian corn or maize, ten cents per bushel. Oats, ten cents per bushel. Corn-meal, ten cents per bushel of forty-eight pounds. Oat-meal, one-half cent per pound. Rye-flour, one half cent per pound. Wheat-flour twenty per centum ad valorem. Potato or corn starch, two cents per pound ; rice starch, two and a half cents per pound ; other starch, two and a half cents per pound. [See *Chung Yune v. Kelly*, 8 Sawyer, 415 ; 14 F. R. 639. *Union Bank v. Seeberger*, 30 F. R. 429.] Rice, cleaned, two and one-fourth cents per pound ; uncleaned, one and one-half cents per pound. [See *Williams v. Barney*, 5 Blatch. 219.] Paddy, one and one fourth cents per pound. Rice-flour and rice-meal, twenty per centum ad valorem. Hay, two dollars per ton. [See *Frazee v. Moffitt*, 20 Blatch. 267 ; 18 F. R. 584.] Honey, twenty cents



per gallon. Hops, eight cents per pound. Milk, preserved or condensed, twenty per centum ad valorem. Fish: Mackerel, one cent per pound. Herrings, pickled or salted, one-half of one cent per pound. [See *Hansen v. Robertson*, 29 F. R. 686.] Salmon, pickled, one cent per pound; other fish, pickled, in barrels, one cent per pound. Foreign-caught fish, imported otherwise than in barrels or half barrels, whether fresh, smoked, dried, salted or pickled, not specially enumerated or provided for in this act, fifty cents per hundred pounds. [See *Gauthier v. Bell*, 23 Int. Rev. Rec. 210. *United States v. Burdett*, 2 Sumner, 336. See, also, *Cross v. Seeberger*, 30 F. R. 427.] Anchovies and sardines, packed in oil or otherwise, in tin boxes measuring not more than five inches long, four inches wide, and three and one half inches deep, ten cents per whole box; in half boxes, measuring not more than five inches long, four inches wide, and one and five-eighths deep, five cents each; in quarter boxes measuring not more than four inches and three-quarters long, three and one-half inches wide, and one and a quarter deep, two and one-half cents each; when imported in any other form, forty per centum ad valorem. [See *Russell v. Worthington*, 23 F. R. 248.] Fish preserved in oil, except anchovies and sardines, thirty per centum ad valorem. Salmon, and all other fish, prepared or preserved, and prepared meats of all kinds, not specially enumerated or provided for in this act, twenty-five per centum ad valorem. [See *Hansen v. Robertson*, 29 F. R. 686.] Pickles and sauces, of all kinds, not otherwise specially enumerated or provided for in this act, thirty-five per centum ad valorem. Potatoes, fifteen cents per bushel of sixty pounds. Vegetables, in their natural state, or in salt or brine, not specially enumerated or provided for in this act, ten per centum ad valorem. [See *Windmuller v. Robertson*, 23 Blatch. 233; 23 F. R. 652.] Vegetables, prepared or preserved, of all kinds not otherwise provided for, thirty per centum ad valorem. Chicory root, ground or unground, burnt or prepared, two cents per pound. [See *Arthur v. Herold*, 100 U. S. 75; 15 A. G. Op. 491.] Vinegar, seven and one-half cents per gallon. The standard for vinegar shall be taken to be that strength which requires thirty-five grains of bi-carbonate of potash to neutralize one ounce Troy of vinegar; and all import duties that may by law be imposed on vinegar imported from foreign countries shall be collected according to this standard. Acorns and dandelion root, raw or prepared, and all other articles used or intended to be used as coffee, or as substitutes therefor, not specially enumerated or provided for in this act, two cents per pound. Chocolate, two cents per pound. [See *Arthur v. Stephani*, 96 U. S. 125; S. T. D. 7840.] Cocoa, prepared or manufactured, two cents per pound. Fruits: Currants, Zante or other, one cent per pound. Dates, plums and prunes, one cent per pound. Figs, two cents per pound. Oranges, in boxes of capacity not exceeding two and one-half cubic feet, twenty-five cents per box; in one-half boxes, capacity not exceeding one and one-fourth cubic feet, thirteen cents per half box; in bulk, one dollar and sixty cents per thousand; in barrels, capacity not exceeding that of the one hundred and ninety-six pounds flour-barrel, fifty-five cents per barrel. [See *Phelps v. Merritt*, 15 F. R. 789. *Scattergood v. Sutton*, 2 F. R. 28; *Arthur v. Lahey*, 96 U. S. 116.] Lemons, in boxes of capacity not exceeding two and one-half cubic feet, thirty cents per box; in one-half boxes, capacity not exceeding one and one-fourth cubic feet, sixteen cents per half box; in bulk, two dollars per thousand. Lemons and oranges in packages, not specially enumerated or provided for in this act, twenty per centum ad valorem. Limes and grapes, twenty per centum ad valorem. Raisins, two cents per pound. Fruits, preserved in their own juices, and fruit-juice, twenty per centum ad valorem. Comfits, sweetmeats, or fruits preserved in sugar, spirits, syrup, or molasses, not otherwise specified or provided for in this act, and jellies of all kinds, thirty-five per centum ad valorem. Nuts: Almonds, five cents per pound; shelled, seven and one-half cents per pounds; filberts, and walnuts, of all kinds, three cents per pound. [See *Homer v. Collector*, 1 Wall. 486.] Peanuts or ground beans, one cent per pound; shelled, one and one-half cent per pound. Nuts, of all kinds, shelled or unshelled, not specially enumerated or provided for in this act, two cents per pound. Mustard, ground or preserved, in bottles or otherwise, ten cents per pound.

#### SCHEDULE H. — LIQUORS.

Champagne, and all other sparkling wines, in bottles containing each not more than one quart and more than one pint, seven dollars per dozen bottles; containing not more than one pint each and more than one half pint, three dollars and fifty cents per dozen bottles; containing one-half pint each, or less, one dollar and seventy-five cents per dozen bottles; in bottles containing more than one quart each, in addition to seven dollars per dozen bottles, at the rate of two dollars and twenty-five cents per gallon on the quantity in excess of one quart bottle. [See *De Bary v. Arthur*, 93 U. S. 420; *Bollinger's Champagne*, 3 Wall. 560.] Still wines, in casks, fifty cents per gallon; in bottles, one dollar and sixty cents per case of one dozen bottles containing each not more than one quart and more than one pint, or twenty-four bottles containing each not more than one pint; and any excess beyond these quantities found in such bottles shall be subject to a duty of five cents per pint or fractional part thereof; but no separate or additional duty shall be collected on the bottles: *Provided*, That any wines imported containing more than twenty-four per centum of alcohol shall be forfeited to the United States: *Provided*



further, That there shall be no allowance for breakage, leakage, or damage on wines, liquors, cordials, or distilled spirits. [See 18 St. 307, ch. 36, §§ 2, 3, *Cavaroc v. Collector*, 1 Woods, 172; *Bensusan v. Murphy*, 10 Blatch. 530.] Vermouth, the same duty as on still wines. Wines, brandy, and other spirituous liquors imported in bottles, shall be packed in packages containing not less than one dozen bottles in each package; and all such bottles, except as specially enumerated or provided for in this act, shall pay an additional duty of three cents for each bottle. [United States v. Ninety Demijohns, 4 Woods, 637; 8 F. R. 485. See 26 Int. Rev. Rec. 61, 65.] Brandy, and other spirits manufactured or distilled from grain or other materials and not specially enumerated or provided for in this act, two dollars per proof gallon; each and every gauge or wine gallon of measurement shall be counted as at least one proof gallon; and the standard for determining the proof of brandy and other spirits or liquors of any kind imported shall be the same as that which is defined in the laws relating to internal revenue; but any brandy or other spirituous liquors imported in casks of less capacity than fourteen gallons shall be forfeited to the United States. [See *The Willie G.*, 1 Haskell, 254; *The Sarah Bernice*, Id. 84; *United States v. Duvier*, 12 Blatch. 449; 15 A. G. Op. 656.] On all compounds or preparations of which distilled spirits are a component part of chief value, not specially enumerated or provided for in this act, there shall be levied a duty not less than that imposed upon distilled spirits. Cordials, liquors, arrack, absinthe, kirschwasser, ratafia, and other similar spirituous beverages or bitters, containing spirits, and not specially enumerated or provided for in this act, two dollars per proof gallon. No lower rate or amount of duty shall be levied, collected, and paid on brandy, spirits, and other spirituous beverages than that fixed by law for the description of first proof; but it shall be increased in proportion for any greater strength than the strength of first proof; and all imitations of brandy or spirits or wines imported by any names whatever shall be subject to the highest rate of duty provided for the genuine articles respectively intended to be represented, and in no case less than one dollar per gallon. [See *Dallet v. Synthe*, 6 Blatch. 419. *United States v. Seventy Casks*, 9 Int. Rev. Rec. 105.] Bay-rum, or bay-water, whether distilled or compounded, one dollar per gallon of first proof, and in proportion for any greater strength than first proof. Ale, porter, and beer, in bottles or jugs of glass, stone, or earthen ware, thirty-five cents per gallon; otherwise than in bottles or jugs of glass, stone, or earthen ware, twenty cents per gallon. [See *Nichols v. Beard*, 15 F. R. 435; *Merritt v. Park*, 108 U. S. 109; *Schmidt v. Badger*, 107 Id. 85; 16 A. G. Op. 359.] Ginger-ale or ginger-beer, twenty per centum ad valorem, but no separate or additional duty shall be collected on bottles or jugs containing the same. [See *Elmes on Customs*, p. 430; *Lelar v. Hartranft*, 33 F. R. 242.]

#### SCHEDULE I. — COTTON AND COTTON GOODS.

Cotton thread, yarn, warps, or warp-yarn, whether single or advanced beyond the condition of single, by twisting two or more single yarns together, whether on beams or in bundles, skeins, or cops, or in any other form, valued at not exceeding twenty-five cents per pound, ten cents per pound; valued at over twenty-five cents per pound, and not exceeding forty cents per pound, fifteen cents per pound; valued at over forty cents per pound, and not exceeding fifty cents per pound, twenty cents per pound; valued at over fifty cents per pound, and not exceeding sixty cents per pound, twenty-five cents per pound; valued at over sixty cents per pound, and not exceeding seventy cents per pound, thirty-three cents per pound; valued at over seventy cents per pound, and not exceeding eighty cents per pound, thirty-eight cents per pound; valued at over eighty cents per pound, and not exceeding one dollar per pound, forty-eight cents per pound; valued at over one dollar per pound, fifty per centum ad valorem. [See *Newman v. Arthur*, 109 U. S. 132.] On all cotton cloth not bleached, dyed, colored, stained, painted, or printed, and not exceeding one hundred threads to the square inch, counting the warp and filling, two and one half cents per square yard; if bleached, three and one half cents per square yard; if dyed, colored, stained, painted, or printed, four and one half cents per square yard. [See *Fisk v. Arthur*, 103 U. S. 431.] On all cotton cloth, not bleached, dyed, colored, stained, painted, or printed, exceeding one hundred and not exceeding two hundred threads to the square inch, counting the warp and filling, three cents per square yard; if bleached, four cents per square yard; if dyed, colored, stained, painted, or printed, five cents per square yard: *Provided*, That on all cotton cloth not exceeding two hundred threads to the square inch, counting the warp and filling, not bleached, dyed, colored, stained, painted, or printed, valued at over eight cents per square yard; bleached, valued at over ten cents per square yard; dyed, colored, stained, painted, or printed, valued at over thirteen cents per square yard, there shall be levied, collected, and paid a duty of forty per centum ad valorem. [See *Hutton v. Schell*, 25 Int. Rev. Rec. 168.] On all cotton cloth exceeding two hundred threads to the square inch, counting the warp and filling, not bleached, dyed, colored, stained, painted, or printed, four cents per square yard; if bleached, five cents per square yard; if dyed, colored, stained, painted, or printed, six cents per square yard: *Provided*, That on all such cotton cloths not bleached, dyed, colored, stained, painted, or



printed, valued at over ten cents per square yard; bleached, valued at over twelve cents per square yard; and dyed, colored, stained, painted, or printed, valued at over fifteen cents per square yard, there shall be levied, collected, and paid a duty of forty per centum ad valorem. On stockings, hose, half-hose, shirts, and drawers, and all goods made on knitting machines or frames, composed wholly of cotton, and not herein otherwise provided for, thirty-five per centum ad valorem. [See *Reimer v. Schell*, 4 Blatch. 328.] On stockings, hose, half-hose, shirts, and drawers, fashioned, narrowed, or shaped wholly or in part by knitting machines or frames, or knit by hand, and composed wholly of cotton, forty per centum ad valorem. Cotton cords, braids, gimps, galloons, webbing, goring, suspenders, braces, and all manufactures of cotton, not specially enumerated or provided for in this act, and corsets, of whatever material composed, thirty-five per centum ad valorem. [See *Stuart v. Maxwell*, 16 How. 150; *Barber v. Schell*, 107 U. S. 617; *Arthur v. Zimmerman*, 96 Id. 124; *Arthur v. Lahey*, Id. 112; *Arthur v. Herman*, Id. 141; *Kohlsaat v. Murphy*, Id. 153; *Leahy v. Spaulding*, 19 F. R. 417; *Butterfield v. Arthur*, 6 Blatch. 216; 16 A. G. Op. 648.] Cotton laces, embroideries, insertings, trimmings, lace window-curtains, cotton damask, hemmed handkerchiefs, and cotton velvet, forty per centum ad valorem. Spool-thread of cotton, seven cents per dozen spools, containing on each spool not exceeding one hundred yards of thread; exceeding one hundred yards on each spool, for every additional one hundred yards of thread or fractional part thereof in excess of one hundred yards, seven cents per dozen.

#### SCHEDULE J. — HEMP, JUTE, AND FLAX GOODS.

Flax straw, five dollars per ton. Flax, not hackled or dressed, twenty dollars per ton. Flax, hackled, known as "dressed line," forty dollars per ton. Tow, of flax or hemp, ten dollars per ton. Hemp, manila and other like substitutes for hemp not specially enumerated or provided for in this act, twenty-five dollars per ton. Jute butts, five dollars per ton. Jute, twenty per centum ad valorem; sunn, sisal grass, and other vegetable substances, not specially enumerated or provided for in this act, fifteen dollars per ton. [See *Wills v. Russell*, 100 U. S. 621; 1 *Holmes*, 228.] Brown and bleached linens, ducks, canvas, paddings, cot bottoms, diapers, crash, huckabacks, handkerchiefs, lawns, or other manufactures of flax, jute, or hemp, or of which flax, jute, or hemp shall be the component material of chief value, not specially enumerated or provided for in this act, thirty-five per centum ad valorem. [See *Arthur v. Homer*, 96 U. S. 137; *Richardson v. Lawrence*, 1 Blatch. 501.] Flax, hemp, and jute yarns, thirty-five per centum ad valorem. Flax or linen thread, twine, and pack thread and all manufactures of flax, or of which flax shall be the component material of chief value, not specially enumerated or provided for in this act, forty per centum ad valorem. [See *Smith v. Field*, 105 U. S. 52; *American Net Company v. Worthington*, 33 F. R. 826.] Flax or linen laces and insertings, embroideries, or manufactures of linen, if embroidered or tamboured in the loom or otherwise, by machinery or with the needle or other process, and not specially enumerated or provided for in this act, thirty per centum ad valorem. Burlaps, not exceeding sixty inches in width, of flax, jute, or hemp, or of which flax, jute, or hemp, or either of them, shall be the component material of chief value (except such as may be suitable for bagging for cotton), thirty per centum ad valorem. [See *Arthur v. Cumming*, 91 U. S. 362.] Oil-cloth foundations, or floor-cloth canvas, or burlaps exceeding sixty inches in width, made of flax, jute, or hemp, or of which flax, jute, or hemp, or either of them, shall be the component material of chief value, forty per centum ad valorem. Oil-cloths for floors, stamped, painted, or printed, and on all other oil-cloth (except silk oil-cloth), and on water-proof cloth, not otherwise provided for, forty per centum ad valorem. Gunny cloth, not bagging, valued at ten cents or less per square yard, three cents per pound; valued at over ten cents per square yard, four cents per pound. [See *Wills v. Russell*, *supra*.] Bags and bagging, and like manufactures, not specially enumerated or provided for in this act (except bagging for cotton), composed wholly or in part of flax, hemp, jute, gunny cloth, gunny bags, or other material, forty per centum ad valorem. [See *Curtis v. Martin*, 3 How. 106.] Bagging for cotton, or other manufactures not specially enumerated or provided for in this act, suitable to the uses for which cotton bagging is applied, composed in whole or in part of hemp, jute, jute butts, flax, gunny bags, gunny cloth, or other material, and valued at seven cents or less per square yard, one and one half cents per pound; valued at over seven cents per square yard, two cents per pound. Tarred cables or cordage, three cents per pound. Untarred manila cordage, two and one half cents per pound. All other untarred cordage, three and one half cents per pound. Seines and seine and gilling twine, twenty-five per centum ad valorem. [See *American Net Co. v. Worthington*, 33 F. R. 826.] Sail duck, or canvas for sails, thirty per centum ad valorem. Russia and other sheetings, of flax or hemp, brown or white, thirty-five per centum ad valorem. All other manufactures of hemp, or manila, or of which hemp or manila shall be a component material of chief value, not specially enumerated or provided for in this act, thirty-five per centum ad valorem. Grass-cloth, and other manufactures of jute, ramie, China, and sisal grass, not specially enumerated or provided for in this act, thirty-five per centum ad valorem.



## SCHEDULE K. — WOOL AND WOOLLENS.

All wools, hair of the alpaca, goat, and other like animals, shall be divided, for the purpose of fixing the duties to be charged thereon, into the three following classes [see *Washington Mills v. Russell*, 1 Holmes, 245] :

**CLASS ONE, CLOTHING WOOLS.** — That is to say, merino, mestiza, metz, or metis wools, or other wools of merino blood, immediate or remote, down clothing wools, and wools of like character with any of the preceding, including such as have been heretofore usually imported into the United States from Buenos Ayres, New Zealand, Australia, Cape of Good Hope, Russia, Great Britain, Canada, and elsewhere, and also including all wools not hereinafter described or designated in classes two and three.

**CLASS TWO, COMBING WOOLS.** — That is to say, Leicester, Cotswold, Lincolnshire, Down combing wools, Canada long wools, or other like combing wools of English blood, and usually known by the terms herein used, and also all hair of the alpaca, goat, and other like animals.

**CLASS THREE, CARPET WOOLS AND OTHER SIMILAR WOOLS.** — Such as Donkoi, native South American, Cordova, Valparaiso, native Smyrna, and including all such wools of like character as have been heretofore usually imported into the United States from Turkey, Greece, Egypt, Syria, and elsewhere. [See *Saxonville Mills v. Russell*, 116 U. S. 13 ; 1 Lowell, 450 ; 1 F. R. 118.]

The duty on wools of the first class which shall be imported washed shall be twice the amount of the duty to which they would be subjected if imported unwashed ; and the duty on wools of all classes which shall be imported scoured shall be three times the duty to which they would be subjected if imported unwashed. The duty upon wool of the sheep, or hair of the alpaca, goat, and other like animals, which shall be imported in any other than ordinary condition, as now and heretofore practised, or which shall be changed in its character or condition for the purpose of evading the duty, or which shall be reduced in value by the admixture of dirt or any other foreign substance, shall be twice the duty to which it would be otherwise subject. [See *Arthur v. Pastor*, 109 U. S. 139.] Wools of the first class, the value whereof at the last port or place whence exported to the United States, excluding charges in such port, shall be thirty cents or less per pound, ten cents per pound ; wools of the same class, the value whereof at the last port or place whence exported to the United States, excluding charges in such port, shall exceed thirty cents per pound, twelve cents per pound. [See 15 A. G. Op. 172, overruling *Id.* 105.] Wools of the second class, and all hair of the alpaca, goat, and other like animals, the value whereof, at the last port or place whence exported to the United States, excluding charges in such port, shall be thirty cents or less per pound, ten cents per pound ; wools of the same class, the value whereof at the last port or place whence exported to the United States, excluding charges in such port, shall exceed thirty cents per pound, twelve cents per pound. [See 15 A. G. Op. *supra*.] Wools of the third class, the value whereof, at the last port or place whence exported to the United States, excluding charges in such port, shall be twelve cents or less per pound, two and a half cents per pound ; wools of the same class, the value whereof, at the last port or place whence exported to the United States, excluding charges in such port, shall exceed twelve cents per pound, five cents per pound. [See 15 A. G. Op. *supra* ; *Id.* 72, 76.] Wools on the skin, the same rates as other wools, the quantity and value to be ascertained under such rules as the Secretary of the Treasury may prescribe. Woollen rags, shoddy, mungo, waste, and flocks, ten cents per pound. Woollen cloths, woollen shawls, and all manufactures of wool of every description, made wholly or in part of wool, not specially enumerated or provided for in this act, valued at not exceeding eighty cents per pound, thirty-five cents per pound and thirty-five per centum ad valorem ; valued at above eighty cents per pound, thirty-five cents per pound, and in addition thereto forty per centum ad valorem. [See *Herman v. Arthur*, 127 U. S. 363. *Cohn v. Seeberger*, 30 F. R. 425.] Flannels, blankets, hats of wool, knit goods, and all goods made on knitting-frames, balmorals, woollen and worsted yarns, and all manufactures of every description, composed wholly or in part of worsted, the hair of the alpaca, goat, or other animals (except such as are composed in part of wool), not specially enumerated or provided for in this act, valued at not exceeding thirty cents per pound, ten cents per pound ; valued at above thirty cents per pound, and not exceeding forty cents per pound, twelve cents per pound ; valued at above forty cents per pound, and not exceeding sixty cents per pound, eighteen cents per pound ; valued at above sixty cents per pound, and not exceeding eighty cents per pound, twenty-four cents per pound ; and in addition thereto, upon all the above named articles, thirty-five per centum ad valorem ; valued at above eighty cents per pound, thirty-five cents per pound, and in addition thereto forty per centum ad valorem. [See *Arthur v. Victor*, 127 U. S. 572 ; *Victor v. Arthur*, 104 *Id.* 498 ; 19 F. R. 250 ; *Wilson v. Spaulding*, 19 *Id.* 304 ; *Cotzhausen v. Nazro*, 107 U. S. 215 ; 15 F. R. 891 ; 11 Biss. 44 ; *Wilkinson v. Greeley*, 1 *Curtis*, 439 ; *Cohn v. Seeberger*, 30 F. R. 425 ; *Toplitz v. Hedden*, 33 *Id.* 617.] Bunting, ten cents per square yard, and in addition thereto, thirty-five per centum ad valorem. [See *Butler v. Russell*, 3 *Cliff.* 251.] Women's and children's dress goods, coat



linings, Italian cloths, and goods of like description, composed in part of wool, worsted, the hair of the alpaca, goat, or other animals, valued at not exceeding twenty cents per square yard, five cents per square yard, and in addition thereto, thirty-five per centum ad valorem; valued at above twenty cents per square yard, seven cents per square yard, and forty per centum ad valorem; if composed wholly of wool, worsted, the hair of the alpaca, goat, or other animals, or of a mixture of them, nine cents per square yard and forty per centum ad valorem, but all such goods with selvages, made wholly or in part of other materials, or with threads of other materials introduced for the purpose of changing the classification, shall be dutiable at nine cents per square yard and forty per centum ad valorem: *Provided*, That all such goods weighing over four ounces per square yard shall pay a duty of thirty-five cents per pound and forty per centum ad valorem. [See *Reimer v. Schell*, 4 Blatch. 328; *Ellison v. Hartranft*, 24 F. R. 136.] Clothing, ready-made, and wearing apparel of every description, not specially enumerated or provided for in this act, and balmoral skirts, and skirting, and goods of similar description, or used for like purposes, composed wholly or in part of wool, worsted, the hair of the alpaca, goat, or other animals, made up or manufactured wholly or in part by the tailor, seamstress, or manufacturer, except knit goods, forty cents per pound, and in addition thereto, thirty-five per centum ad valorem. [See *Greenleaf v. Worthington*, 26 F. R. 303; *Maillard v. Lawrence*, 16 How. 251; 1 Blatch. 504; *Arthur v. Victor*, 127 U. S. 572; *Wilson v. Spaulding*, 19 F. R. 304; *Greenleaf v. Goodrich*, 101 U. S. 284; 1 Haskell, 586.] Cloaks, dolmans, jackets, talmas, ulsters, or other outside garments, for ladies' and children's apparel and goods of similar description, or used for like purposes, composed wholly or in part of wool, worsted, the hair of the alpaca, goat, or other animals, made up or manufactured wholly or in part by the tailor, seamstress, or manufacturer (except knit goods), forty-five cents per pound, and in addition thereto forty per centum ad valorem. Webbing, gorings, suspenders, braces, beltings, bindings, braids, galloons, fringes, jimps, cords, and tassels, dress trimmings, head nets, buttons, or barrel buttons, or buttons of other forms for tassels or ornaments, wrought by hand, or braided by machinery, made of wool, worsted, the hair of the alpaca, goat, or other animals, or of which wool, worsted, the hair of the alpaca, goat, or other animals is a component material, thirty cents per pound, and in addition thereto, fifty per centum ad valorem. [See *Beard v. Nichols*, 120 U. S. 260; 7 F. R. 579; *Thorp v. Lawrence*, 1 Blatch. 351; *Chester v. Curtis*, Id. 499; *Whiting v. Bancroft*, 1 Story, 560.] Aubusson, Axminster, and chenille carpets, and carpets woven whole for rooms, forty-five cents per square yard, and in addition thereto, thirty per centum ad valorem. Saxony, Wilton, and Tournay velvet carpets, forty-five cents per square yard, and in addition thereto, thirty per centum ad valorem. Brussels carpets, thirty cents per square yard, and in addition thereto, thirty per centum ad valorem. Patent velvet and tapestry velvet carpets, printed on the warp or otherwise, twenty-five cents per square yard, and in addition thereto, thirty per centum ad valorem. Tapestry Brussels carpets, printed on the warp or otherwise, twenty cents per square yard, and in addition thereto, thirty per centum ad valorem. Treble ingrain, three-ply, and worsted-chain Venetian carpets, twelve cents per square yard, and in addition thereto, thirty per centum ad valorem. Yarn Venetian, and two-ply ingrain carpets, eight cents per square yard, and in addition thereto, thirty per centum ad valorem. Druggets and bookings, printed, colored, or otherwise, fifteen cents per square yard, and in addition thereto, thirty per centum ad valorem. Hemp or jute carpeting, six cents per square yard. Carpets and carpetings of wool, flax, or cotton, or parts of either or other material, not otherwise herein specified, forty per centum ad valorem; and mats, rugs, screens, covers, hassocks, bedsides, and other portions of carpets or carpetings, shall be subjected to the rate of duty herein imposed on carpets or carpeting of like character or description; and the duty on all other mats not exclusively of vegetable material, screens, hassocks, and rugs, shall be forty per centum ad valorem. [See *Riggs v. Frick*, Taney, 100.] Endless belts or felts for paper or printing machines, twenty cents per pound and thirty per centum ad valorem.

#### SCHEDULE L.—SILK AND SILK GOODS.

(See 18 St. 307, ch. 36, § 1; 14 A. G. Op. 542; 15 Id. 51.)

Silk, partially manufactured from cocoons, or from waste silk, and not further advanced or manufactured than carded or combed silk, fifty cents per pound. Thrown silk, in gum, not more advanced than singles, tram, organzine, sewing silk, twist, floss, in the gum, and spun silk, silk threads or yarns, of every description, purified or dyed, thirty per centum ad valorem. [See *Mandel v. Spalding*, 26 F. R. 609; *Strange v. Barney*, 35 Id. 196; *Jaffray v. Murphy*, 19 Int. Rev. Rec. 143.] On lastings, mohair cloth, silk twist, or other manufactures of cloth, woven or made in patterns of such size, shape, or form, or cut in such manner as to be fit for buttons exclusively, ten per centum ad valorem. All goods, wares, and merchandise, not specially enumerated or provided for in this act, made of silk, or of which silk is the component material of chief value, fifty per centum ad valorem. [See *Drew v. Grinnell*, 115 U. S. 477;



Swan v. Arthur, 103 Id. 597; Solomon v. Arthur, 102 Id. 208; Arthur v. Morrison, 96 Id. 108; Arthur v. Lahey, Id. 112; Smythe v. Fiske, 23 Wall. 374; Morrison v. Arthur, 13 Blatch. 195; Davies v. Arthur, Id. 34; Chapon v. Smythe, 11 Id. 120; Duden v. Arthur, 24 Int. Rev. Rec. 380; Lane v. Russell, 4 Cliff. 122; Wilson v. Spaulding, 19 F. R. 413; Myer v. Hartrauft, 28 Id. 356; Hermann v. Robertson, 33 Id. 654; Morrison v. Miller, 37 Id. 82.]

#### SCHEDULE M. — BOOKS, PAPERS, ETC.

Books, pamphlets, bound or unbound, and all printed matter, not specially enumerated or provided for in this act, engravings, bound or unbound, etchings, illustrated books, maps, and charts, twenty-five per centum ad valorem. [See Pott v. Smith, 104 U. S. 735; Arthur v. Moller, 97 Id. 365; United States v. Kaub, 23 Int. Rev. Rec. 211; Bonte v. Seeberger, 31 Id. 884.] Blank books, bound or unbound, and blank books for press-copying, twenty per centum ad valorem. Paper, sized or glued, suitable only for printing paper, twenty per centum per annum. Printing paper, unsized, used for books and newspapers exclusively, fifteen per centum ad valorem. Paper, manufactures of, or of which paper is a component material, not specially enumerated or provided for in this act, fifteen per centum ad valorem. [See Liebenroth v. Robertson, 33 F. R. 457.] Sheathing paper, ten per centum ad valorem. Paper boxes, and all other fancy boxes, thirty-five per centum ad valorem. Paper envelopes, twenty-five per centum ad valorem. Paper-hangings, and paper for screens or fire-boards, paper antiquarian, demy, drawing, elephant, foolscap, imperial, letter, note, and all other paper not specially enumerated or provided for in this act, twenty-five per centum ad valorem. [See Lawrence v. Merritt, 127 U. S. 113.] Pulp, dried, for paper-makers' use, ten per centum ad valorem.

#### SCHEDULE N. — SUNDRIES.

Alabaster and spar statuary and ornaments, ten per centum ad valorem. Baskets and all other articles composed of grass, osier, palm leaf, whalebone, or willow, or straw, not specially enumerated or provided for in this act, thirty per centum ad valorem. Beads, and bead ornaments of all kinds, except amber, fifty per centum ad valorem. [See Benziger v. Robertson, 122 U. S. 211; 16 A. G. Op. 94.] Blackening of all kinds, twenty-five per centum ad valorem. Bladders, manufactures of, twenty-five per centum ad valorem. Bone, horn, ivory, or vegetable ivory, all manufactures of, not specially enumerated or provided for in this act, thirty per centum ad valorem. [See Harrison v. Merritt, 115 U. S. 577.] Bonnets, hats, and hoods for men, women, and children, composed of chip, grass, palm-leaf, willow, or straw, or any other vegetable substance, hair, whalebone, or other material, not specially enumerated or provided for in this act, thirty per centum ad valorem. [See Stodder v. Spaulding, 24 F. R. 89; Toplitz v. Hedden, 33 Id. 617.] Bouillons, or cannetille, metal threads, filé, or gespinst, twenty-five per centum ad valorem. [See Roundy v. Spaulding, 20 F. R. 43.] Bristles, fifteen cents per pound. [See Von Stade v. Arthur, 13 Blatch. 251.] Brooms of all kinds, twenty-five per centum ad valorem. Brushes of all kinds, thirty per centum ad valorem. Bulbs and bulbous roots, not medicinal, and not specially enumerated or provided for in this act, twenty per centum ad valorem. Burr-stones, manufactured or bound up into mill-stones, twenty per centum ad valorem. Buttons and button-molds, not specially enumerated or provided for in this act, not including brass, gilt, or silk buttons, twenty-five per centum ad valorem. Candles and tapers of all kinds, twenty per centum ad valorem. Canes and sticks for walking, finished, thirty-five per centum ad valorem; if unfinished, twenty per centum ad valorem. Card-cases, pocket-books, shell-boxes, and all similar articles, of whatever material composed, and by whatever name known, not specially enumerated or provided for in this act, thirty-five per centum ad valorem. Card clothing, twenty-five cents per square foot; when manufactured from tempered steel wire, forty-five cents per square foot. Carriages, and parts of, not specially enumerated or provided for in this act, thirty-five per centum ad valorem. Chronometers, box or ship's, and parts thereof, ten per centum ad valorem. Clocks, and parts of clocks, thirty per centum ad valorem. Coach and harness furniture of all kinds, saddlery, coach, and harness hardware, silver-plated, brass, brass-plated, or covered, common, tinned, burnished, or japanned, not specially enumerated or provided for in this act, thirty-five per centum ad valorem. Coal slack or culm, such as will pass through a half-inch screen, thirty cents per ton of twenty-eight bushels, eighty pounds to the bushel. Coal, bituminous, and shale, seventy-five cents per ton of twenty-eight bushels, eighty pounds to the bushel. A drawback of seventy-five cents per ton shall be allowed on all bituminous coal imported into the United States which is afterwards used for fuel on board of vessels propelled by steam which are engaged in the coasting trade of the United States, or in the trade with foreign countries, to be allowed and paid under such regulations as the Secretary of the Treasury shall prescribe. By 24 St. 81, § 10, this drawback applies only to vessels of the United States.



[See *Marvel v. Merritt*, 116 U. S. 11.] Coke, twenty per centum ad valorem. [See *Balfour v. Sullivan*, 8 Sawyer, 648; 17 F. R. 231.] Combs, of all kinds, thirty per centum ad valorem. Compositions of glass or paste, when not set, ten per centum ad valorem. Coral, cut, manufactured, or set, twenty-five per centum ad valorem. Corks and cork bark, manufactured, twenty-five per centum ad valorem. Crayons of all kinds, twenty per centum ad valorem. Dice, draughts, chess-men, chess-balls, and billiard and bagatelle balls, of ivory or bone, fifty per centum ad valorem. Dolls and toys, thirty-five per centum ad valorem. [See *Vanacker v. Spalding*, 24 F. R. 88.] Emery, grains and emery manufactured, ground, pulverized, or refined, one cent per pound. Epaullets, galloons, laces, knots, stars, tassels, and wings, of gold, silver, or other metal, twenty-five per centum ad valorem. Fans of all kinds, except common palm-leaf fans, of whatever material composed, thirty-five per cent ad valorem. Feathers of all kinds, crude or not dressed, colored or manufactured, twenty-five per centum ad valorem; when dressed, colored, or manufactured, including dressed and finished birds, for millinery ornaments, and artificial and ornamental feathers and flowers, or parts thereof, of whatever material composed, for millinery use, not specially enumerated or provided for in this act, fifty per centum ad valorem. [See *Arthur v. Rheims*, 96 U. S. 143.] Finishing powder, twenty per centum ad valorem. Fire-crackers of all kinds, one hundred per centum ad valorem. Floor-matting and floor-mats, exclusively of vegetable substances, twenty per centum ad valorem. Friction or lucifer matches of all descriptions, thirty-five per centum ad valorem. Fulminates, fulminating powders, and all like articles, not specially enumerated or provided for in this act, thirty per centum ad valorem. Fur, articles made of, and not specially enumerated or provided for in this act, thirty per centum ad valorem. Gloves, kid or leather, of all descriptions, wholly or partially manufactured, fifty per centum ad valorem. [See *Arthur v. Unkart*, 96 U. S. 118; *Wilson v. Spaulding*, 19 F. R. 413; *Adam v. Bancroft*, 3 Sumner, 384.] Grease, all not specially enumerated or provided for in this act, ten per centum ad valorem. Grind-stones, finished or unfinished, one dollar and seventy-five cents per ton. Gunpowder, and all explosive substances used for mining, blasting, artillery, or sporting purposes, when valued at twenty cents or less per pound, six cents per pound; valued above twenty cents per pound, ten cents per pound. Gun-wads, of all descriptions, thirty-five per centum ad valorem. Gutta-percha, manufactured, and all articles of, not specially enumerated or provided for in this act, thirty-five per centum ad valorem. [Junge v. Hedden, 37 F. R. 197.] Hair, human, bracelets, braid, chains, rings, curls, and ringlets, composed of hair, or of which hair is the component material of chief value, thirty-five per centum ad valorem. Curled hair, except of hogs, used for beds or mattresses, twenty-five per centum ad valorem. Human hair, raw, uncleaned, and not drawn, twenty per centum ad valorem. If clean or drawn, but not manufactured, thirty per centum ad valorem; when manufactured, thirty-five per centum ad valorem. Hair cloth, known as "erinoline cloth," and all other manufactures of hair not specially enumerated or provided for in this act, thirty per centum ad valorem. [See *Von Stade v. Arthur*, 13 Blatch. 251; *Butterfield v. Arthur*, 16 Id. 216.] Hair cloth, known as "hair seating," thirty cents per square yard. Hair pencils, thirty per centum ad valorem. Hats, and so forth, materials for: Braids, plaits, flats, laces, trimmings, tissues, willow sheets and squares, used for making or ornamenting hats, bonnets, and hoods, composed of straw, chip, grass, palm-leaf, willow, hair, whalebone, or any other substance or material, not specially enumerated or provided for in this act, twenty per centum ad valorem. [See *Arthur v. Zimmerman*, 96 U. S. 124; *Arthur v. Morrison*, Id. 108; *Arthur v. Lahey*, Id. 112; *Arthur v. Unkart*, Id. 118; *A. G. Op. Feb. 15, 1884* in S. T. D. 6197; *United States v. Goodwin*, 4 Mason, 128; *Marsh v. Seeberger*, 30 F. R. 422; *Hartranft v. Lungfeld*, 125 U. S. 128.] Hat bodies of cotton, thirty-five per centum ad valorem. Hatters' furs, not on the skin, and dressed furs on the skin, twenty per centum ad valorem. Hatters' plush, composed of silk or of silk and cotton, twenty-five per centum ad valorem. Hemp seed and rape seed, and other oil seeds of like character, other than linseed or flaxseed, one quarter of one cent per pound. India-rubber fabrics, composed wholly or in part of India rubber, not specially enumerated or provided for in this act, thirty per centum ad valorem. Articles composed of India rubber, not specially enumerated or provided for in this act, twenty-five per centum ad valorem. [See *Vanacker v. Spalding*, 24 F. R. 88; *Elmes on Law of Customs*, p. 445; *Beard v. Nichols*, 120 U. S. 260; 7 F. R. 579; *Junge v. Hedden*, 37 Id. 197.] India rubber boots and shoes, twenty-five per centum ad valorem. Inks of all kinds and ink powders, thirty per centum ad valorem. Japanned ware of all kinds, not specially enumerated or provided for in this act, forty per centum ad valorem. Jet, manufactures and imitations of, twenty-five per centum ad valorem. Jewelry of all kinds, twenty-five per centum ad valorem. [See *Robbins v. Robertson*, 33 F. R. 709.] Leather, bend or belting leather, and Spanish or other sole leather, and leather not specially enumerated or provided for in this act, fifteen per centum ad valorem. [See *Movius v. Arthur*, 95 U. S. 144.] Calfskins, tanned, or tanned and dressed, and dressed upper leather of all other kinds, and skins dressed and finished, of all kinds, not specially enumerated or provided for in this act, and skins of morocco, finished, twenty per centum ad valorem. [See *Coggill v. Lawrence*, 1 Blatch. 602; *Keutgen v. Lawrence*, Id. 615.] Skins for morocco, tanned, but unfinished, ten per centum ad valorem. All manufactures, and articles of leather, or of which



leather shall be a component part, not specially enumerated or provided for in this act, thirty per centum ad valorem. [See *Liebenroth v. Robertson*, 33 F. R. 457; *Junge v. Hedden*, 37 Id. 197.] Limes, ten per centum ad valorem. Garden seeds, except seed of the sugar beet, twenty per centum ad valorem. [See *Ferry v. Livingston*, 115 U. S. 542.] Linseed or flaxseed, twenty cents per bushel of fifty-six pounds; but no drawback shall be allowed on oil-cake made from imported seed. Marble of all kinds, in block, rough or squared, sixty-five cents per cubic foot; veined marble, sawed, dressed, or otherwise, including marble slabs and marble paving-tiles, one dollar and ten cents per cubic foot. All manufactures of marble not specially enumerated or provided for in this act, fifty per centum ad valorem. [See *Sutton v. Viti*, 108 U. S. 312; 14 F. R. 241; *Arthur v. Jacoby*, 103 U. S. 677.] Musical instruments of all kinds, twenty-five per centum ad valorem. Paintings, in oil or water colors, and statuary not otherwise provided for, thirty per centum ad valorem. But the term "statuary," as used in the laws now in force imposing duties on foreign importations, shall be understood to include professional productions of a statuary or of a sculptor only. [See cases last cited, *supra*, 15 A. G. Op. 206.] Osier, or willow, prepared for basket-makers' use, twenty-five per centum ad valorem. Papier-maché, manufactures, articles, and wares of, thirty per centum ad valorem. Pencils of wood filled with lead or other material and pencils of lead, fifty cents per gross and thirty per centum ad valorem; pencil-leads, not in wood, ten per centum ad valorem. Percussion caps, forty per centum ad valorem. Philosophical apparatus and instruments, thirty-five per centum ad valorem. [See *Mauasse v. Spaulding*, 24 F. R. 86; S. T. D. 6811.] Pipes, pipe-bowls, and all smokers' articles whatsoever, not specially enumerated or provided for in this act, seventy per centum ad valorem; all common pipes of clay, thirty-five per centum ad valorem. [See *Wedemeyer v. Lancaster*, 31 F. R. 446.] Plaster of Paris, when ground or calcined, twenty per centum ad valorem. Playing cards, one hundred per centum ad valorem. Polishing powders of every description, by whatever name known, including Frankfort black, and Berlin, Chinese, fig, and wash blue, twenty per centum ad valorem. Precious stones of all kinds, ten per centum ad valorem. [See 16 A. G. Op. 94.] Rags, of whatever material composed, and not especially enumerated or provided for in this act, ten per centum ad valorem. Rattan and reeds, manufactured, but not made up into completed articles, ten per centum ad valorem. Salt, in bags, sacks, barrels, or other packages, twelve cents per one hundred pounds; in bulk, eight cents per one hundred pounds: *Provided*, That exporters of meats, whether packed or smoked, which have been cured in the United States with imported salt, shall, upon satisfactory proof, under such regulations as the Secretary of the Treasury shall prescribe, that such meats have been cured with imported salt, have refunded to them from the Treasury the duties paid on the salt so used in curing such exported meats, in amounts not less than one hundred dollars: *And provided further*, That imported salt in bond may be used in curing fish taken by vessels licensed to engage in the fisheries, and in curing fish on the shores of the navigable waters of the United States, under such regulations as the Secretary of the Treasury shall prescribe; and upon proof that the salt has been used for either of the purposes stated in this proviso, the duties on the same shall be remitted. [See *Karthauss v. Fricks*, Taney, 94. *United States v. Dodge*, Deady, 124.] Scagliola, and composition tops for tables or for other articles of furniture, thirty-five per centum ad valorem. Sealing-wax, twenty per centum ad valorem. Shells, whole or parts of, manufactured, of every description, not specially enumerated or provided for in this act, twenty-five per centum ad valorem. [See *Hartrauft v. Wiegman*, 121 U. S. 609, 616; *Young v. Spaulding*, 24 F. R. 87.] Stones, unmanufactured or undressed, freestone, granite sandstone, and all building or monumental stone, except marble, not specially enumerated or provided for in this act, one dollar per ton; and upon stones as above, hewn, dressed, or polished, twenty per centum ad valorem. Strings. All strings of catgut, or any other like material, other than strings for musical instruments, twenty-five per centum ad valorem. Tallow, one cent per pound. [Fairbanks v. Spaulding, 19 F. R. 416.] Teeth, manufactured, twenty per centum ad valorem. Umbrella and parasol ribs, and stretcher frames, tips, runners, handles, or other parts thereof, when made in whole or chief part of iron, steel, or any other metal, forty per centum ad valorem; umbrellas, parasols, and shades, when covered with silk or alpaca, fifty per centum ad valorem; all other umbrellas, forty per centum ad valorem. Umbrellas, parasols, and sunshades, frames and sticks for, finished or unfinished, not specially enumerated or provided for in this act, thirty per centum ad valorem. Waste, all not specially enumerated or provided for in this act, ten per centum ad valorem. [See *Lennig v. Maxwell*, 3 Blatch. 125.] Watches, watch-cases, watch-movements, parts of watches, and watch materials, not specially enumerated or provided for in this act, twenty-five per centum ad valorem. [See *Elgin Watch Co. v. Spaulding*, 19 F. R. 411.] Webbing, composed of cotton, flax, or any other materials, not specially enumerated or provided for in this act, thirty-five per centum ad valorem. [See *Beard v. Nichols*, 120 U. S. 260; 7 F. R. 579.]



## THE FREE LIST.

"SEC. 2503. The following articles when imported shall be exempt from duty: Albumen, in any form or condition; lactarine. Aconite. Ambergris. Annato, ronceau, rocou, or orleans, and all extracts of. Balm of Gilead. Blood, dried. Bones, crude, not manufactured, burned, calcined, ground or steamed. [See *Harrison v. Merritt*, 115 U. S. 577; S. T. D. 7764]. Bone-dust and bone-ash for manufacture of phosphate and fertilizers. Carbon, animal, fit for fertilizing only. Guano, manures, and all substances expressly used for manure. Musk, crude, in natural pod. Civit, crude. Cochineal. Dyeing or tanning: Articles in a crude state used in dyeing or tanning, not specially enumerated or provided for in this act. Fish-skins. Hide-cuttings, raw, with or without hair, and all glue-stock. Hoofs. Horns, and parts of horns, unmanufactured, and horn strips and tips. Ipecac. Fish-sounds or fish-bladders. Leather, old scraps. Leeches. Rennets, raw or prepared. Argal, or Argol, or crude Tartar. Assafoetida. Barks, Cinchona, or other barks, used in the manufacture of quinia. Brazil paste. Camphor, crude. Cassia, Cassia buds, Cassia Vera, unground. Charcoal. Cinnamon, and chips of, unground. Cloves, and clove stems, unground. Coccus indicus. Cudbear. Curry and Curry powder. Cutch. Divi-divi. Dragon's blood. Ergot. Gambier. Ginger-root, unground. Indigo and artificial indigo. [See *United States v. Wigglesworth*, 2 Story, 369.] Iodine, crude. Jalap. Kelp. Lac dye, crude, seed, button, stick, and shell. Lac spirits. Lemon juice and lime juice. Licorice root, unground. Litmus, prepared or not prepared. Mace. Madder, and munjeet or Indian madder, ground or prepared, and extracts of. Manna. Myrobolan. Orchil, or orchil liquid. Nutmegs. Nux vomica. Otter of roses. Salacine. Oils: Almond. Amber, crude and rectified. Ambergris. Anise, or anise seed. Aniline, crude. Aspic, or spike lavender. Bergamot. Cajeput. Carraway. Cassia and cinnamon. Cedrat. Chamomile. Citronella, or lemon grass. Civet. Fennel. Jasmine, or jasmine. Juglandium. Juniper. Lavender. Lemon. Limes. Mace. Neroli, or orange flower. Orange. Palm and cocoanut. Poppy. Rosemary or anthoss. Sesame or sesamum-seed, or bene. Thyme or origanum, red or white, valerian. Pepper, unground, of all kinds. Pimento, unground. Saffron and safflower, and extract of, and saffron cake. Selep, or saloup. Storax, or styrax. Turmeric. Turpentine, Venice. Valonia. Vegetable and mineral wax. Wood ashes, and lye of, and beet-root ashes. Acids used for medicinal, chemical, or manufacturing purposes, not specially enumerated or provided for in this act. Alizarine, natural or artificial. Agates, unmanufactured. Apatite. Asbestos, unmanufactured. Arsenic. Antimony ore, crude sulphide of. Arsenic, sulphide of, or orpiment. Arseniate of aniline. Baryta, carbonate or witherite. Bauxite. Aniline salts or black salts and black tares. Bromine. Cadmium. Calamine. Cerium. Cobalt, as metallic arsenic. Chalk and cliff-stone, unmanufactured. Feldspar. Cryolite or kryolith. Iridium. Kieserite. Kyanite or cyanite, and kainite. Lime, citrate of. Lime, chloride of, or bleaching powder. Magnesium. Magnesite, or native mineral carbonate of magnesia. Manganese, oxide and ore of. Mineral waters, all not artificial. [See *Merritt v. Stephani*, 108 U. S. 106; *Pascal v. Sullivan*, 10 Sawyer, 284; 21 F. R. 496.] Osmium. Palladium. Paraffine. Phosphates, crude or native, for fertilizing purposes. Potash, muriate of. Plaster of Paris or sulphate of lime, unground. Quinia, sulphate of, salts of, and cinchonidia. Soda, nitrate of, or cubic nitrate. Strontia, oxide of, and proto-oxide of strontian, and strontianite, or mineral carbonate of strontia. Sulphur, or brimstone, not specially enumerated or provided for in this act. Sulphur lac or precipitated. Tripoli. Uranium, oxide of, verdegis or subacetate of copper. Drugs, barks, beans, berries, balsams, buds, bulbs, and bulbous roots and excrescences, such as nut-galls, fruits, flowers, dried fibres; grains, gums and gum-resin; herbs, leaves, lichens, mosses, nuts, roots, and stems; spices, vegetables, seeds aromatic, and seeds of morbid growth; weeds, woods used expressly for dyeing, and dried insects—any of the foregoing, of which are not edible and are in a crude state, and not advanced in value or condition by refining or grinding, or by other process of manufacture, and not specially enumerated or provided for in this act. Vaccine virus. Crude minerals, not advanced in value or condition by refining or grinding, or by other process of manufacture, not specially enumerated or provided for in this act."

## SUNDRIES.

"Aluminium. Amber beads and gum. Animals, brought into the United States temporarily, and for a period not exceeding six months, for the purpose of exhibition or competition for prizes offered by any agricultural or racing association; but a bond shall be first given in accordance with the regulations. Animals, specially imported for breeding purposes, shall be admitted free upon proof thereof satisfactory to the Secretary of the Treasury, and under such regulations as he may prescribe; and teams of animals, including their harness and tackle and the vehicles or wagons actually owned by persons emigrating from foreign countries to the United States with their families, and in actual use for the purpose of such emigration, shall also be admitted free of duty, under such regulations as the Secretary of the Treasury



may prescribe. By 25 St. 76, ch. 56, the Secretary of the Treasury is to remit duties upon special importations, prior to the act of animals for breeding purposes, and the remission is made a sufficient defence to pending suits. [See *Morrill v. Jones*, 106 U. S. 466; *United States v. 11 Horses*, 30 F. R. 916; *United States v. 196 Mares*, 29 Id. 139; S. T. D. 4248, 5551, 5664, 5712, 6732, 7805.] Asphaltum and bitumen, crude. Arrowroot. Articles imported for the use of the United States, provided that the price of the same did not include the duty. Bamboo reeds, no further manufactured than cut into suitable lengths for walking sticks or canes, or for sticks for umbrellas, parasols, or sunshades. Bamboo, unmanufactured. Barrels of American manufacture, exported filled with domestic petroleum, and returned empty, under such regulations as the Secretary of the Treasury may prescribe, and without requiring the filing of a declaration at time of export of intent to return the same empty. Articles the growth, produce, and manufacture of the United States, when returned in the same condition as exported. Casks, barrels, carboys, bags, and other vessels of American manufacture, exported filled with American products, or exported empty and returned filled with foreign products, including shooks when returned as barrels or boxes; but proof of the identity of such articles shall be made under regulations to be prescribed by the Secretary of the Treasury; and if any of such articles are subject to internal tax at the time of exportation, such tax shall be proved to have been paid before exportation and not refunded. [See *Gauthier v. Bell*, 23 Int. Rev. Rec. 210; *United States v. Bradley*, 28 Id. 75; *Cargo from Wreck*, 12 F. R. 508; 10 *Sawyer*, 103; *Balfour v. Sullivan*, 19 F. R. 578.] Bed-feathers and down. Bells, broken, and bell metal broken and fit only to be remanufactured. [See 16 A. G. Op. 450.] Birds, stuffed. Birds, and land and water fowls. [See cases cited under Schedule G.] Bismuth. Bladders, crude, and all integuments of animals not specially enumerated or provided for in this act. Bologna sausages. Bolting cloths. Books, engravings, bound or unbound, etchings, maps, and charts, which shall have been printed and manufactured more than twenty years at the date of importation. Books, maps, and charts imported by authority or for use of the United States or for the use of the Library of Congress; but the duty shall not have been included in the contract of price paid. Books, maps, and charts specially imported, not more than two copies in any one invoice, in good faith, for the use of any society incorporated or established for philosophical, literary, or religious purposes, or for the encouragement of the fine arts, or for the use or by order of any college, academy, school, or seminary of learning in the United States. [See S. T. D. 7678.] Books, professional, of persons arriving in the United States. Books, household effects, or libraries, or parts of libraries, in use, of persons or families from foreign countries, if used abroad by them not less than one year, and not intended for any other person or persons, nor for sale. [See *Arthur v. Morgan*, 112 U. S. 495; 15 A. G. Op. 125. See S. T. D. 2028, 2901.] Breccia, in blocks or slabs. Brine. Brazil pebbles for spectacles, and pebbles for spectacles rough. [See *Young v. Spalding*, 24 F. R. 22.] Bullion, gold and silver. Burgundy pitch. Burr-stone, in blocks, rough or unmanufactured, and not bound up in mill-stones. Cabinets of coins, medals, and all other collections of antiquities. [See *United States v. 65 Vases*, 21 Blatch. 511, 513; 18 F. R. 508; 10 F. R. 880, *United States v. 1 Oil Painting*, 31 Id. 881; 16 A. G. Op. 353.] Castor or castoreum. Catgut strings, or gut-cord, for musical instruments. Catgut or whip-gut, unmanufactured. Coal, anthracite. Coal-stores of American vessels, but none shall be unloaded. Cobalt, ore of. Cocoa, or cacao, crude, and fibre, leaves, and shells of. Coffee. Coins, gold, silver, and copper. [See *Crocker v. Redfield*, 4 Blatch. 378; 18 *How. Pr.* 85; 16 A. G. Op. 353.] Coir and coir yarn. Copper, old, taken from the bottom of American vessels compelled by marine disaster to repair in foreign ports. Copper, when imported for the United States Mint. Coral, marine, unmanufactured. [See *Bailey v. Schell*, 5 Blatch. 195.] Cork-wood, or cork-bark, unmanufactured. Cotton. Curling-stones, or quoits. Cuttle-fish bone. Diamonds, rough or uncut, including glaziers' diamonds. Diamond dust or bort. Dyeing or tanning articles, in a crude state, used in dyeing or tanning, not specially enumerated or provided for in this act. Eggs. Esparto or Spanish grass, and other grasses, and pulp of, for the manufacture of paper. Emery ore. [See *McAndrew v. Robertson*, 24 Blatch. 170; 29 F. R. 246.] Fans, common palm-leaf. Farina. [See *Union Nat. Bank v. Seeberger*, 30 F. R. 429.] Fashion-plates, engraved on steel or on wood, coloured or plain. [See *Blood v. Merritt*, 11 F. R. 289.] Felt, adhesive, for sheathing vessels. Fibrin, in all forms. Firewood. Fish, fresh, for immediate consumption. [See *Cross v. Seeberger*, 30 F. R. 427; see notes Schedule G, *Gauthier v. Bell*, 23 Int. Rev. Rec. 210; S. T. D. 5729, 5730, 7746, 7837.] Fish, for bait. Flint, flints, and ground flint-stones. Fossils. Fruit-plants, tropical and semi-tropical, for the purpose of propagation or cultivation. Fruits, green, ripe, or dried, not specially enumerated or provided for in this act. Furs, undressed. Fur-skins of all kinds, not dressed in any manner. Glass, broken pieces, and old glass which cannot be cut for use, and fit only to be remanufactured. Glass-plate or disks, unwrought, for use in the manufacture of optical instruments. Goat skins, raw. Gold-beaters' molds and wrought, for use in the manufacture of optical instruments. Goat skins, raw. Gold-beaters' molds and wrought, for use in the manufacture of optical instruments. Goat skins, raw. Gold-beaters' skins. Gold-size. [See S. T. D. 6690.] Grease, for use as soap-stock only, not specially enumerated or provided for. Gunny bags and gunny cloth, old or refuse, fit only for remanufacturing. [See *Troost v. Barney*, 5 Blatch. 196.] Gut, and worm gut, manufactured or unmanufactured. Guts, salted.



Gutta percha, crude. Hair, horse or cattle, and hair of all kinds, cleaned or uncleaned, drawn or undrawn, but unmanufactured, not specially enumerated or provided for in this act; of hogs, curled for beds and mattresses, and not fit for bristles. [See *Fifty-one Bales of Goats' Hair*, 2 Ben. 479.] Hide-rope. Hides, raw or uncured, whether dry, salted, or pickled, and skins, except sheep-skins with the wool on, Angora goat skins, raw, without the wool, unmanufactured, asses' skins, raw or unmanufactured. Hones and whetstones. Hop-roots, for cultivation. Hop-poles. Ice. India rubber, crude, and milk of. [Junge v. Hedden, 37 F. R. 197.] India-malacca joints, not further manufactured than cut into suitable lengths for the manufactures into which they are intended to be converted. Ivory, and vegetable ivory, unmanufactured. Jet, unmanufactured. Joss-stick, or joss-light. Junk, old. Lava, unmanufactured. Life-boats and life-saving apparatus, specially imported by societies incorporated or established to encourage the saving of human life. Lithographic stones, not engraved. Loadstones. Logs, and round, unmanufactured timber, not specially enumerated or provided for in this act, and ship timber, and ship planking. Macaroni and vermicelli. Magnets. Manuscripts. Marrow, crude. Marsh-mallows. Medals of gold, silver, or copper. Meerschaum, crude or raw. Mica and mica waste. Models of inventions and other improvements in the arts; but no article or articles shall be deemed a model or improvements which can be fitted for use. Moss, sea-weeds, and all other vegetable substances used for beds and mattresses. Newspapers and periodicals. Nuts, cocoa, and Brazil or cream. Oakum. Oil-cake. Oil, spermaceti, whale, and other fish oils of American fisheries, and all other articles the produce of such fisheries. [See *United States v. Burdett*, 2 Sumner, 336.] Olives, green or prepared. Orange and lemon peel, not preserved, candied, or otherwise prepared. Ores, of gold and silver. Palm nuts and palm-nut kernels. Paper-stock, crude, of every description, including all grasses, fibres, rags of all kinds, other than wool, waste, shavings, clippings, old paper, rope ends, waste rope, waste bagging, gunny bags, gunny cloth, old or refuse, to be used in making, and fit only to be converted into paper, and unfit for any other manufacture, and cotton waste, whether for paper stock or other purposes. Parchment. Pearl, mother of. Personal and household effects, not merchandise, of citizens of the United States dying abroad. [See *Arthur v. Morgan*, 112 U. S. 495; 15 A. G. Op. 113.] Pewter and britannia metal, old and fit only to be remanufactured. Philosophical and scientific apparatus, instruments, and preparations, statuary, casts of marble, bronze, alabaster, or plaster of Paris, paintings, drawings, and etchings, specially imported in good faith for the use of any society or institution incorporated or established for religious, philosophical, educational, scientific, or literary purposes, or encouragement of the fine arts, and not intended for sale. [See 16 A. G. Op. 486; S. T. D. 7792.] Plants, trees, shrubs, and vines of all kinds not otherwise provided for, and seeds of all kinds, except medicinal seeds not specially enumerated or provided for in this act. [See *Ferry v. Livingston*, 115 U. S. 542; *Windmuller v. Robertson*, 23 Blatch. 233; *Nordlinger v. Robertson*, 33 F. R. 241.] Plants, trees, shrubs, roots, seed cane, and seeds imported by the Department of Agriculture or the United States Botanical Garden. Platina, unmanufactured. Platinum unmanufactured, and vases, retorts, and other apparatus, vessels, and parts thereof, for chemical uses. Plumbago. [See *Gautier v. Arthur*, 104 U. S. 345; 13 Blatch. 432.] Polishing-stones. Pulu. Pumice and pumice stone. Quills, prepared or unprepared. Railroad-ties, of wood. Rattans and reeds, unmanufactured. Regalia and gems, statues, statuary, and specimens of sculpture, where specially imported in good faith for the use of any society incorporated or established for philosophical, literary, or religious purposes, or for the encouragement of the fine arts, or for the use or by order of any college, academy, school, seminary of learning, or public library in the United States. Root-flour. Rotten stone. Sago, sago crude, and sago flour. [See *Chung Yune v. Kelly*, 8 Sawyer, 415; 14 F. R. 639.] Saur-kraut. Sausage-skins. Sea-weed, not otherwise provided for. Seed of the sugar beet. Shark skins. Shells of every description, not manufactured. [See *Hartrauft v. Wiegman*, 121 U. S. 609.] Shingle-bolts and stave bolts, provided that heading bolts shall be held and construed to be included under the term stave bolts. Handle-bolts. Shrimps, or other shell fish. [See *Russell v. Worthington*, 23 F. R. 248.] Silk, raw, or as reeled from the cocoon, but not doubled, twisted, or advanced in manufacture in any way. Silk cocoons and silk waste. Silk-worms' eggs. Skeletons, and other preparations of anatomy. Skins dried, salted, or pickled. Snails. Soap-stocks. Sodium. Sparterre, for making or ornamenting hats. Specimens of natural history, botany, and mineralogy, when imported for cabinets, or as objects of taste or science, and not for sale. Spunk. Spurs and stils, used in the manufacture of earthen, stone, or crockery ware. Straw, unmanufactured. [See *Rheimer v. Maxwell*, 3 Blatch. 124.] Sugar of milk. Sweepings of silver and gold. Tamarinds. Tapioca, cassava, or cassada. [See *Chung Yune v. Kelly*, 8 Sawyer, 415; 14 F. R. 639.] Tea. [See *Smith v. Draper*, 5 Blatch. 238; *Two Hundred Chests of Tea*, 9 Wheat. 430.] Tea plants. Teasels. Teeth, unmanufactured. Terra alba, aluminous. Terra japonica. Tin ore, bars, blocks, or pigs, grain or granulated. Tonquin, Tonqua, or Tonka beans. Tortoise and other shells, unmanufactured. Turtles. Types, old, and fit only to be remanufactured. Umbrella sticks, crude, to wit, all partridge, hair wood, pimento, orange, myrtle, and all other sticks and canes in the rough, or no further manufactured than cut into lengths



suitable for umbrella, parasol, or sunshade sticks or walking-canes. Vellum. Wafers, unmedicated. Wearing apparel, in actual use, and other personal effects (not merchandise), professional books, implements, instruments, and tools of trade, occupation, or employment of persons arriving in the United States. But this exemption shall not be construed to include machinery or other articles imported for use in any manufacturing establishment, or for sale. [See *Arthur v. Morgan*, 112 U. S. 495; *Astor v. Merritt*, 111 Id. 202; *Maillard v. Lawrence*, 16 How. 251; 1 Blatch. 504; *Simmon's case*, Brown Adm. 128; A. G. Op. Jan. 13, 1886, in S. T. D. 7344. See also S. T. D. 6317, 6451, 7827, 7833.] Whalebone, unmanufactured. Woods, poplar, or other woods, for the manufacture of paper. Woods, namely, cedar, lignum-vitæ, lancewood, ebony, box, granadilla, mahogany, rosewood, satinwood, and all cabinet woods, unmanufactured. Works of art, painting, statuary, fountains, and other works of art, the production of American artists. But the fact of such production must be verified by the certificate of a consul or minister of the United States indorsed upon the written declaration of the artist; paintings, statuary, fountains, and other works of art, imported expressly for the presentation to national institutions, or to any State, or to any municipal corporation, or religious corporation or society. [S. T. D. 6883.] Yams. Zaffer.

The act of 1883 (22 St. 525) further provides (§ 7 thereof being given with § 2907, and § 8 with § 2841):—

"SEC. 9. If upon the appraisal of imported goods, wares, and merchandise, it shall appear that the true and actual market value and wholesale price thereof, as provided by law, cannot be ascertained to the satisfaction of the appraiser, whether because such goods, wares, and merchandise be consigned for sale by the manufacturer abroad to his agent in the United States, or for any other reason, it shall then be lawful to appraise the same by ascertaining the cost or value of the materials composing such merchandise, at the time and place of manufacture, together with the expense of manufacturing, preparing, and putting up such merchandise for shipment, and in no case shall the value of such goods, wares, and merchandise be appraised at less than the total cost or value thus ascertained.

"SEC. 10. That all imported goods, wares, and merchandise which may be in the public stores or bonded warehouses on the day and year when this act shall go into effect, except as otherwise provided in this act, shall be subjected to no other duty upon the entry thereof for consumption than if the same were imported respectively after that day; and all goods, wares, and merchandise remaining in bonded warehouses on the day and year this act shall take effect, and upon which the duties shall have been paid, shall be entitled to a refund of the difference, between the amount of duties paid and the amount of duties said goods, wares, and merchandise would be subject to if the same were imported respectively after that date. [See *Hartranft v. Oliver*, 125 U. S. 525; *Fabbri v. Murphy*, 95 Id. 191; *McAndrew v. Robertson*, 24 Blatch. 170; 29 F. R. 246; *United States v. Duvivier*, 12 Blatch. 449; *Abbot v. United States*, 20 Ct. Cl. 280.]

"SEC. 11. Nothing in this act shall in any way change or impair the force or effect of any treaty between the United States and any other government, or any laws passed in pursuance of or for the execution of any such treaty, so long as such treaty shall remain in force in respect of the subjects embraced in this act; but whenever any such treaty, so far as the same respects said subjects, shall expire or be otherwise terminated, the provisions of this act shall be in force in all respects in the same manner and to the same extent as if no such treaty had existed at the time of the passage hereof.

"SEC. 12. That in respect of all articles mentioned in Schedule E of § 6 of this act, this act shall take effect on and after June 1, A. D. 1883.

"SEC. 13. That the repeal of existing laws or modifications thereof embraced in this act shall not affect any act done, or any right accruing or accrued, or any suit or proceeding had or commenced in any civil cause, before the said repeal or modifications; but all rights and liabilities under said laws shall continue and may be enforced in the same manner as if said repeal or modifications had not been made, nor shall said repeal or modifications in any manner affect the right to any office, or change the term or tenure thereof. Any offences committed, and all penalties or forfeitures or liabilities incurred under any statute embraced in or changed, modified, or repealed by this act may be prosecuted and punished in the same manner and with the same effect as if this act had not been passed. All acts of limitation, whether applicable to civil causes and proceedings or to the prosecution of offences or for the recovery of penalties or forfeitures embraced in or modified, changed or repealed by this act, shall not be affected thereby; and all suits, proceedings, or prosecutions, whether civil or criminal, for causes arising or acts done or committed prior to the passage of this act, may be commenced and prosecuted within the same time and with the same effect as if this act had not been passed." [See *McAndrew v. Robertson*, 24 Blatch. 170; 29 F. R. 246.]



St. June 26, 1884, ch. 121, §§ 16, 17 (23 St. 57), provides:—

“SEC. 16. All articles of foreign production needed, and actually withdrawn from bonded warehouses, for supplies not including equipment of vessels of the United States engaged in the foreign trade, including the trade between the Atlantic and Pacific ports of the United States, may be so withdrawn free of duty, under such regulations as the Secretary of the Treasury may prescribe.

“SEC. 17. When a vessel is built in the United States for foreign account, wholly or partly of foreign materials on which import duties have been paid, there shall be allowed on such vessel, when exported, a drawback equal in amount to the duty paid on such materials, to be ascertained under such regulations as may be prescribed by the Secretary of the Treasury. Ten per centum of the amount of such drawback so allowed shall, however, be retained for the use of the United States by the collector paying the same.”

St. Jan. 9, 1883, ch. 17 (22 St. 402), provides —

“That grain brought into the United States in wagons or other ordinary road vehicles, by farmers residing in the Dominion of Canada, to be ground by mills owned by citizens of the United States, shall not be deemed to be imported or liable to import duties, *Provided*, That such grain shall be brought into the United States under such regulations as the Treasury Department may prescribe to prevent fraud and evasion, and shall be returned as in like manner provided by such regulations: *And provided further*, That entry shall be made of and duties paid upon all such grain as shall be taken or received by mill-owners as tolls for such grinding, under like regulations provided by the Treasury Department.”

By 25 St. 176, ch. 374, § 1, in order to defray the expenses of collecting the revenue from customs for the year ending June 30, 1888, a certain sum is appropriated, “to be expended by, or under the direction of the Secretary of the Treasury, who is authorized to cause to be paid therefrom the full compensation which the employés in the customs-revenue service would have been entitled to receive had no order been made reducing their compensation in consequence of an estimated deficiency in the appropriation.” By act of March 3, 1887 (24 St. 475), the President may deny vessels, &c., of British dominions of North America, entry into waters, &c., of the United States in certain contingencies. By 18 St. 125, §§ 10–13, owners, agents, or masters of vessels are to report to collectors of customs accidents involving loss of life, of property, or injury to persons, and damages affecting seaworthiness or officering of vessel; also probable loss of vessels.

It has been held that dutiable goods cannot be imported in the foreign mail under the International Postal Treaty. *Cotzhausen v. Nazro*, 107 U. S. 215; 15 F. R. 891.

SECT. 2504. — Rev. Stats. 2507. See note, § 2491. By 18 St. 194, ch. 398, any portion of the cargo of a vessel, if sunken two years and abandoned, may be admitted free of duty, when raised. *Cargo from Wreck*, 12 F. R. 508.

SECT. 2505. — Rev. Stats. 2508. 19 St. 244 inserts “the” before “United States” in the fifth line. S. T. D. 2217, 3071, 3790, 4300, 7397, 7459.

SECT. 2506. — Rev. Stats. 2509. See note, § 2505.

SECT. 2507. — Rev. Stats. 2511. See § 2491. By 18 St. 307, ch. 36, § 7, the duty on jute butts shall be \$6 per ton: *Provided*, that all machinery not now manufactured in the United States adapted exclusively to manufactures from the fibre of the ramie, jute, or flax, may be admitted free of duty for two years from July 1, 1875; and bags other than of American manufacture, in which grain has been actually exported, may be returned empty here, free of duty, under regulations prescribed by the Secretary of the Treasury.

SECT. 2508. — Rev. Stats. 2512. See note, § 2491; *Viti v. Tutton*, 14 F. R. 241. St. June 6, 1878 ch. 156 (20 St. 99), incorporated in the act of 1883 as § 2509, further provides as follows:—

“That all works of art, collections in illustration of the progress of the arts, science or manufactures, photographs, works in terra-cotta, Parian, pottery, or porcelain and artistic copies of antiques in metal or other material hereafter imported in good faith for permanent exhibition at a fixed place by any society or institution established for the encouragement of the arts or science, and not intended for sale, nor for any other purpose than is hereinbefore expressed, and all such articles, imported as aforesaid, now in bond,



and all like articles imported in good faith by any society or association for the purpose of erecting a public monument and not for sale shall be admitted free of duty under such regulations as the Secretary of the Treasury may prescribe: *Provided*, That the parties importing articles as aforesaid shall be required to give bonds, with sufficient sureties, under such rules and regulations as the Secretary of the Treasury may prescribe, for the payment of lawful duties which may accrue should any of the articles aforesaid be sold, transferred, or used contrary to the provisions and intent of this act." [See 16 A. G. Op. 486.]

SECT. 2510. — Rev. Stats. 2513. See note, § 2511. The act of 1883 (22 St. 489), inserts "wire rope" after "manila" in the first line; "for foreign account and ownership or" after "United States" in the fourth line; "after the passage of this act" for "after June 6, 1872" in the sixth line; and adds at the end of the section —

"*Provided*, That vessels built in the United States for foreign account and ownership shall not be allowed to engage in the coastwise trade of the United States."

St. June 26, 1884, ch. 121, § 17 (23 St. 57), provides —

"When a vessel is built in the United States for foreign account, wholly or partly of foreign materials on which import duties have been paid, there shall be allowed on such vessel, when exported, a drawback equal in amount to the duty paid on such materials, to be ascertained under such regulations as may be prescribed by the Secretary of the Treasury. Ten per centum of the amount of such drawback so allowed shall, however, be retained for the use of the United States by the collector paying the same."

Rebate under § 2510 applies only to vessels designed to be documented for and employed in foreign trade, or in trade between the Atlantic and Pacific ports. 15 A. G. Op. 114. And the intention is to encourage the foreign carrying trade in American vessels only. *Russell v. United States*, 15 Blatch. 26. A vessel sailing from an Atlantic to a Pacific port of the United States is engaged in the "foreign" not "coastwise trade." *United States v. Patten*, 1 Holmes, 421.

SECT. 2511. — Rev. Stats. 2514. See note, § 2491. 19 St. 245 inserts "the" before "Treasury" in the last line. Section 6 of St. May 1, 1802, ch. 45 (2 St. 182), providing that no duty should be demanded or collected on domestic or foreign merchandise transported coastwise between the United States Atlantic ports and the United States districts on the Mississippi, or its branches, although landed at New Orleans, &c., was omitted from the Revision as having been rendered inapplicable by the United States acquiring, in 1803, the territory at the mouth of the Mississippi River. 1 Com. D. 1229. St. June 26, 1884, ch. 121, § 16 (23 St. 57), provides —

"All articles of foreign production needed, and actually withdrawn from bonded warehouses, for supplies not including equipment of vessels of the United States engaged in the foreign trade, including the trade between the Atlantic and Pacific ports of the United States, may be so withdrawn free of duty, under such regulations as the Secretary of the Treasury may prescribe."

It was held in 1877 that § 2511 was to be construed with the preceding section as if a part thereof. 15 A. G. Op. 369. Without this section the benefits of § 2510 would be confined to the materials used in the original construction of a vessel. *Russell v. United States*, *supra*. As to fishing and whaling vessels, see 24 St. 82, § 15.

SECT. 2512. — Rev. Stats. 2515. The act of 1883 (22 St. 489) inserts "Indians" after "United States" in the second line. See 2 A. G. Op. 340. S. T. D. 7743.

SECT. 2513. — Rev. Stats. 2516. See note, § 2491. Hay is a raw or unmanufactured article under this section. *Frazee v. Motlitt*, 20 Blatch. 267; 18 F. R. 584. But iron ore is not. *Marvel v. Merritt*, 116 U. S. 11. As to stearine, see *Fairbanks v. Spaulding*, 19 F. R. 416. Quilts of cotton and eider down, or silk and eider down, the latter being in each case the component material of chief value, are manufactured articles not enumerated. *Hartranft v. Sheppard*, 125 U. S. 337. See *Lloyd v. M'Williams*, 31 F. R. 262-265; *Union National Bank v. Seeberger*, 30 Id. 429. As to glucose and grape sugar. *Weilbacher v. Merritt*, 37 F. R. 85.



## TITLE XXXIV.

## COLLECTION OF DUTIES UPON IMPORTS.

## CHAPTER I.

## COLLECTION DISTRICTS, PORTS, AND OFFICERS.

It is the policy of the government in defining collection-districts, in cases of small bodies of water, not to divide the jurisdiction; and the decisions of the Secretary upon boundaries are not conclusive upon the courts, unless made so by statute. *United States v. M'Nelly*, 28 F. R. 609.

SECT. 2517. — Cl. 1. In the third line, after "sixty-nine," 21 St. 325, ch. 60, inserts, —

"Excepting those towns, plantations, and townships lying on the line of the European and North American Railway."

Cl. 4. 24 St. 50, ch. 339, establishes the port of Mount Desert Ferry, in the town of Hancock, in Maine, as a port of entry, —

"Subject to the same regulations, privileges, and facilities as other ports of entry in the United States: *Provided*, That the official duties of said port shall be performed under the direction of the collector of customs for the district of Frenchman's Bay, and by a deputy detailed by him for that purpose."

Cl. 6. 21 St. 325, ch. 60, inserts after "forty-seven," in the fourth line, —

"And the several towns, plantations, and townships in the counties of Aroostook and Washington lying on the line of the European and North American Railway."

Cl. 7, 10, 13. 19 St. 240, ch. 69, inserts in cl. 7 "Isleborough" in place of "Islesborough;" in cl. 10 strikes out "Brunswick;" in cl. 13 inserts "Kennebuck and Kennebuckport" in place of the words "and Arundel, as they were bounded on May 10, 1800;" and inserts "Kennebunkport" in place of "Cape Porpoise."

Cl. 8. 18 St. 480, ch. 146, changes the port of Nobleborough to the port of Damariscotta.

Cl. 10. See note, cl. 7, *supra*. 20 St. 243, ch. 366, inserts "Gardiner and Richmond" after "Bowdoinham," making the former ports of delivery.

Cl. 13. See note, cl. 7, *supra*.

SECT. 2518. — Cl. 4. See note, *supra*, § 2517, cl. 4.

Cl. 6. Amended by 19 St. 245, ch. 69, and 21 St. 325, ch. 60, to read as follows: —

"Sixth. In the district of Bangor, a collector, who shall reside at Bangor; a deputy collector, who shall reside at Frankfort; and a deputy collector, who shall reside at Vanceboro."

SECT. 2519. — Amended by 19 St. 245, ch. 69, by substituting "§ 2517" in place of the words "preceding section," and the words "Commissioner of Customs" in place of "Comptroller of the Treasury."

SECTS. 2525, 2526. — Burlington was inserted in the Revision as appearing from the Biennial Register of 1871 to have been designated under the power conferred by the acts



cited in the margin; and the proviso of § 6 of St. 1799 was omitted because the power was formerly exercised by the erection of the district of Memphremagog, which district was afterwards abolished. 1 Com. D. 1252; St. May 7, 1822, ch. 107 (3 St. 693).

SECT. 2527. — Cl. 9. 18 St. 318, ch. 80, inserts "nine" after "ninety" in cl. 9; and 19 St. 245, ch. 69, substitutes "Watuppa" in place of "Wattupper" in cl. 11. Cl. 2 is amended by 23 St. 11, ch. 25, by making Rockport a port of delivery in the district of Gloucester; and cl. 7 by 23 St. 155, ch. 232, adding after the word "Provincetown," the words "Dennis Bourne."

SECTS. 2530, 2545. — 19 St. 245, ch. 69, substitutes "appraisers" for "appraiser."

SECT. 2531. — 18 St. 318, ch. 80, inserts after "county" in the fifth line of cl. 1, the words "as the same existed."

SECT. 2533. — Cl. 3 is amended by St. March 3, 1887, ch. 348 (24 St. 492), to read as follows:—

"Third. The district of Hartford; to comprise the waters and shores of the towns of Saybrook, Clinton, Westbrook, Old Saybrook, Essex, Chester, Haddam, East Haddam, Middletown, Cromwell, Catham, Portland, Wethersfield, Rocky Hill, Glastonbury, Hartford, East Hartford, Windsor, Windsor Locks, East Windsor, South Windsor, Suffield, and Endfield, as bounded on January 1, 1886; in which Hartford shall be the port of entry, and Saybrook, Clinton, Westbrook, Old Saybrook, Essex, Chester, Haddam, East Haddam, Middletown, Chatham, Portland, Cromwell, Rocky Hill, Wethersfield, Glastonbury, and East Hartford ports of delivery."

SECT. 2534. — Cl. 3 is amended by the same act to read as follows:—

"Third. In the district of Hartford a collector, who shall reside at Hartford."

SECT. 2535. — St. Jan. 29, 1875, ch. 29 (18 St. 304), provides:—

"That the village of Patchogue, on the south side of Long Island, State of New York, shall be, and the same is hereby, made a port of delivery within the collection district of the port of New York, and shall be subject to the same regulations as other ports of delivery in the United States; that a surveyor be appointed by the President, with the advice and consent of the Senate, to reside at the said port of Patchogue, who shall have the power to enroll and license vessels to be employed in the coasting trade and fisheries, under such regulations as the Secretary of the Treasury may deem necessary, and who shall give the usual bond, perform the usual duties in the manner prescribed, and receive the fees he may be entitled to by law as allowed to surveyors for the same duties, and no more."

St. Feb. 28, 1879, ch. 112 (20 St. 324), provides:—

"That the collection-district of the port of New York shall hereafter include, in addition to the other territory embraced therein, all that part of the county of Hudson, in the State of New Jersey, and the waters adjacent, now within the collection-district of Newark, New Jersey, east of Newark Bay and the Hackensack River."

SECT. 2536. — See preceding note. St. Feb. 27, 1877, ch. 69 (19 St. 245), adds at the end of this section, —

"A surveyor at each of the ports of Cold Spring, on the north side of Long Island and Port Jefferson, who shall reside at their respective ports."

The appointment of assistant appraisers for the port of New York is made by the President with the consent of the Senate, § 2536 impliedly repealing § 2 of St. July 27, 1866, ch. 284. 15 A. G. Op. 449.

SECT. 2541. — See note, § 2535. St. May 28, 1888 (25 St. 158), changes the name of the port of Lamberton (see cl. 6 of § 2541) to the port of Trenton.

SECT. 2543. — The cited act of 1872, for which subdivision 3 was substituted in the Revision, did not define the boundaries of the collection-district for which Pittsburgh was made the port of entry. 2 Com. D. 1263.



SECT. 2544. — Cl. 1. 18 St. 480, ch. 147, authorizes the appointment from the list of inspectors of three gaugers for the customs service at Philadelphia, their compensation to be the same as that paid at Boston, provided that the number of officers or employés at Philadelphia shall not be thereby increased.

SECT. 2545. — See note, § 2530.

SECTS. 2546, 2547. — 21 St. 62, ch. 13, authorizes the Secretary of the Treasury to appoint a deputy collector or other suitable officer at Seaford, Sussex County, Delaware, with power to enter and clear all vessels coming to that port, whose salary shall not exceed \$500 per annum.

SECT. 2549. — This section providing for two appraisers at Baltimore, and § 2950 providing for an appraisement by any one appraiser, the President need not provide an incumbent for one appraisership, when vacant, at Baltimore, if he deems it unnecessary to do so. 16 A. G. Op. 266. See § 1768.

SECT. 2552. — Amended by 24 St. 76, ch. 396, by substituting "Cape Charles City" for "Cherrystone" in the sixth line of cl. 1. Cl. 4 is amended by St. Oct. 12, 1888, ch. 1093 (25 St. 552), amending 22 St. 103, ch. 219 (see also 21 St. 143, ch. 106), to read as follows:—

"That the district of Newport News shall comprise all the waters and shores from the point forming the south shore of the mouth of the Rappahannock River, along the coast of the Chesapeake Bay, to Back River Light-House; thence to a point south of Old Point Comfort midway in the channel of Hampton Roads; thence in a southwesterly direction to Pig Point Light-House; thence along the south shore of the James River to a point on the peninsula formed by the James and York Rivers opposite Williamsburgh, and thence across said peninsula to the south bank of York River, so as to embrace in said district, in addition to the ports heretofore included, Hampton and Newport News; in which Newport News shall be the port of entry, and Yorktown a port of delivery."

Cl. 5. Amended by St. Oct. 12, 1888 (amending 22 St. 103), to read as follows:—

"The district of Norfolk and Portsmouth to comprise all the waters and shores within the State of Virginia southward of the district of Newport News, as above described, and not included in the districts of Petersburg and Richmond; in which Norfolk and Portsmouth shall be the sole ports of entry, and Suffolk and Smithfield the ports of delivery."

Cl. 7. Amended by St. May 27, 1880, ch. 106, § 2 (21 St. 143), to read as follows:—

"The district of Richmond: To comprise all the waters and shores of the James River, from its junction with the Appomattox River to the highest tide-waters of the James River, and all the waters and shores of the York River from Chappahoesic to its head, and the waters and shores of the Pamunkey and Mattaponi Rivers, to the highest tide-waters in said rivers, in which the port of entry shall extend from Richmond and Manchester to Bermuda Hundreds, and to West Point, at the head of the York River."

SECT. 2553. — Cl. 4. Amended by 22 St. 104, § 3, to read as follows:—

"In the district of Yorktown, a collector who shall reside at Newport News, and a surveyor who shall reside at Yorktown."

Cl. 7. 21 St. 143, ch. 106, § 3, strikes out "and" after "Richmond" in the second line, and adds at the end "and a deputy collector, who shall reside at West Point."

SECT. 2555. — 19 St. 245, ch. 69, substitutes "Newberne" for "Newburn" in cl. 2, and "Carolina" for "Carlolina" in cl. 4.

SECTS. 2559, 2560. — 21 St. 373, ch. 92, constitutes Atlanta, Ga., a port of delivery, with a surveyor of customs, residing there, at a salary determined by the Secretary of the Treasury, not exceeding \$1000 per annum, and extends to said port the privileges of immediate transportation of dutiable merchandise conferred by 21 St. 173, ch. 190. St. Oct. 12, 1888, ch. 1099 (25 St. 557), provides, —



"That Sapelo Sound, Sapelo River, and the Island of Sapelo shall henceforth be included in, and be a part of, the second district for the collection of customs, in the State of Georgia, known as the Brunswick district."

SECT. 2562. — The port of Tampa, Hillsborough County, Florida, was made a port of entry by 24 St. 429, ch. 275. St. March 1, 1889, provides, —

"That a customs collection district be, and the same is hereby, established on the gulf coast of the State of Florida, to be known as the collection district of Tampa.

"SEC. 2. That said district shall include the territory south of a line immediately north of Anclote Key light-house, running easterly across the peninsula to Indian River, and thence south to a point opposite to and north of Charlotte Harbor, and thence westerly across the peninsula to the coast north of Charlotte Harbor, and midway between Manatee Bay and Peace River and Charlotte Harbor.

"SEC. 3. That the collector for the port of Tampa shall be appointed by the President, by and with the advice and consent of the Senate, and shall be paid a salary of \$2000 per annum. There shall also be appointed an appraiser and such inspecting and other officers as the Secretary of the Treasury shall consider useful or necessary for the transaction of the business of the port and for the prevention of smuggling within the district."

SECTS. 2564, 2565. — 18 St. 196, ch. 402, constitutes Montgomery, Ala., a port of delivery, within the collection-district of Mobile, with a deputy collector, residing there, who receives a salary, determined by the Secretary of the Treasury, not exceeding \$500 per annum.

SECT. 2566. — 18 St. 481, ch. 150, makes East Pascagoula, Miss., in the district of Pearl River, a port of delivery for said district.

SECTS. 2568, 2569, 2570. — 21 St. 373, ch. 91, makes Chattanooga, Tenn., a port of delivery with a surveyor at a salary of \$350 per annum and the customary fees. 21 St. 66, ch. 30, authorizes the Secretary of the Treasury to appoint a deputy collector at Lake Charles, Calcasieu Parish, La., with power to enter and clear all vessels coming to that port. 21 St. 283, ch. 239, constitutes Portsmouth, Ohio, a port of delivery within the collection district of New Orleans, subject to the same regulations and restrictions as other ports of delivery in the United States; extends to said port all the privileges and facilities afforded by 4 St. 480, ch. 87 (which, so far as unrepealed, is incorporated in Rev. Stats. §§ 2568, 2570, 2822-2831); and provides for a surveyor of customs, to reside at said port, with the compensation provided by law for surveyors of the same grade; *provided*, that the collector's salary shall not exceed the net fees collected at said port. St. Aug. 7, 1882, ch. 447 (22 St. 349), strikes out, in the first subdivision of § 2568, the words "in Missouri" following "Saint Louis," and adds the following to said subdivision: —

"Saint Louis as used in this section, shall include Saint Louis, in Missouri, and East-Saint Louis, in Illinois; and the surveyor and acting collector for the port of Saint Louis may receive goods, issue landing certificates to carriers, and issue orders to inspectors of customs to open cars containing goods and packages, and generally do and perform all acts necessary to be done and performed by him in East-Saint Louis, in Illinois, as well as in Saint Louis in Missouri."

St. Oct. 19, 1888, constitutes Lincoln, in the State of Nebraska, a port of delivery in the customs collection district of New Orleans, extends the privileges of § 7 of St. June 10, 1880, amending the statutes in relation to immediate transportation of dutiable goods, to said port, and provides that there shall be appointed at said port a surveyor with compensation at \$250 per annum and the usual fees.

22 St. 47, ch. 83, substituted the words "one appraiser and two assistant appraisers" in place of the words "two appraisers and one assistant appraiser" in cl. 1 of § 2569. St. Aug. 3, 1882, ch. 377 (22 St. 215), provides: —

"That Kansas City and Saint Joseph, in the State of Missouri, be and the same are hereby, constituted ports of delivery; and that the privileges of immediate transportation of dutiable merchandise conferred by 21 St. 173, ch. 190, be and the same are hereby, extended to said ports: and there shall be



appointed a surveyor of customs for each of said ports, to reside at the port for which he shall be appointed, who shall receive a salary to be determined in amount by the Secretary of the Treasury, not exceeding \$1000 per annum."

St. July 23, 1888, ch. 692 (25 St. 339), provides:—

"That the limits of the port of entry of New Orleans, Louisiana, shall be, and the same are hereby, extended so as to include that portion of the Parish of Jefferson lying between the Mississippi River, Lake Ponchartrain, the upper line of the Parish of Orleans, left bank, and a line running parallel thereto, commencing at the Mississippi River at a point two miles above the upper line of the said Parish of Orleans, and extending to Lake Ponchartrain."

St. March 2, 1889, provides,—

"That the limits of the present port of Memphis, Tennessee, be extended from Beale street southward to Jackson street, and that the east line of the present port be extended southward until it intersects said Jackson street."

SECT. 2576. — Substituted for the cited acts. 2 Com. D. 1275.

SECTS. 2578, 2579. — 19 St. 245, ch. 69, substitutes "Encinal" for "Encinao" in the third subdivision of § 2578; and in subdivision two of § 2579 strikes out "and" in the second line, and inserts "and" after "Lavaca" in the third line. St. March 2, 1889, amends cl. 1 of § 2579 to read as follows:—

"In the district of Galveston, a collector, who shall reside at Galveston; a deputy collector, who shall reside at Sabine Pass, and said deputy collector shall have power to enter and clear all vessels coming to that port and exercise such other powers as the Secretary of the Treasury may prescribe in pursuance of law; a surveyor, who shall reside at Velasco, and a surveyor, who shall reside at Houston."

SECTS. 2582, 2583, 2585. — Sect. 5 of 9 St. 400, ch. 112, was omitted in the Revision as obsolete under the later legislation admitting California as a State and organizing the United States courts therein. 2 Com. D. 1277. The same act substituted "Wilmington" for "San Pedro" in the fourth line of subdivision 1 of § 2582; and in § 2585 struck out "either" in the second line, and "or the port of Wilmington" in the third line. It was previously provided by 18 St. 61, ch. 218, that the port of San Pedro, Cal., should be called Wilmington. St. June 16, 1882, ch. 223 (22 St. 105), amends §§ 2582, 2583, to read as follows:—

"SEC. 2582. There shall be in the State of California four collection districts, as follows:

"First. The district of San Diego; to comprise all the waters and shores of the county of San Diego; in which San Diego, on the Bay of San Diego, shall be the sole port of entry.

"Second. — The district of Wilmington; to comprise all the waters and shores of the counties of Santa Barbara, Ventura, Los Angeles, and San Bernardino, in which Wilmington, on the Bay of Wilmington, shall be the sole port of entry, and Santa Barbara, San Buena Ventura and Huenerne ports of delivery.

"Third. — The district of San Francisco; to comprise all the waters and shores of the State north of the counties embraced in the second district and south of the county of Humboldt; in which San Francisco shall be the port of entry and Vallejo and San Luis Obispo ports of delivery.

"Fourth. — The district of Humboldt; to comprise all the waters and shores of the counties of Humboldt and Del Norte; in which Eureka, on the Bay of Humboldt, shall be the sole port of entry, and Crescent City a port of delivery.

"SEC. 2583. — There shall be in the collection districts of California the following officers:

"First. In the district of San Diego, a collector, who shall reside at San Diego.

"Second. — In the district of Wilmington, a collector, who shall reside at Wilmington; a deputy collector who shall reside at Wilmington; and one inspector, to be appointed by the collector, with the approval of the Secretary of the Treasury, for each of the ports of Santa Barbara, San Buena Ventura and Huenerne.

"Third. — In the district of San Francisco, a collector, a naval officer, a surveyor, who shall reside at San Francisco; two appraisers, two assistant appraisers, and a special examiner of drugs, medicines, and chemicals; a deputy collector who shall reside at Vallejo; a deputy collector who shall reside at



San Luis Obispo; an inspector at Monterey, an inspector at Sacramento, an inspector at Benicia, and an inspector at Stockton.

"Fourth. — In the district of Humboldt; a collector who shall reside at Eureka, and one inspector to be appointed by the collector, with the approval of the Secretary of the Treasury, for the port of Crescent City."

SECTS. 2586, 2587. — 19 St. 245, ch. 69, changed "Townshend" to "Townsend" in the fourth subdivision of § 2587. St. April 25, 1882, ch. 88 (22 St. 48), amends these sections to read as follows:—

"SEC. 2586. There shall be in the State of Oregon and Territory of Washington five collection districts, as follows:

"First. The southern district of Oregon; to comprise all of the waters and shores of that part of the State of Oregon lying south and east of the north bank of the Siuslaw River; in which Coos Bay, in Coos County, shall be the port of entry, and Ellensburg, at the mouth of Rogue River, Port Orford, and Gardner, on the Umpqua River, ports of delivery.

"Second. The district of Yaquina; to comprise all the waters and shores lying north and east of the north bank of the Siuslaw River to the north bank of the Salmon River, and west of the summit of the Cascade Range of mountains; in which Yaquina shall be the port of entry and Newport a port of delivery.

"Third. The district of Oregon; to comprise all the waters and shores lying north and east of the north bank of the Salmon River to the forty-sixth and one-half degree of north latitude, and west of the Coast Range of mountains to the forty-eighth degree of north latitude, except that portion situated above the junction of the Willamette and Columbia Rivers and drained by those rivers and tributary waters; in which Astoria shall be the port of entry.

"Fourth. The district of Willamette; to comprise all the waters and shores lying north and east of the north bank of the Salmon River to the forty-sixth and one-half degree of north latitude, and west of the Coast Range of mountains to the forty-eighth degree of north latitude, above the junction of the Willamette and Columbia Rivers, and drained by those rivers and their tributary waters, and all other portions of said State drained by said Willamette River or its tributaries; in which Portland shall be the port of entry.

"Fifth. The district of Puget Sound; to comprise all the waters and shores of the State of Oregon and Territory of Washington not included in the districts of the southern district of Oregon, Yaquina, Oregon, and Willamette; in which Port Townsend shall be the port of entry.

"SEC. 2587. There shall be in the collection districts in the State of Oregon and the Territory of Washington the following officers:

"First. In the southern district of Oregon, a collector, who shall reside at Empire City, and three deputy collectors, who may be appointed by the collector, with the approval of the Secretary of the Treasury, and of whom one shall reside at Ellensburg, one at Port Orford, and one at Gardner.

"Second. In the district of Yaquina, a collector, who shall reside at Yaquina, and who shall receive a salary of one thousand dollars a year, with the fees allowed by law, and a commission on all customs money collected and accounted for by him, such salary, fees, and commissions not to exceed the sum of \$2500 per year.

"Third. In the district of Oregon, a collector, who shall reside at Astoria.

"Fourth. In the district of Willamette, a collector and an appraiser, who shall reside at Portland.

"Fifth. In the district of Puget Sound, a collector, who shall reside at Port Townsend."

St. March 1, 1889, provides, —

"That the limits of the port of Portland, in the State of Oregon, as a port of entry, be, and the same are hereby, extended so as to include all that portion of the east bank of the Willamette River lying opposite to the city of Portland, for a distance of one mile in width, and extending from the south boundary-line of the corporate limits of the city of Portland down said east bank of said river to a point directly opposite to the lower end of Swan Island, in said river."

St. Aug. 8, 1882, ch. 471 (22 St. 374), provides:—

"That the deputy collector of customs stationed at San Juan Island, in the Puget Sound district, in Washington Territory is, with the approval of the Secretary of the Treasury, empowered to enter and clear vessels and collect duties."



St. March 1, 1889, provides, —

“That Tacoma, Washington Territory, and Seattle, Washington Territory, be, and they are hereby, constituted ports of entry in the Puget Sound customs collection district, and that the privileges of §§ 1, 7, of an act approved June 10, 1880, entitled ‘An act to amend the statutes in relation to immediate transportation of dutiable goods, and for other purposes,’ be, and the same are hereby, extended to said ports.”

SECTS. 2591, 2592. — 20 St. 47, ch. 78, provides that, until the formal organization of the Territory of Alaska, the oath of the collector or other officer of customs in Alaska may be taken before the judge of any United States circuit or district court.

SECT. 2594. — St. March 6, 1882, ch. 25 (22 St. 13), provides, —

“That Denver, in the State of Colorado, be, and the same is hereby, constituted a port of delivery; and that the privileges of immediate transportation of dutiable merchandise conferred by 21 St. 173, ch. 190, be, and the same are hereby extended to said port. And there shall be appointed a surveyor of customs to reside at said port, who shall receive a salary to be determined by the Secretary of the Treasury, not exceeding \$1500 per annum.”

SECTS. 2595, 2596. — 19 St. 139, ch. 270, § 2, allowed to the appraiser at the port of St. Paul the same salary as the deputy collector there receives. Sect. 1 of this act being now superseded by 21 St. 173, this § 2 appears to be the only authority existing for appointing an appraiser at St. Paul. Sup. 240, *note*. St. March 3, 1883, ch. 132 (22 St. 566), amended §§ 2595, 2596, by creating St. Vincent, Minn. —

“the port of entry for the collection district of Minnesota, in place of Pembina, in the Territory of Dakota; that from and after the date of the passage of this act Pembina shall cease to be a port of entry of the United States; that the collector of customs for the collection district of Minnesota shall reside at Saint Vincent.”

Sects. 2595, 2596, were further amended by St. May 2, 1888, ch. 227 (25 St. 134), so as to read as follows: —

“SEC. 2595. That there shall be in the State of Minnesota two collection districts, as follows:

“First. The district of Minnesota: to comprise all the territory of the United States east of the western line of the State of Minnesota, and west of the westerly line of the State of Wisconsin, except the waters and shores of Lake Superior and the rivers flowing into the same, in which Saint Paul shall be the port of entry, and Saint Vincent a subport of entry and delivery.

“Second. The district of Duluth: to comprise all the waters and shores of Lake Superior and the rivers connected therewith, within the State of Minnesota, in which Duluth shall be the port of entry and delivery, with the privilege of immediate transportation as defined by § 7 of the act of June 10, 1880, entitled ‘An act to amend the statutes in relation to immediate transportation of dutiable goods, and for other purposes,’ being chapter 190, volume 21, of the Statutes at Large.

“SEC. 2596. There shall be in the collection districts of the State of Minnesota the following officers:

“First. In the district of Minnesota, a collector, who shall reside at Saint Paul and whose compensation shall be the same as that provided for the collectors named in § 2675 of the Revised Statutes of the United States, and a deputy collector who shall reside at Saint Vincent.

“Second. In the district of Duluth, a collector, who shall reside at Duluth.”

SECT. 2598. — In the first line “districts” was changed to “district” by 19 St. 245, ch. 69.

SECT. 2599. — 19 St. 60, ch. 137, declares Cheboygan, Mich., a port of delivery instead of Duncan City, removes the deputy-collectorship at Duncan City to Cheboygan, and repeals all acts declaring Duncan City a port of entry. St. June 4, 1888, ch. 341 (25 St. 166), provides (see *note*, § 2990), —

“That Grand Rapids, in the State of Michigan, be, and the same is hereby, constituted a port of delivery; and that the privileges of immediate transportation of dutiable merchandise conferred by the act of June 10, 1880, entitled ‘An act to amend the statutes in relation to immediate transportation of dutiable goods, and for other purposes,’ be, and the same are hereby, extended to said port.



"SEC. 2. That there shall be appointed by the President a surveyor of customs for said port, who shall reside at said port, and who shall receive a salary to be determined in amount by the Secretary of the Treasury, not exceeding \$1200 per annum."

SECTS. 2601, 2602. — 21 St. 512, ch. 156, constitutes Indianapolis, Ind., a port of delivery; extends thereto the privileges of immediate transportation of dutiable merchandise conferred by 21 St. 173, ch. 190, and provides for a surveyor of customs to reside there with a salary, determined by the Secretary of the Treasury, not exceeding \$1000 per annum.

SECT. 2603. — Amended by St. Feb. 28, 1887, ch. 278 (24 St. 430). —

"So that the district of Miami, in the State of Ohio, shall comprise all the waters and shores of Lake Erie within the jurisdiction of the United States from the western bank of the Portage River to the western bank of the Miami River, in which Toledo shall be the port of entry; and so that the district of Sandusky shall comprise all the waters and shores of Lake Erie within the jurisdiction of the United States from the eastern bank of the Vermillion River to and including the western bank of the Portage River, and all the islands at the head of Lake Erie, lying east of a line drawn north from the west bank of the Portage River at its mouth, in which Sandusky shall be the port of entry. Vessels shall be allowed to ply between the port of Toledo, in the Miami district, and any of the said islands, in the same manner and subject to the same conditions only as if said islands were in the district of Miami."

St. Feb. 9, 1889, provides, —

"That Columbus, in the State of Ohio, be, and is hereby, constituted a port of delivery, and that the privileges of § 7 of the act approved June 10, 1880, entitled 'An act to amend the statutes in relation to immediate transportation of dutiable goods, and for other purposes,' be, and the same are hereby, extended to said port, and that there shall be appointed at said port a surveyor, with compensation at \$900 per annum and the usual fees."

The acts and decisions of the Secretary of the Treasury respecting collection districts are not conclusive upon the courts, unless made so by statute; and in defining such districts, the government's policy is not to divide the jurisdiction over small bodies of water. *United States v. McNelly*, 28 F. R. 609.

SECT. 2605. — Sect. 14 of 3 St. 695, ch. 107, prohibiting, at certain named ports, any person being an inspector who then holds any other office in the collection of customs in either of the ports, was omitted from the Revision as covered by a general prohibition against holding two offices, *ante* Title 19. 21 St. 414, ch. 132, § 1, provides, —

"That hereafter the Secretary of the Treasury may appoint inspectors of customs at a compensation less than \$3 per day when, in his judgment, the public service will permit."

An inspector is a public officer, and not merely the collector's agent or servant. *Hooper v. 51 Casks, Davies*, 370; 2 Ware, 371. His office ceases with that of the collector who appointed him. *United States v. Wood*, 2 Gall. 361; *United States v. Phelps*, 4 Day, 469. The collector's appointment of an inspector is a nullity, if not approved by the Secretary of the Treasury. *Hayden v. United States*, 15 Leg. Int. 341. As to appointment and removal, see 1 Op. 459; 2 Id. 410; 3 Id. 325, 331; *Marbury v. Madison*, 1 Cranch, 137, 155.

SECT. 2606. — See note, preceding section.

SECT. 2607. — Amended by St. June 16, 1882, ch. 223 (22 St. 105), to read as follows: —

"At the port of Wilmington, in the district of Wilmington, and at the port of San Diego, in the district of San Diego, and at the port of Eureka, in the district of Humboldt the Secretary of the Treasury shall have power to appoint such inspectors, weighers, gaugers, measurers, and other officers as may be necessary for the collection of the revenue of those ports. Also such inspectors as he may deem necessary to enforce the custom laws along the boundary between the Republic of Mexico and the counties of San Diego and San Bernardino."

See note, § 2605.



SECT. 2608. — Sects. 2726, 2728, do not impliedly authorize the appointment of a general appraiser in addition to the number hereby authorized. 15 A. G. Op. 260. An appraiser's acts are not purely ministerial, but under the acts of Congress he is a *quasi* judge. *Gibb v. Washington*, McAll. 430; S. T. D. 2196, 3281, 3383, 3496.

SECT. 2609. — The regular appraisers and the merchant appraisers, detailed for the duty, must each personally inspect and examine the goods. *Greely v. Thompson*, 10 How. 225. A deputy or acting collector may appoint a merchant appraiser, on reappraisement, and administer the oath to him. *Falleck v. Barney*, 5 Blatch. 38. A merchant appraiser is not an officer within article 2, § 2, of the United States Constitution. *Auffmordt v. Hedden*, 30 F. R. 360.

SECT. 2612. — 22 St. 451, ch. 64, regulates the importation of teas, and prohibits the importation of any merchandise for sale as tea, adulterated with spurious leaf or with exhausted leaves. See S. T. D. 6854, 7752.

## CHAPTER II.

### QUALIFICATIONS, PAY, AND DUTIES OF OFFICERS.

SECT. 2613. — At the end of four years the office becomes vacant. If the incumbent is reappointed, the sureties on the original bond are liable for delinquencies only under the first appointment. *United States v. Eckford*, 1 How. 250, 258, 259.

SECT. 2616. — St. Feb. 8, 1875, ch. 36, § 11 (18 St. 309), provides, —

“That the oaths now required to be taken by subordinate officers of the customs may be taken before the collector of the customs in the district in which they are appointed, or before any officer authorized to administer oaths generally; and the oaths shall be taken in duplicate, one copy to be transmitted to the Commissioner of Customs, and the other to be filed with the collector of customs for the district in which the officer appointed acts.”

SECTS. 2617, 2618. — See note, § 2591.

SECT. 2619. — St. Feb. 27, 1877, ch. 69 (19 St. 245), strikes out in the fourth line the words “under penalty as follows,” and there inserts the following: —

“And all bonds to be hereafter given shall be of the form following, to wit: Know all men by these presents that we — are held and firmly bound unto the United States of America in the full and just sum of — dollars, money of the United States; to which payment, well and truly to be made, we bind ourselves, jointly and severally our joint and several heirs executors and administrators, firmly by these presents, sealed with our seals and dated this — day of — one thousand — The condition of the foregoing obligation is such, that whereas the President of the United States hath, pursuant to law, appointed the said — to the office of — in the State of —: Now, therefore, if the said — has truly and faithfully executed and discharged, and shall continue truly and faithfully to, execute and discharge, all the duties of the said office, according to law, then the above obligation to be void and of none effect; otherwise it shall abide and remain in full force and virtue. Sealed and delivered in the presence of — And the amount of penalty shall be fixed by the President, as provided in § 3639.”

The addition of a condition not named in the act of Congress does not relieve the sureties of liability. *Chadwick v. United States*, 3 F. R. 750. The bond becomes effective from delivery, and not necessarily from the date of approval. *Broome v. United States*, 15 How. 143; see 3 A. G. Op. 584, 600, 609. Sureties, as well as the collector, are liable for moneys received by the latter from his predecessor in office or from another collector, transmitted upon the representation that such money was necessary to defray the current expenses of his office. *Broome v. United States*, 15 How. 143. If a collector continued in office for more than one term gives different sureties, their liability is to be estimated



as though another collector had been appointed for the second term. *United States v. Eckford*, 1 How. 250. The officers of the Treasury cannot by discretion enlarge or restrict the obligations of the collector's bond. *Id.* A collector who receives counterfeit money, cancelled Treasury notes, cancelled notes stolen or purloined from him, whether considered as money or only evidences of debt by the Treasury Department, is responsible to the government for the amount thereof. *United States v. Morgan*, 11 How. 154.

SECT. 2620. — See *Broome v. United States*, 15 How. 143; *Duncan v. United States*, 7 Pet. 435; *Postmaster-General v. Norvell*, Gilpin, 106; *Bank v. Dandridge*, 12 Wheat. 64.

SECT. 2621. — *United States v. Leng*, 18 F. R. 19. By the seventh clause of this section, Congress exercises its constitutional power of vesting by law in the head of a department the appointment of officers of the United States. *Frelinghuysen v. Baldwin*, 12 F. R. 397. That clause implies a power of removal in the collector with the Secretary's approval. *Turner v. United States*, 21 Ct. Cl. 24; see *Pray v. United States*, 14 Id. 256. It has been held that collectors can neither appoint nor dismiss inspectors, weighers, &c., without the approbation of the Secretary of the Treasury. 1 A. G. Op. 459; see 3 Id. 325, 392. As to an inspector's office terminating with that of the collector by whom appointed, see *United States v. Wood*, 2 Gall. 361. As to the compensation of one who was both collector and inspector, see *Stewart v. United States*, 17 How. 116.

SECTS. 2622, 2625. — See note, § 2158. In case of succession to the office, under § 2625, the authority to exercise it is imparted by § 1769. 15 A. G. Op. 398.

SECT. 2625. — See 4 A. G. Op. 26; 15 Id. 398, 401; 14 Id. 259; *Dignan v. Shields*, 51 Tex. 322, 327.

SECT. 2627. — 3 A. G. Op. 331.

SECT. 2629. — See note, §§ 1769, 2632.

SECT. 2630. — See note, § 2609; 50,000 Cigars, 1 Lowell, 22. Under the act of 1817, the deputy was a permanent officer of the customs, and was deemed entitled to a reasonable compensation for his services, although none was fixed therefor. *Andrews v. United States*, 2 Story, 202; *United States v. Barton*, Gilpin, 439. A deputy may administer an oath required to be administered by a collector. *Schmaire v. Maxwell*, 3 Blatch. 408; *United States v. Barton*, *supra*; *Falleck v. Barney*, 5 Blatch. 38, 40. At a port where there are no appraisers, a deputy collector, as well as the collector, may examine goods entered for warehousing, to ascertain their dutiable value. *Spring v. Russell*, 1 Lowell, 258. If a collection is not a part of the collector's official duty, being made by the deputy acting as his cashier, the collector has no official responsibility. *Cleveland Railroad v. McClung*, 119 U. S. 454, 462. But it has been held that a collector is personally liable for the illegal acts of his deputy, in exacting unauthorized fees, although he believed the acts legal, and has paid over the amount to the government. *Ogden v. Maxwell*, 3 Blatch. 319; see 4 A. G. Op. 230. A collector is not personally liable for the tort of his subordinates, where there is no evidence to connect the collector personally with the wrong or that the subordinates were not competent, or were not properly selected. *Robertson v. Sichel*, 127 U. S. 507.

SECT. 2632. — See note, § 2630. Neither this provision nor § 2629 empowers the collector to fill the offices named, but only to depute some fit person to exercise the functions thereof temporarily. 16 A. G. Op. 566. Under this section, the collector still acts and is entitled to all the perquisites and emoluments of the office, but, in case of his death, its duties devolve upon the deputy, and the emoluments subsequently accruing to the office do not belong to his estate. *Merriam v. Clinch*, 6 Blatch. 5. See 15 A. G. Op. 355.

SECT. 2633. — The cited acts being deemed to cover so much of 9 St. 220, ch. 40, as relates to the deputy-collector's bond at Ship Island, that provision was omitted from the Revision. 1 Com. D. 1293.



SECT. 2634. — 15 A. G. Op. 356. Under this section the Secretary of the Treasury cannot allow to officers whose pay is fixed by law, a compensation regulated by his own discretion. *Id.* 286.

SECT. 2636. — As extortion proceeds only from a corrupt mind, this provision does not apply to an act done by a collector in the honest discharge of his duty and in obedience to the Regulations of the Secretary of the Treasury. *Hedden v. Iselin*, 24 Blatch. 455, 460; 31 F. R. 266; 28 F. R. 416.

SECT. 2638. — An inspector may recover the value of a vessel, purchased by him contrary to this section, in an action of trespass against a sheriff who attached the same as the property of the vendor. *Bliss v. Winslow*, 80 Me. 274.

SECT. 2639. — An officer who does not keep and transmit the required yearly accounts, does not forfeit his right to be reimbursed for such expenditures, but only subjects himself to payment of the penalty. *Andrews v. United States*, 2 Story, 202.

SECT. 2640. — The act of 2 March, 1779, § 21, made it the duty of collectors to pay to the order of the proper officer the whole of the moneys received. *Held*, that the Secretary could require the collector to use the money received in the redemption of Treasury notes. *Ganssen v. United States*, 97 U. S. 584; 2 Woods, 92.

SECT. 2647. — *United States v. Macdonald*, 5 Wall. 647; 2 Cliff. 270. All storage fees received are to be computed, including those accrued from storage of merchandise in government buildings. 15 A. G. Op. 117; see 13 *Id.* 35, 213; *McLean's Case*, 8 Ct. Cl. 217; *United States v. Walker*, 22 How. 299.

SECT. 2648. — See note, § 3617. These fees are intended for the use of the officer and are not required to be paid into the Treasury. 15 A. G. Op. 654.

SECTS. 2649, 2650, 2651. — See note, § 74. Modified by St. Aug. 15, 1876, ch. 287 (19 St. 152), so as —

“to authorize the appointment of only 20 special agents, each of whom shall receive a compensation of not exceeding \$8.00 per day, in the discretion of the Secretary of the Treasury, and actual travelling expenses when actually employed in the duties of such agency.”

St. June 19, 1878, ch. 329 (20 St. 178), authorizes the Secretary of the Treasury —

“to employ 8 additional special agents in the customs service at a compensation of not exceeding \$6.00 per day, in the discretion of the Secretary, and actual travelling expenses when actually employed in the duties of such agency.”

SECT. 2652. — See note, § 2984. The Secretary of the Treasury, under his general powers, is not a liquidating officer, and is not authorized to assess duties upon particular importations, which is a duty specially charged upon the collector. *United States v. Leng*, 18 F. R. 19; *Tucker v. Kane*, Taney, 146; 16 A. G. Op. 20, 94; 14 *Id.* 559.

SECT. 2654. — See notes, §§ 2691, 4186. St. June 22, 1874, ch. 391, § 23 (18 St. 190), as amended by St. Feb. 26, 1879, ch. 103 (20 St. 322), provides:—

“That in lieu of the salaries, moieties and perquisites of whatever name or nature, and commissions or disbursements, now paid to or received by the collectors, naval officers, and surveyors connected with the customs service in the several collection districts of the United States, hereinafter named, there shall be paid, from and after July 1, 1874, an annual salary as follows: To the collector of the district of New York, \$12000. To the collectors of the districts of Boston and Charlestown, Mass., and Philadelphia, Penn., each \$8000. To the collectors of the districts of San Francisco, Cal., Baltimore, Md., and New Orleans, La., each \$7000. To the collector of the district of Portland and Falmouth, Maine, \$6000. To the naval officer for the district of New York, \$8000. To the naval officers of the districts of Boston and Charlestown, Mass.; and San Francisco, Cal., and Philadelphia, Penn., and Baltimore, Md., and New Orleans, La., each \$5000. To the surveyor of the port of New York, \$8000. To the surveyors of the ports of Boston, Mass.; and San Francisco, Cal., and Philadelphia, Penn., each \$5000. *Provided*, the surveyors at Portland, Maine, and Baltimore, Md., shall each receive the sum of \$4500, and the surveyor at New Orleans, La., shall receive the sum of \$3500.”



Under § 2 of St. 1799, a collector was entitled to charge fees only for permits actually issued, and not for constructive permits to land goods. *Ogden v. Maxwell*, 3 Blatch. 319; see *Burke v. United States*, 19 Ct. Cl. 420. See note, p. 284, *infra*.

SECTS. 2655-2659. — See preceding and next notes, and note, § 2691. 19 St. 246, ch. 69, amends § 2659 by striking out "or" in the last line, and adding at the end "and marine hospital dues." The acts 2 St. 172, ch. 37, § 2; p. 300, ch. 58, § 1; 3 St. 694, ch. 107, § 6, were omitted from the Revision as therein incorporated or superseded. 2 Com. D. 1310. See 15 A. G. Op. 259; *United States v. Heth*, 3 Cranch, 399.

SECT. 2660. — Amended by 19 St. 246 by inserting "Plymouth" after "Fall River" in the eighth line, and "Gloucester" and "Nantucket" after "Perth Amboy" in the eleventh line. These amendments made by 19 St. to this section and § 2659 are not retroactive. 15 A. G. Op. 259.

SECT. 2675. — Amended by 19 St. 246, ch. 69, by inserting, after "respectively" in the eighth line, the words "on account of duties on imports, tonnage, and marine hospital dues." See note, § 2654. St. March 3, 1883, ch. 135 (22 St. 567), provides: —

"That from and after June 30, 1882, the salary of the Collector of Customs of the District of Chicago, Illinois, shall be \$7000 per annum, and the same shall be in place of all salary, commissions, fees, and charges now allowed by law as compensation of that officer: *Provided*, That all fees and emoluments now received by the said collector and applied to his compensation under the provisions of existing law shall from and after June 30, 1882, be accounted for and paid into the Treasury of the United States."

SECT. 2684. — Amended by St. June 16, 1882, ch. 223 (22 St. 105), to read as follows: —

"The collector of the district of San Diego shall receive a salary of \$2500 a year; the collector of the district of Wilmington shall receive a salary of \$2500 a year, and the deputy collector of said district shall receive a salary of \$1500 a year; and the collector of the district of Humboldt shall receive a salary of \$2500 a year."

SECT. 2686. — See *Doane v. Phillips*, 12 Pick. 223; *Bates v. Drury*, 4 Mason, 119.

SECTS. 2688, 2689. — See notes, §§ 2654, 4186. St. March 3, 1875, ch. 130, § 10 (18 St. 401), adds at the end of § 2688 the following: —

"That hereafter the maximum compensation of each surveyor of customs, performing the duties of collectors of customs, shall be \$5000 a year, out of any and all fees and emoluments by him received."

All the fees and commissions received by the officers named are received for their own use until they exceed the maximum amounts stated in this section. *United States v. Pearce*, 2 Sumner, 575; *United States v. Walker*, 22 How. 308; *United States v. Macdonald*, 5 Wall. 647; 2 Cliff. 270; *McLean v. United States*, 8 Ct. Cl. 217; *United States v. Wendell*, 2 Cliff. 349. Officers of the United States, entitled to a yearly compensation and superseded within the year, are, in general, entitled to a *pro rata* compensation. *Hoyt v. United States*, 10 How. 143; *United States v. Wendell*, *supra*.

The system of classes, established for salary purposes by St. 1822, extends to surveyors doing collectors' duty in ports subsequently created. *Donovan v. United States*, 23 Wall. 383; 3 Dillon, 53.

The Treasury Department acts judicially in determining the charges to which a collector is subject, and cannot afterwards vary that adjudication to his prejudice. *United States v. Collier*, 3 Blatch. 325; see *United States v. Pearce*, 2 Sumner, 575.

SECT. 2690. — See notes, §§ 2654, 2688, 2689.

SECT. 2691. — See note, § 2654. Amended by St. Feb. 27, 1877, ch. 69 (19 St. 246), by adding at the end of the section: —

"No collector, surveyor, or naval officer shall receive more than \$400 annually, exclusive of his compensation as collector, surveyor, or naval officer, and the fines and forfeitures allowed by law, for any services he may perform for the United States in any office or capacity, except as provided in §§ 2654, 2657." [See *Burke v. United States*, 19 Ct. Cl. 420.]



SECT. 2697. — See 15 A. G. Op. 286.

SECT. 2701. — See note, § 2595.

SECT. 2702. — 19 St. 246, ch. 69, changes "Ellinsburg" to "Ellensburg."

SECTS. 2703, 2704. — See note, § 2654; McLean's Case, 8 Ct. Cl. 217, 230; 13 A. G. Op. 297.

SECT. 2705. — See 15 A. G. Op. 286.

SECT. 2711. — Repealed by 18 St. 318, ch. 80, the ports of Pacific City and Milwaukee having been abolished.

SECTS. 2714, 2719. — See notes, §§ 2654, 2703, 2704.

SECTS. 2719, 2720. — Sect. 2720 amended by 19 St. 246, ch. 69 by inserting after "States" in the fifth line "but each surveyor of this class shall be entitled to a maximum compensation of \$2000 a year out of any and all fees and emoluments by him received;" and by inserting, in the ninth line, after the word "surveyor," the words "at the ports designated in § 2719."

SECT. 2721. — See 16 A. G. Op. 565.

SECT. 2722. — See 15 A. G. Op. 286.

SECT. 2725. — Sect. 1 of 11 St. 221, ch. 108, providing for an additional appraiser-general, was omitted from the Revision as not permanent. 2 Com. D. 1327. This section applies only to ports where there is no appraiser. *Iselin v. Hedden, supra* § 2636.

SECTS. 2726, 2728. — See note, § 2608.

SECT. 2727. — Repealed by 19 St. 246.

SECT. 2730. — Amended by 18 St. 318, ch. 80, by inserting "Pittsburgh" at the end of the first line.

SECT. 2733. — St. June 10, 1880, ch. 189 (21 St. 173), repealing inconsistent acts, provides :—

"That hereafter the compensation to inspectors of customs employed under existing laws for service at night may be increased by the Secretary of the Treasury at such ports as he may think it advisable so to do to a sum not exceeding \$3.00 for each night's service."

This section had previously been amended by 20 St. 206, ch. 359, § 1, which provided that the compensation of inspectors employed under § 2733 for services at night should not exceed \$2.50 for each night when actually employed.

A public officer, like an inspector of customs, may recover the lawful compensation of his office, even when he has accepted and receipted in full for a less sum; and the appointing power has no control over such compensation, when fixed by statute, either to increase or diminish it. *Adams v. United States*, 20 Ct. Cl. 115. See *Iselin v. Hedden, supra* § 2636. *Champney v. Bancroft*, 1 Story, 423.

SECT. 2737. — See preceding note.

SECT. 2738. — See *Adams v. United States, supra*.

SECT. 2739. — An occasional weigher and measurer does not come within this section. *Pray v. United States*, 14 Ct. Cl. 256.

SECT. 2742. — Amended by 19 St. 246, ch. 69, by inserting "gaugers" in the second line in place of the words "same class of officers."

SECT. 2743. — Amended by St. June 11, 1874, ch. 75 (23 St. 40), so that —

"the special examiner of drugs, medicines, chemicals, chemical preparations, dyes and dye-stuffs, paints, oils, varnishes, and other similar articles, at Boston, Mass., shall receive a salary of \$2500 per annum, and shall be paid each year quarterly."

SECT. 2745. — See 15 A. G. Op. 286, 355.

SECT. 2746. — 16 A. G. Op. 565. Amended by 19 St. 246, ch. 69, by striking out the words "and weighers" and inserting in the second line, after "appraisers," the words "deputy collectors, deputy surveyors, and." The proviso of § 4 of the cited act of 1866



“that the additional compensation of 25 per centum, as now provided by law, shall be continued,” &c., was here incorporated in § 2746, although the act originally authorizing the additional compensation was not found. 2 Com. D. 1331; see 14 A. G. Op. 241.

## CHAPTER III.

### REVENUE CUTTERS AND BOATS.

SECT. 2747. — The words “import and tonnage duties” in the second line and the last fifteen words of this section are substituted for the other words in the two acts first cited, in order to give effect to the proviso in the cited act of 1868. 2 Com. D. 1332.

SECT. 2748. — The act of 1799 gave this power to the President, while the proviso came from the cited act of 1866. 17 St. 154, ch. 195, § 2, authorized the Secretary of the Navy to sell useless vessels of the Navy. The following were temporary provisions, exhausted when once exercised: 14 St. 40, ch. 63, § 2; 15 St. 110, 114, ch. 177, § 1; 12 St. 286, ch. 41; 1 St. 400, Res. 1. 2 Com. D. 1332.

SECT. 2749. — St. July 31, 1876, ch. 246 (see 19 St. 107; 16 A. G. Op. 288), provides, —

“That hereafter upon the occurring of a vacancy in the grade of third lieutenant in the Revenue Marine Service, the Secretary of the Treasury may appoint a cadet, not less than 18 nor more than 25 years of age, with rank next below that of third lieutenant, whose pay shall be three-fourths that of a third lieutenant, and who shall not be appointed to a higher grade until he shall have served a satisfactory probationary term of two years and passed the examination required by the regulations of said service; and upon the promotion of such cadet another may be appointed in his stead; but the whole number of third lieutenants and cadets shall at no time exceed the number of third lieutenants now authorized by law.”

SECT. 2752. — See 15 A. G. Op. 396; 16 Id. 288.

SECT. 2754. — The provisions of the three preceding sections, being regarded as superseding that part of § 3 of St. 1799 which relates to the compensation of the commissioned officers of the revenue cutters, was omitted from the Revision. 2 Com. D. 1334.

SECT. 2756. — So much of the cited act as relates to the number of officers in the revenue cutters was regarded as superseded by the act of 1861, embodied in § 2749, *supra*. 2 Com. D. 1335.

SECT. 2758. — 18 St. 20, ch. 47, authorizes the Secretary of the Treasury to discontinue the use of the “Relief” as a revenue cutter, and to use her as a boarding station in the district of Mobile.

SECT. 2760. — See 15 A. G. Op. 396; 16 Id. 288; S. T. D. 8308.

## CHAPTER IV.

### ENTRY OF MERCHANDISE.

FOREIGN armed ships adopting the character of merchant ships are to be treated as such by our revenue officers. 1 A. G. Op. 337.

SECT. 2766. — See note, § 3082. The words here defined, and in the two following sections, are for the purpose of avoiding frequent repetition. 2 Com. D. 1332. See *Cotzhausen v. Nazro*, 11 Biss. 55; 15 F. R. 899; 107 U. S. 215.

SECT. 2767. — See note, § 4141. Under this provision the word “port” means a place for the importation of merchandise, when used in the statute on that subject; but



used elsewhere, it may and does have a more general meaning, as in § 4347, where it is used as an alternative word for "place." The *Lotus* No. 2. 26 F. R. 639; *Petrel Guano Co. v. Jarnette*, 25 F. R. 677; see 15 A. G. Op. 166.

SECT. 2768. — See note, § 2873.

SECT. 2769. — The numerous forms of instruments prescribed by the duties collection act of 1799 were omitted from the Revision except where there was special reason for preserving them. 2 Com. D. 1340.

SECTS. 2770, 2771. — Generalized from the provisos in § 18 of the act of 1799 and later acts. 2 Com. D. 1343, 1345; *United States v. Hayward*, 2 Gall. 485, 510.

SECT. 2772. — The *Saratoga*, 9 F. R. 324.

SECT. 2773. — The words "more interior district" mean a district farther within the indentation of the contiguous country. *United States v. Bearse*, 4 Mason, 192. It is a departure or an attempt to depart, and not an intention to violate the revenue laws, which will justify a seizure. *Le Tigre*, 3 Wash. C. C. 567, 572. The mere transit through a river which is the boundary between the United States and a foreign state, for the purpose of proceeding to a foreign port, is not to be deemed an arrival within the limits of the United States from a foreign port. *The Apollon*, 9 Wheat. 362. See S. T. D. 8280, 8308.

SECT. 2774. — *The Strathairly*, 124 U. S. 578; *The Paolina S.*, 11 F. R. 171; *Badger v. Gutherez*, 111 U. S. 734. Under § 30 of the cited statute of 1799, it was held that the report of arrival must be made at the office of the chief officer of the customs; that a report to an inspector, on board the vessel, or in a shop on shore, did not comply with the act, and that report be made, whether the arrival is voluntary, or by stress of weather, or at another than the intended port of discharge. *United States v. Webber*, 1 Gall. 392; *United States v. Rendell*, 1 Curtis, 369; *United States v. Galacar*, 1 Sprague, 545; *United States v. Randall*, Id. 546.

SECTS. 2776, 2778. — See note, § 2825. *The Chadwicke*, 29 F. R. 523; *M'Lean v. Hager*, 31 F. R. 604. The last four words of § 2778 are substituted for "Comptroller of the Treasury" in the act of 1799. 2 Com. D. 1347; see *The Schooner Mary*, 1 Gall. 210. Section 2776 is amended by St. June 26, 1884, ch. 121, § 29 (23 St. 59), by adding —

"that vessels arriving at a port of entry in the United States, laden with coal, salt, railroad-iron, and other like articles in bulk, may proceed to places within that collection district to be specially designated by the Secretary of the Treasury, by general regulations or otherwise, under the superintendence of customs officers, at the expense of the parties interested, for the purpose of unlading cargoes of the character before mentioned."

SECT. 2785. — See note, § 2841. By 18 St. 190, ch. 391, § 21 (see note, § 1047), entry and passage free of duty after one year from the time of entry in the absence of fraud or protest, are final. See *United States v. Seidenberg*, 17 F. R. 230. Where the duty cannot be performed by neglect of the officer to do a pre-requisite, the statute is not violated. *United States v. Randall*, 1 Sprague, 546. One who is consignee as well as owner is entitled to enter the goods. *Conrad v. Pacific Ins. Co.*, 6 Pet. 262. But not a sub-purchaser after importation. *United States v. Lyman*, 1 Mason, 482. "*Prime cost including*," &c. See 95 *Bales v. United States*, 1 Paine, 149. "*The species of money*," &c. See *De Forest v. Redfield*, 4 Blatch. 478. See further on this section S. T. D. 7890, 8420, 8917.

SECT. 2791. — The provisions extend to privateers as well as to national ships. *The Wilson*, 1 Brock. 423.

SECT. 2792. — Section 2 of the resolution 16 St. 595, relating to the entry of ferry-boats, being regarded as superseded by the cited act, was omitted from the Revision. 2 Com. D. 1352.

SECT. 2793. — See 15 A. G. Op. 166.

SECT. 2796. — In the absence of fraud or collusion the decision as to the amount is conclusive. *An Ullage Box of Sugar*, 1 Ware, 350. If goods entered as sea stores are ap-



propriated to any other use, the master may be liable to the penalty of false swearing, and if the owners offer them for sale they would be liable to an action for the duties. *Id.*

SECT. 2797. — See note, § 3104.

SECT. 2799. — For a case of forfeiture under 1 St. 661, 662, see *The Robert Edwards*, 6 Wheat. 187; also *Astor v. Merritt*, 111 U. S. 211; *United States v. Three Cases*, 6 Ben. 558.

SECT. 2801. — See *Ogden v. Maxwell*, 3 Blatch. 322.

SECT. 2802. — See note, § 2799; *Friedenstein v. United States*, 125 U. S. 224. *Re Leszynsky*, 16 Blatch. 18.

SECT. 2804. — See *United States v. Jacoby*, 12 Blatch. 491; S. T. D. 8014.

SECT. 2806. — See note, § 3088; *Servey v. United States*, 15 Blatch. 2.

SECT. 2807. — See notes, §§ 3088, 3104. That part of 14 St. 184, ch. 201, § 25, which required the Secretary of State to send copies of the section to consular officers, was omitted as temporary. 2 Com. D. 1357. See S. T. D. 7890.

SECT. 2809. — See notes, §§ 2837, 3066, 3088. The omission must be intentional to incur forfeiture. *United States v. A Lot of Umbrellas*, 12 F. R. 142; *United States v. The Stadacona*, 4 Am. L. T. 213. It was held that there could be no decree of forfeiture where a practice had long prevailed with the acquiescence of the customs officers to permit officers and crews of vessels to import and pay duties upon merchandise without entering the same upon the vessel's manifest. *United States v. Three Trunks*, 7 Sawyer, 364; 8 F. R. 583. See cases under § 16, act of 1874, note to § 2837. Also *United States v. Hutchinson*, 1 Haskell, 146; *United States v. The Missouri*, 9 Blatch. 433. If the master takes goods without a bill of lading or invoice, intending to smuggle or enter them, as he may elect, he is the consignee though the goods were to go to the use of another. *United States v. 10,000 Cigars*, 2 Curtis, 436. The method of procedure is enlarged upon in *United States v. The Queen*, 4 Ben. 237. Originally it was necessary to show that the vessel belonged in whole or in part to a citizen or inhabitant of the United States. *Id.*; *The Bark Antilles*, 8 *Id.* 9; *United States v. 26 Diamond Rings*, 1 Sprague, 294. The offence is complete when the goods are brought within the limits of a port of entry. *United States v. 10,000 Cigars, supra*; *The Missouri*, 3 Ben. 508. It is too late then to make a manifest. *United States v. 10,000 Cigars, supra*. If a claimant has destroyed the manifest to prevent its being used as evidence, he cannot introduce secondary evidence as to its contents. *The Ariel*, 1 Haskell, 65. On the question as to whether the goods were entered on the manifest of the vessel's cargo her manifest filed in the custom house is competent evidence. *United States v. The Missouri, supra*. The value of the goods must be shown. *The Bark Antilles, supra*. As against the government, "shall" in statutes is, in the absence of a contrary intention, to be construed as "may." *Railroad Co. v. Hecht*, 95 U. S. 168. See S. T. D. 8073.

SECT. 2810. — Amended by 19 St. 246, ch. 69, by changing "are" to "is" in the fourth line. A case is within this section where none of the cargo was unshipped and the manifest was inadvertently lost before sailing. *United States v. Certain Cigars*, 1 Woods, 306. Ignorance of the master that the goods were on the vessel and precautions by him to prevent smuggling have been held to be no excuse. *The Helvetia*, 6 Ben. 51. See *United States v. The Queen*, 11 Blatch. 416; 4 Ben. 237; *United States v. The Missouri*, 9 Blatch. 433; 4 Ben. 410; 3 *Id.* 508. But see note, § 2837. It has been held that it is not necessary to make out an unusually clear case of mistake but that ordinary proof only is required. *United States v. 9 Packages*, 1 Paine, 129.

SECT. 2811. — See *The Ariel*, 1 Haskell, 74; *The Chadwicke*, 29 F. R. 523; S. T. D. 8308.

SECT. 2814. — *United States v. Teftry*, 3 Int. Rev. Rec. 67; S. T. D. 8308.

SECT. 2819. — Amended by 19 St. 246, ch. 69, by changing "Saint Marks" to "Cedar Keys" in the third line.

SECT. 2820. — Amended by the same act by inserting "at" after "entered" in the third line.



SECT. 2821. — Amended by the same act by inserting "Buffalo Bayou" in place of "Trinity River" in the second line.

SECT. 2822. — Amended by the same act by striking out, in the sixth line, "and Natchez, in Mississippi," and inserting "and" after "Missouri" in the fifth line. See, also, note, § 2568.

SECTS. 2825, 2826. — See note, § 2568. 19 St. 247, ch. 69, changes "importation" to "destination" in the last line of § 2826. St. June 20, 1876, ch. 136 (19 St. 60), provides, —

"That when any bond is required by law to be executed by any firm or partnership for the payment of duties upon goods, wares or merchandise, imported into the United States by such firm or partnership, the execution of such bond by any member of such firm or partnership, in the name of said firm or partnership, shall bind the other members or partners thereof, in like manner and to the same extent, as if such other members or partners had personally executed the same. And any action or suit may be instituted on such bond against all the members or partners of such firm, as if all of the members or partners had executed the same."

SECT. 2837. — See S. T. D. 8804, 8827. St. June 22, 1874, ch. 391 (18 St. 186), provides in part as follows (other sections of this act being given in notes on §§ 563, 838, 1047, 2654, 3091, 3689, 5292, 5295): —

"SEC. 9. That except in the case of personal effects accompanying the passenger, no importation exceeding one hundred dollars in dutiable value shall be admitted to entry without the production of a duly certified invoice thereof as required by law, or of an affidavit made by the owner, importer, or consignee, before any officer authorized to administer oaths, showing why it is impracticable to produce such invoice.

"SEC. 10. That no entry shall be made in the absence of a certified invoice, upon affidavit as aforesaid, unless such affidavit be accompanied by a statement, in the form of an invoice or otherwise, showing either the actual cost of the merchandise included in such importation, or, to the best of the knowledge, information, and belief of the deponent, the foreign market value thereof; which statement shall be verified by the owner, importer, consignee, or agent desiring to make entry of the merchandise, and which oath shall be administered by the collector or his deputy.

"SEC. 11. That before such oath is taken, it shall be lawful for the collector or deputy administering the same to question the deponent touching the sources of his knowledge, information, or belief in the premises, and to require him to make oath to the same, and to produce any letter or paper, in his possession or under his control, which may assist the officers of the customs in ascertaining the dutiable value of the importation, or any part thereof;

"And in default of such production, when so requested, such owner, importer, consignee, and agent shall be thereafter debarred from producing any such letter or paper for the purpose of avoiding any penalty or forfeiture incurred under this act, unless he shall show to the satisfaction of the court that it was not in his power to produce the same when so demanded.

"SEC. 12. That any owner, importer, consignee, agent, or other person who shall, with intent to defraud the revenue, make, or attempt to make, any entry of imported merchandise, by means of any fraudulent or false invoice, affidavit, letter, or paper, or by means of any false statement, written or verbal, or who shall be guilty of any wilful act or omission by means whereof the United States shall be deprived of the lawful duties, or any portion thereof, accruing upon the merchandise, or any portion thereof, embraced or referred to in such invoice, affidavit, letter, paper, or statement, or affected by such act or omission, shall, for each offence, be fined in any sum not exceeding five thousand dollars nor less than fifty dollars, or be imprisoned for any time not exceeding two years, or both; and, in addition to such fine, such merchandise shall be forfeited; which forfeiture shall only apply to the whole of the merchandise in the case or package containing the particular article or articles of merchandise to which such fraud or alleged fraud relates; and anything contained in any act which provides for the forfeiture or confiscation of an entire invoice in consequence of any item or items contained in the same being undervalued, be, and the same is hereby, repealed.

"SEC. 13. That any merchandise entered by any person or persons violating any of the provisions of the preceding section, but not subject to forfeiture under the same section, may, while owned by him or them, or while in his or their possession, to double the amount claimed, be taken by the collector and held as security for the payment of any fine or fines incurred as aforesaid, or may be levied upon and sold on execution to satisfy any judgment recovered for such fine or fines. But nothing herein contained shall



prevent any owner or claimant from obtaining a release of such merchandise on giving a bond, with sureties satisfactory to the collector, or, in case of judicial proceedings, satisfactory to the court, or the judge thereof, for the payment of any fine or fines so incurred: *Provided, however*, That such merchandise shall in no case be released until all accrued duties thereon shall have been paid or secured.

"SEC. 14. Repealed by 22 St. 523, § 7. See note § 2907.

"SEC. 15. That it shall be the duty of any officer or person employed in the customs revenue service of the United States, upon detection of any violation of the customs laws, forthwith to make complaint thereof to the collector of the district, whose duty it shall be promptly to report the same to the district attorney of the district in which such frauds shall be committed. Immediately upon the receipt of such complaint, if, in his judgment, it can be sustained, it shall be the duty of such district attorney to cause investigation into the facts to be made before a United States commissioner having jurisdiction thereof, and to initiate proper proceedings to recover the fines and penalties in the premises, and to prosecute the same with the utmost diligence to final judgment.

"SEC. 16. That in all actions, suits, and proceedings in any court of the United States now pending or hereafter commenced or prosecuted to enforce or declare the forfeiture of any goods, wares, or merchandise, or to recover the value thereof, or any other sum alleged to be forfeited by reason of any violation of the provisions of the customs-revenue laws, or any of such provisions, in which action, suit, or proceeding an issue or issues of fact shall have been joined, it shall be the duty of the court, on the trial thereof, to submit to the jury, as a distinct and separate proposition, whether the alleged acts were done with an actual intention to defraud the United States, and to require upon such proposition a special finding by such jury; or, if such issues be tried by the court without a jury, it shall be the duty of the court to pass upon and decide such proposition as a distinct and separate finding of fact; and, in such cases, unless intent to defraud shall be so found, no fine, penalty, or forfeiture shall be imposed.

"SEC. 17. That whenever, for an alleged violation of the customs-revenue laws, any person who shall be charged with having incurred any fine, penalty, forfeiture, or disability other than imprisonment, or shall be interested in any vessel or merchandise seized or subject to seizure, when the appraised value of such vessel or merchandise is not less than one thousand dollars, shall present his petition to the judge of the district in which the alleged violation occurred, or in which the property is situated, setting forth, truly and particularly, the facts and circumstances of the case, and praying for relief, such judge shall, if the case, in his judgment, requires, proceed to inquire, in a summary manner into the circumstances of the case, at such reasonable time as may be fixed by him for that purpose, of which the district attorney and the collector shall be notified by the petitioner, in order that they may attend and show cause why the petition should be refused.

"SEC. 18. That the summary investigation hereby provided for may be held before the judge to whom the petition is presented, or, if he shall so direct, before any United States commissioner for such district, and the facts appearing thereon shall be stated and annexed to the petition, and, together with a certified copy of the evidence, transmitted to the Secretary of the Treasury, who shall thereupon have power to mitigate or remit such fine, penalty, or forfeiture, or remove such disability, or any part thereof, if, in his opinion, the same shall have been incurred without wilful negligence or any intention of fraud in the person or persons incurring the same, and to direct the prosecution, if any shall have been instituted for the recovery thereof, to cease and be discontinued upon such terms or conditions as he may deem reasonable and just.

"SEC. 19. That it shall not be lawful for any officer or officers of the United States to compromise or abate any claim of the United States arising under the customs laws, for any fine, penalty, or forfeiture incurred by a violation thereof; and any officer or person who shall so compromise or abate any such claim, or attempt to make such compromise or abatement, or in any manner relieve or attempt to relieve from such fine, penalty, or forfeiture, shall be deemed guilty of a felony, and, on conviction thereof, shall suffer imprisonment not exceeding 10 years, and be fined not exceeding \$10000; *Provided, however*, That the Secretary of the Treasury shall have power to remit any fines, penalties, or forfeitures, or to compromise the same, in accordance with existing law. [See 18 St. 303, ch. 22.]

"SEC. 20. That whenever any application shall be made to the Secretary of the Treasury for the mitigation or remission of any fine, penalty, or forfeiture, or the refund of any duties, in case the amount involved is less than \$10000, the applicant shall notify the district attorney and the collector of customs in which the duties, fine, penalty, or forfeiture accrued; and it shall be the duty of such collector and district attorney to furnish to the Secretary of the Treasury all practicable information necessary to enable him to protect the interests of the United States."

"SEC. 24. That the Secretary of the Treasury shall, from time to time, make such regulations as he may deem necessary for the conduct and management of the bonded warehouses, general order stores, and other depositories of the imported merchandise throughout the United States; all regulations or orders issued by collectors of customs in regard thereto shall be subject to revision, alteration, or revocation by



him; and no warehouse shall be bonded and no general-order store established without his authority and approval.

“And it shall be the duty of the Secretary of the Treasury, in granting permits to establish general-order warehouses, to require such warehouse or warehouses to be located contiguous, or as near as may be, to the landing places of steamers and vessels from foreign ports;

“And that no officer of the customs shall have any personal ownership of, or interest in, any bonded warehouse or general-order store.

“SEC. 25. That public cartage of merchandise in the custody of the Government shall be let after not less than thirty days’ notice of such letting to the lowest responsible bidder giving sufficient security, and shall be subject to regulations approved by the Secretary of the Treasury.

“SEC. 26. That all acts and parts of acts inconsistent with the provisions of this act are hereby repealed; that nothing herein contained shall affect existing rights of the United States; and in all cases in which prosecutions have been actually commenced for forfeitures incurred, the Secretary of the Treasury shall have power to make compensation, as provided in § 4 of this act, to the persons who would, under former laws, have been entitled to share in the distribution of such forfeitures.”

Sects. 9, 10. Sect. 2900 does not apply to an entry under this act made in the absence of a certified invoice. 16 A. G. Op. 160.

Sect. 12. The government is entitled to a decree of forfeiture even if the claimant purchased in good faith and for full value, because § 16 only means that it must be shown that the fraud was wilful and intentional. *United States v. Certain Diamonds*, 30 F. R. 364. See *United States v. Eleven Horses*, Id. 916. The United States may maintain an action to recover duties unpaid. *United States v. Boyd*, 23 Blatch. 299; 24 F. R. 690, 692. This section applies to attempts whenever made. Id. 696. It repeals § 2864 so far as it provides for the forfeiture of the value of merchandise. See note, § 2864. The merchandise may be forfeited independently of the imposition of the fine. *Origet v. United States*, 125 U. S. 246. This act contains no provision for any addition to the entry. 16 A. G. Op. 161. See notes, §§ 9, 10, *supra*, and § 2900.

Sect. 16. See note, § 2809. It is not necessary to aver in an information an actual intention to defraud. *Friedenstein v. United States*, 125 U. S. 233, overruling *United States v. Ninety Demijohns*, 4 Woods, 636; 8 F. R. 485. But the court must find an actual intention to defraud. *United States v. The Purissima Concepcion*, 24 F. R. 358; *United States v. Newmark*, 3 Sawyer, 584. A verdict is sufficient that “the goods were brought in with intent to defraud the United States.” *Oviget v. United States*, 125 U. S. 240. The suit cannot be defeated by one claiming that he bought the goods in good faith without notice that they were fraudulently imported. *United States v. Certain Diamonds*, 30 F. R. 364. The statement by a buyer in a doubtful case, of the purchase either way, in one place or another, or mere mistake, do not prove intent to defraud. *Forty Sacks of Wool*, 14 F. R. 643. A proper form of submitting the question to the jury is passed upon in *Lewey v. United States*, 15 Blatch. 1. See *United States v. Curtis*, 16 F. R. 184.

Sects. 17, 18. See note, § 3469. Exceptions should go with the report to the Secretary to be considered by him in his judgment, and the Commissioner’s opinions on the law should be stricken from the report. *United States v. Six Hundred Tons Iron Ore*, 17 F. R. 137; 9 Id. 595. The persons who, at the time when the act causing the forfeiture occurred, had specific interests in the vessel, &c., incur the forfeiture. 16 A. G. Op. 473.

Sect. 26. Sects. 6 and 26 of this act are incompatible; the specific power given in § 26 prevails in existing suits while the general language of § 6 is limited to cases in which judicial proceedings were commenced after the passage of the act. *Re Jayne*, 28 F. R. 419; *United States v. 9 Trunks*, 22 Int. Rev. 317, 319.

SECT. 2838. — See notes, §§ 2837, 3564. *De Forest v. Redfield*, 4 Blatch. 478. “It was the object of this law to compel the parties to show in the invoices the actual prices and cost of their goods, in the currency of the country where bought, and not leave it to them to make a pretended estimate of the cost in a coin valuation.” *Cramer v. Arthur*, 102 U. S. 612, 618.



SECT. 2839.—See notes, §§ 2837, 2854, 2864, 2865, 3066. This provision applies only to purchased goods; and under it the United States cannot recover for a forfeiture of the value of imported merchandise belonging to its foreign manufacturer, against its consignee for sale on commission, who entered it as such consignee, on the ground that the merchandise was entered at invoice prices lower than its actual market value when and where it was exported. *United States v. Auffmordt*, 122 U. S. 197; 19 F. R. 893; *Alfonso v. United States*, 2 Story, 421, 429. To come within this section the design to defraud the United States must have existed at the time of making the invoice and the invoice must be prepared to carry that design into effect. *United States v. Three Parcels*, 9 Law Rep. (N. S.) 144. The fact that the fraud is not discovered until after the goods have passed from the custody of the officers does not purge away the forfeiture. *Wood v. United States*, 16 Pet. 362; *Clifton v. United States*, 4 How. 242; *Buckley v. United States*, Id. 215. But see *United States v. Riddle*, 5 Cranch, 311. The United States have no title until an election to recover the goods or their value. Therefore rights acquired *bona fide* by third persons in the meantime are protected. *Caldwell v. United States*, 8 How. 366. The evidence must show satisfactorily that the goods were invoiced below their true value at the place of exportation. *United States v. One Hundred and Fifty Crates*, 3 Wheat. 232. It has been held that while "actual cost" means the real price paid, and that while there is no forfeiture when the goods are so invoiced, although the purchase be below market price, yet "actual cost" does not apply to voluntary gift when the consideration is not money, nor to a case where consideration is partly money and partly affection. *United States v. Sixteen Packages*, 2 Mason, 48. See *Tappan v. United States*, Id. 393; *Alfonso v. United States*, *supra*; *Goodwin v. United States*, 2 Wash. 493; *United States v. Twenty-five Cases*, *Crabbe*, 356. The testimony of local merchants as to the market values in foreign ports is admissible as in the nature of expert testimony. *Alfonso v. United States*, *supra*. Evidence of other invoices of other goods is admissible to show intent as to fraud. Id.; *Wood v. United States*, 16 Pet. 342. See *Buckley v. United States*, 4 How. 251. As bearing on the market value in May, evidence may be given of what it was in July and August. *Alfonso v. United States*, *supra*. To subject the goods to a forfeiture the invoice must have been presented at the custom-house. *United States v. Twenty-eight Packages*, *Gilpin*, 306. The originals or examined copies made conformably to statute are admissible in evidence. *Buckley v. United States*, 4 How. 251. It has been held that the jury might find either the whole package or the invoice forfeited, though containing other goods correctly valued. Id. It has been held that, in case of forfeiture a bond having been given for the value of the goods and duties, the importer loses the duties also. *United States v. Segars*, 3 Phila. 517. See S. T. D. 8304.

SECT. 2840.—See note, § 2837. Where goods were seized with probable cause therefor and were subsequently lost while in the possession of the collector, it was held that the government was not liable. *Schmalz v. United States*, 5 Ct. Cl. 294; *United States v. Six Packages*, 6 Wheat. 520.

SECT. 2841.—Amended by 19 St. 247, ch. 69, by inserting in the second sentence of the first oath the words "the owner (or owners)" after "is (or are)." Also amended by St. March 3, 1883, ch. 121, § 8 (22 St. 523), by adding, after "agent" in the fourth line:—

"Provided, that if any of the invoices or bills of lading of any merchandise imported in said vessel, which should otherwise be embraced in said entry, have not been received at the date of the entry, the affidavit may state the fact, and thereupon such merchandise of which the invoices or bills of lading are not produced shall not be included in such entry, but may be entered subsequently."

The same act inserts after "merchandise," in the fifteenth line of the first oath, and also, in the sixteenth line of the second oath, and in the fourteenth line of the third oath the words "that the said invoice and the declaration therein are in all respects true,



and were made by the person by whom the same purports to have been made;" and, in the twenty-sixth line of the first oath after "merchandise," strikes out "all the charges thereon," and there inserts "including all cost for finishing said goods, wares, and merchandise to their present condition." It also strikes out, in the sixth, seventh, and eighth lines, the clause, beginning with "of all" and ending with "packing," and there inserts "including all cost of finishing said goods, wares, and merchandise to their present condition." In the third oath that act further strikes out "all the" in the third line; in the eighth and ninth lines, strikes out the clause beginning with "including" and ending with "packing;" and in the twelfth line, changes "of all charges actually paid" to "of all the cost for finishing said goods, wares, and merchandise to their present condition." The new oaths leave out "charges" because the statute leaves them out as dutiable items; the "cost of finishing," &c., is part of the value abroad outside of the abolished "charges." Goods may be bought abroad unfinished, and there be finished, "but in no case can the cost of finishing be left out of their value, however they have been obtained. So the new oaths embrace only the value of the goods *per se*, and there is no oath as to any item before called 'charges.' The item of 'finishing' is broad enough to include bleaching, dyeing, and dressing, but does not include any of the other charges specifically named in the old oaths." *Oberteuffer v. Robertson*, 116 U. S. 513, 514. For a case where it was held that the invoice to be furnished, and the oath to be taken, were such as the law requires from the manufacturer, see *Sinn v. United States*, 14 Blatch. 550 (1878). See *United States v. Wood*, 14 Pet. 430; *Taylor v. United States*, 3 How. 197. By the other invoices or bills of lading are meant those different from the ones presented, and not merely copies or counterparts required by commercial usage or statute to be procured. *United States v. Harrison*, 32 F. R. 386. See S. T. D. 8286, 8917.

St. May 1, 1876, ch. 89, (19 St. 49), repealing inconsistent acts, provides:—

"That a separate entry may be made of one or more packages contained in an importation of packed packages consigned to one importer or consignee, and concerning which packed packages, no invoice, or statement of contents or values, has been received. Every such entry shall contain a declaration of the whole number of parcels contained in such original packed package; and shall embrace all the goods wares, and merchandise imported in one vessel at one time for one and the same actual owner, or ultimate consignee.

"SEC. 2. That the importer, consignee, or agent's oath prescribed by Rev. Stats. § 2841, is hereby modified for the purposes of this Act, so as to require the importer consignee or agent to declare therein that the entry contains an account of all the goods — imported in the — whereof — is master, from — for account of — which oath so modified, shall in each case, be taken on the entry of one or more packages contained in an original package. But nothing in this act contained shall be construed to relieve the importer, consignee, or agent from producing the oath of the owner or ultimate consignee in every case, now required by law; or to provide that an importation may consist of less than the whole number of parcels contained in any packed package, or packed packages consigned in one vessel at one time, to one importer, consignee or agent."

SECT. 2842. — See note, § 2825.

SECTS. 2853, 2855. — Amended by St. June 10, 1880, ch. 190, § 4 (21 St. 173), so as —

"to require that all invoices of merchandise imported from any foreign country and intended to be transported without appraisement to any of the ports mentioned in § 7 of this act, shall be made in quadruplicate; and that the consul, vice-consul, or commercial agent, to whom the same shall be produced, shall certify each of said quadruplicates under his hand and official seal in the manner required by Rev. Stats. § 2855, and shall then deliver to the person producing the same two of the quadruplicates, one to be used in making entry at the port of first arrival of the merchandise in the United States, and one to be used in making entry at the port of destination, file another in his office, there to be carefully preserved, and as soon as practicable transmit the remaining one to the collector or surveyor of the port of final destination of the merchandise: *Provided, however,* That no additional fee shall be collected on account of any service performed under the requirements of this section."



SECT. 2854. — "Place," as here used, refers to a locality as extensive as the country where the goods are bought or manufactured. *Cliquot's Champagne*, 3 Wall. 114; 3109 Cases of Champagne, 1 Ben. 250; 1209 Quarter Casks, 2 Id. 249; 6 Cases of Silk Ribbons, 3 Id. 536. Under this section the invoice is false if simply untrue, without regard to the intent; and if it contains a discount not allowed to the purchaser, the property is forfeited. *United States v. 2117 Bushels of Malt*, 8 F. R. 224; see *United States v. Auffmordt*, 122 U. S. 205, 206. The words "actual market value" mean the price at which the owner or producer holds the goods for sale in the ordinary course of trade. *Cliquot's Champagne*, *supra*; 6 Cases of Silk Ribbons, 3 Ben. 536; 1209 Quarter Casks of Wine, 2 Id. 249; 3109 Cases of Champagne, 1 Id. 241. As to when the burden of proof is on the claimant to show that the invoice contains the actual market value, see cases just cited. The time when an article is manufactured is when its manufacture is complete. 6 Cases of Silk Ribbons, *supra*. An appraisement for bonding has been held not to be evidence of market value. 3109 Cases of Champagne, *supra*. Also, isolated transactions in similar goods in a domestic port are not such evidence. Id. But letters of other manufacturers than the claimants as to the value of their goods are admissible, provided they are of the same grade, &c. Id.; *Cliquot's Champagne*, *supra*. As to appraisement and reappraisement not being conclusive as to their market value, either upon the government or the claimant, see 1209 Quarter Casks of Wine, *supra*. See S. T. D. 8243.

SECT. 2855. — See *Locke v. United States*, 2 Cliff. 574.

SECTS. 2858, 2860. — See notes, §§ 2837, 5292. Sects. 1, 2, of 3 St. 729, ch. 21, were regarded as superseded by the cited provision. 2 Com. D. 1377.

SECT. 2859. — So much of § 1 of St. 1863 as related to goods imported under the reciprocity treaty with Great Britain of June 5, 1854, was here omitted as made obsolete by abrogation of that treaty. 2 Com. D. 1378. See S. T. D. 8993.

SECT. 2863. — This provision was limited to cases arising under § 17 of the cited act, which section was repealed by § 14 of 12 St. 741, ch. 76; but as the repealing act substituted another provision for sworn invoices, this provision was treated as remaining in force. 2 Com. D. 1379.

SECT. 2864. — See notes, §§ 2837, 2854. 18 St. 319, ch. 80, inserts "or the value thereof" after "merchandise" in the last line. This amendment, merely correcting an error in the text of this section, makes it read continuously since 1863, as it read in § 1 of the original act of that date. 12 St. 738, ch. 76. It did not have the effect of enacting that the value of merchandise is to be forfeited under § 2864, notwithstanding St. 1874, ch. 391 (18 St. 180), of which § 12 repeals § 2864 so far as it provides for a forfeiture of the value of merchandise. *United States v. Auffmordt*, 122 U. S. 197; 19 F. R. 893; *United States v. 4 Cases*, 10 Ben. 371. See 600 Tons of Ore, 9 F. R. 595; 16 A. G. Op. 158. If the fraud applies only to a portion of the cargo, the whole of it belonging to the same party is forfeited. *Merchandise v. United States*, Chase Dec. 502. "Entry" means any entry, so called in custom-house language. *United States v. Baker*, 5 Ben. 25. See *United States v. 28 Packages*, Gilpin, 306. In some statutes "entry" refers to the paper or declaration handed in the first instance to the entry clerk; here it is a transaction, namely, the entering of the goods. *United States v. Cargo of Sugar*, 3 Sawyer, 46, 48. The guilty knowledge of the owner is sufficient, irrespective of that of the agent; and it is immaterial whether or not the collector was actually deceived. Id. The penalty is attached to the false entry, not to the result produced on the revenue in the particular instance. *Bollinger's Champagne*, 3 Wall. 560. An action of debt lies against whoever knowingly attempts to make a fraudulent entry, whether owner, consignee, or agent. *United States v. Willetts*, 5 Ben. 220. An action for the value of forfeited merchandise is not an action "to recover a fine or penalty," or one "upon contract, express or implied," within § 549 of the New York code. *United States v. Reid*, 21 Blatch. 429; 17 F. R. 497. "Know-



ingly" means that the claimant "knew better, and that he was swearing falsely." *Cliquot's Champagne*, 3 Wall. 127, 144; 1209 Quarter Casks, 2 Ben. 249; see *Sinn v. United States*, 14 Blatch. 553, 554. Value is not limited to the sum received by the defendant for the identical goods entered, on their sale by him. *United States v. York Street Co.*, 17 Blatch. 138. As to the fact of reappraisement being *prima facie* evidence of an entry, so as to throw the burden of proof on the claimant to show that there was no entry in a libel for forfeiture, see 28 Cases of Wine, 2 Ben. 63. See S. T. D. 8034, 8304.

SECT. 2865.—See notes, §§ 2837, 3082, 3091. Amended by St. Feb. 27, 1877, ch. 69 (19 St. 247), by substituting the following in place of this section:—

"If any person shall knowingly and wilfully, with intent to defraud the revenue of the United States, smuggle, or clandestinely introduce, into the United States, any goods, wares, or merchandise, subject to duty by law, and which should have been invoiced, without paying or accounting for the duty, or shall make out or pass, or attempt to pass, through the custom-house any false, forged or fraudulent invoice, every such person, his, her, or their aiders and abettors, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not exceeding \$5000, or imprisoned for any term of time not exceeding two years, or both, at the discretion of the court."

The question whether the proceeding should be by information or indictment, or by presentation of the grand jury, is considered in *United States v. Johannesen*, 35 F. R. 411. Originally this section did not apply to goods imported from an adjacent territory. *United States v. Nolton*, 5 Blatch. 427; *United States v. Smith*, 2 Id. 127; see *United States v. 67 Packages*, 17 How. 85-99.

SECT. 2866.—See Proclamation No. 2 (18 St. 842).

## CHAPTER V.

### UNLOADING.

SECT. 2867.—See § 16 of the act of 1874, under § 2837, note. And see notes, §§ 2873, 3082, 3104.

This section was intended to guard against smuggling, and a compliance with the requisites alone entitles a party to the benefit of the exception; and the accident, necessity, or distress must affect the *condition* of the ship or goods, and not the *voyage* merely. *United States v. Hayward*, 2 Gall. 485, 514. It has been held that this section does not apply where the illegal unloading is after the arrival of the vessel at her intended port of discharge. *The Schooner Industry*, 1 Gall. 114; see *The Schooner Harmony*, Id. 123; *Clark v. Insurance Co.*, 1 Story, 109; *United States v. Brant*, Pet. C. C. 14. It applies only to the captain or mate. *United States v. Smith*, 2 Wash. 310; see *United States v. Brant*, *supra*. It has been held to comprehend foreign as well as American vessels. *The Schooner Betsey*, 1 Mason, 354. Questions of pleading are considered in *United States v. The Virgin*, Pet. C. C. 7. See S. T. D. 7987.

SECT. 2868.—See *United States v. Hayward*, 2 Gall. 485; *The Schooner Harmony*, 1 Id. 123; *United States v. The Virgin*, Pet. C. C. 7.

SECT. 2869.—See note, § 2872. What constitutes an importation is discussed in *Pero v. United States*, Pet. C. C. 256; *Kohne v. Insurance Co.*, 1 Wash. C. C. 158. See *Porter v. Beard*, 124 U. S. 432.

SECT. 2870.—See note, § 2872.

SECT. 2871.—See *The Egypt*, 25 F. R. 331.

SECT. 2872.—See notes, §§ 2837, 2873, 2874, 3104. Amended by St. June 26, 1884, ch. 121, § 25 (23 St. 59), by adding the following:—



“When the license to unload between the setting and rising of the sun is granted to a sailing-vessel under this section, a fixed, uniform, and reasonable compensation may be allowed to the inspector or inspectors for service between the setting and rising of the sun, under such regulations as the Secretary of the Treasury may prescribe, to be received by the collector from the master, owner, or consignee of the vessel, and to be paid by him to the inspector or inspectors.”

The permit is the same as that mentioned in § 2869, and must be in writing; and innocence of intention is no more a defence than ignorance of law. *United States v. The Sarah B. Harris*, 4 Cliff. 147; 1 Haskell, 52. Appurtenances, &c., of a ship, as a chain cable, &c., purchased *bona fide* for the ship, may be landed without a permit. *United States v. A Chain Cable*, 2 Sumner, 362; *Weld v. Maxwell*, 4 Blatch. 136. So also goods landed from a foreign vessel wrecked on the coast. *The Gertrude*, 3 Story, 68; *Daveia*, 176. It has been held that a vessel in the coasting trade, having goods which have not paid duties, is not within this section. *Jackson v. United States*, 4 Mason, 186. A permit is necessary to land silver dollars. *The Schooner Elizabeth*, 2 Mason, 407. There must be a forfeiture in case of plain violation of the statute. *United States v. 3 Cases*, 6 Ben. 558. See *United States v. A Lot of Jewelry*, 13 Blatch. 60; *Four Packages v. United States*, 97 U. S. 404; *Freidenstein v. United States*, 125 U. S. 224; *United States v. Smith*, 2 Wash. 310; *United States v. 9 Trunks*, 22 Int. Rev. Rec. 317; *United States v. The Express*, 21 Law Rep. 41. The persons who at the time when the act causing the forfeiture occurred had specific interests in the vessel, &c., incur the forfeiture. 16 A. G. Op. 473; see *United States v. 20 Cases*, 2 Biss. 47. In *The Steamship Cleopatra*, 5 Ben. 290, the government officials were criticised, and it was recommended that the case be communicated to the Attorney-General. This section is broad enough to cover all merchandise, lawful or unlawful. *Harford v. United States*, 8 Cranch, 109; *Locke v. United States*, 7 Id. 339. If goods, brought by superior force or inevitable necessity into the United States, are afterwards sold or consumed in the country or incorporated into its property, they become retro-actively liable to duties. *The Brig Concord*, 9 Cranch, 387. If foreign goods once lawfully admitted are re-exported, they can only be re-imported by a compliance with law. *Ten Cases of Opium*, *Deady*, 62. Carrying salt by a fishing vessel to a certain bay, and bringing back and landing the same, does not violate this section, even though the vessel touched at a foreign port near the bay for wood and water. *The E. K. Dresser*, 2 Haskell, 349. As to what allegations are necessary, see *Locke v. United States*, *supra*. See further *United States v. 208 Bags*, 37 F. R. 326.

SECT. 2873. — See notes, §§ 2837, 2867, 2872, 2874, 3104. Where the master was absent, it was held that the penalty must be enforced against the person in command. The knowledge of those who aid must be shown, not that of the master. This section does not apply to the landing of derelict or salvaged goods; to unloading by reason of unavoidable accident, &c.; or where all possible means were used to prevent smuggling. Sect. 16 of 18 St. 186 (see note, § 2837), “does not include the intent of masters of vessels who are made responsible for the illegal and fraudulent removal of goods by persons under their control.” *United States v. Curtis*, 16 F. R. 184; see *The Gertrude*, 3 Story, 68. The law applies to all unloading without a permit in any port or place within any collection-district, whether originally intended for the port of discharge or not. *The Industry*, 1 Gall. 114; *The Harmony*, Id. 123; *The Sarah Bernice*, 1 Haskell, 81; *United States v. 20 Cases*, 2 Biss. 147; *The John C. Brooks*, 3 Ware, 273; *contra*, *United States v. The Hunter*, Pet. C. C. 10; see *United States v. The Virgin*, Id. 7. In *The Active*, *Deady*, 165, this subject is amply discussed, and the court leans to the decision in *United States v. The Hunter*, *supra*. It has been held that the forfeiture attaches to the unloading, and not to the receiving vessel. *Clark v. Protection Ins. Co.* 1 Story, 121; *The Industry*, *supra*. A fraudulent permit is void. *Bottomley v. United States*, 1 Story, 135; *United*



States *v.* The Sarah B. Harris, 4 Cliff. 147; 1 Haskell, 52. It is not necessary to allege the goods to be of foreign growth or manufacture. The Betsy, 1 Mason, 354; The Active, Deady, 165. Questions of pleading are further considered in United States *v.* Burnham, 1 Mason, 57; Walsh *v.* United States, 3 Wood. & M. 341; United States *v.* Hayward, 2 Gall. 485. Dutiable merchandise imported as passenger's baggage, without attempt to so pass it, the owner, not knowing of the seizure, offering it with correct bills of lading and money for entry, is not forfeitable. United States *v.* 95 Boxes, 19 Int. Rev. Rec. 101; see United States *v.* 3 Cases, 6 Ben. 558. It has been held that an action for the penalty cannot be maintained after conviction and punishment for smuggling. United States *v.* Gates, 4 N. Y. Leg. Obs. 8; 8 Law Rep. 465. As to the application of this section to a person who has goods in his store for sale which he knows have been smuggled, see Walsh *v.* United States, *supra*.

SECT. 2874. — See notes, §§ 2867, 2872, 2873, 3082, 3091–3093, 3104. A vessel may be condemned on a clear *prima facie* case not rebutted by the claimants. The John Griffin, 15 Wall. 29. The court must have jurisdiction, and the merchandise must be alleged to be of the value of \$400. The Washington, 17 Law Rep. 497; The Sarah Bernice, 1 Haskell, 81. To create a forfeiture of the vessel the goods must come from one cargo, and be landed from the same vessel, but not necessarily at the same time. *Id.* The innocence of the owner is no defence. United States *v.* The Cuba, 2 Hughes, 489; see 16 A. G. Op. 473. Whenever goods are unlawfully unladen, the forfeiture attaches. United States *v.* 20 Cases, 2 Biss. 47. Laws rendering ships liable to forfeiture for smuggling, conducted by their means though without the connivance of the owners or officers, are necessary though severe; but they are accompanied with the power of remission conferred upon the Secretary of the Treasury. The Cleopatra, 5 Ben. 290. Where a seizure is abandoned, no jurisdiction attaches to any court unless a new seizure is made. To constitute an abandonment, there must be an unequivocal act of dereliction. The Abby, 1 Mason, 360. Questions of pleading are considered in The Active, Deady, 165. As to the present law as to intention to defraud, see United States *v.* 208 Bags, 37 F. R. 326; note, § 2837.

SECT. 2880. — The cited act of 1861 was deemed to supersede § 56 of the act of 1799 and 3 St. 640, ch. 42. 2 Com. D. 1385. See 275 Tons Mineral Phosphates, 9 F. R. 209.

SECT. 2882. — Wine and spirits saved from a wreck seem to be exempt from the rule. Peisch *v.* Ware, 4 Cranch, 347. See the Sarah Bernice, 1 Haskell, 78.

SECT. 2885. — Sects. 39, 40, 41, 42, 43, 44, of the cited act of 1799, although they had become obsolete, were revived by 13 St. 494, ch. 80, § 10, which was repealed by 14 St. 188, ch. 201, § 43; so much of these sections as related to teas was repealed by the cited provision of 1832. The intermediate legislation consisted of 2 St. 150, ch. 19, §§ 7, 8, and 5 St. 131, ch. 364. 2 Com. D. 1387.

SECT. 2887. — See note, § 3104. A surplus as well as a deficiency is a disagreement, and to evade the penalty the defendant must bring himself within the exceptions named in the statute. United States *v.* Fairclough, 4 Wash. C. C. 398. See United States *v.* Graff, 14 Blatch. 381, 394. This section does not protect from forfeiture goods found concealed on board after the master has declared that the whole cargo is discharged. United States *v.* Cave, 3 Hall's L. J. 176.

SECT. 2891. — Where a foreign vessel was driven into an American port, and a portion of the cargo of rum was sold to pay wages, &c., it was held that the President could not give permission to sell the remainder. 1 A. G. Op. 460.

SECT. 2892. — See § 24 of the act of St. 1874, under § 2837.

SECT. 2893. — See note, § 3104.

SECT. 2898. — The cited provision was treated as superseding § 58 of St. 1799, ch. 22 (1 St. 671). The provisions of §§ 53, 56, of St. 1799, and §§ 1, 2, 3, of St. 1802 (2 St.



137), relating to salt and the district of Albemarle, were omitted as superseded by 14 St. 328, ch. 298, § 4. 2 Com. D. 1394. This section modified the allowance of tare, under § 58 of the act of 1799, and repealed it altogether as to draft. *Napier v. Barney*, 5 Blatch. 191, in which case draft and tare are explained. See *Wilson v. Maxwell*, 2 Blatch. 316; *Saxonville Mills v. Russell*, 1 Lowell, 450. Tie-bands of baled jute are considered in S. T. D. 9271.

## CHAPTER VI.

### APPRAISAL.

THE meaning of §§ 2900, 2902, 2906, 2922, 2929, 2930, 2931, 2949, and 3011, is that the appraisement of the customs officers shall be final, but that all other questions as to rate and amount of duties, after the importer has taken the prescribed steps, shall be reviewed in an action at law to recover duties unlawfully exacted; that the valuation by the customs officers is not open to question in an action at law, so long as the officers acted without fraud and "within the power conferred by statute." *Hilton v. Merritt*, 110 U. S. 97; *Oelbermann v. Merritt*, 123 Id. 356, 362, 363; 22 Blatch. 41; 19 F. R. 408. Each act altering the tariff revenue system must be considered, and no disturbance allowed beyond the clear intention of Congress. *Saxonville Mills v. Russell*, 116 U. S. 13; 1 F. R. 118.

SECT. 2899.—Points of practice are discussed in *Powell v. Redfield*, 4 Blatch. 45.

SECT. 2900.—See § 9 of St. 1874, cited § 2837, note, and citation at beginning of this chapter. This statute is intended as a discouragement to fraud, and to prevent efforts to escape the legal rates of duties. *Bartlett v. Kane*, 16 How. 274; S. T. D. 7260; see 16 A. G. Op. 677. "Original invoice" means the consular invoice only. 16 A. G. Op. 158. The act of 1874, ch. 391 (see note, § 2837), initiated a mode of procedure entirely distinct from that described in this section. *Id.* The penalty cannot be imposed unless the requisite preliminary steps have been taken. 16 A. G. Op. 65. The penalty of twenty per cent is only imposed in case the appraised value exceeds by ten per cent or more the invoiced or entered value of the goods. 15 A. G. Op. 335. The undervaluations to which the penalty has been applied are those made to defraud the government. It is not true of undervaluations of articles subject to a specific tax. 15 A. G. Op. 656. The remission of a forfeiture pursuant to the statute releases the cause of forfeiture, and a fulfilment of the conditions of remission is equivalent to a satisfaction of the cause of action. *Murray v. Arthur*, 13 Blatch. 429. For a case where the plaintiff's own act prevented a recovery from the collector, see *Haas v. Arthur*, 14 Id. 346. Where goods imported and warehoused are to be and are transported to another port in bond for re-warehousing, the entry is to be completed at the former port. *Spring v. Russell*, 1 Lowell, 258. The collector has no discretion. *Falleck v. Barney*, 5 Blatch. 38. It has been held that the additional duty attaches independently of the importer's making or not making an addition to the entry. *Schmaire v. Maxwell*, 3 Blatch. 510; *Goddard v. Maxwell*, *Id.* 131; *Morris v. Maxwell*, *Id.* 143; *Vaccari v. Maxwell*, *Id.* 368. The appraisal must conform to the statute. *Howland v. Maxwell*, 3 Blatch. 146; *Carnes v. Maxwell*, *Id.* 420; *Schneider v. Barney*, 6 F. R. 150. In these cases there was no appraisal on the entry before the correct invoice was produced, and there was no fraudulent undervaluation; but for a case distinguishable, see *Harriman v. Maxwell*, 3 Blatch. 421. See also *Morris v. Robertson*, 37 F. R. 199. The acts of 1842 and 1846 do not subject a manufacturer to additional or penal duties, and the words "procured otherwise than by purchase" were not in the act of 1846. See *Ballard v. Thomas*, 19 How. 382; *Crowley*



*v. Maxwell*, 3 Blatch. 383; *Christ v. Maxwell*, Id. 129. See also *Durand v. Lawrence*, 2 Id. 396; *Thomson v. Maxwell*, Id. 385; *Belcher v. Lawrason*, 21 How. 251. "Value" is used in the sense of price. Dev. 75; *Manhattan Gas Light Co. v. Maxwell*, 2 Blatch. 408. There is no assessment on charges and commissions. *Sampson v. Peaslee*, 20 How. 571. See *Grinnell v. Lawrence*, 1 Blatch. 346. The date of sailing is the true period of exportation. This subject, as determined by statutes and decisions, is considered in *Sampson v. Peaslee*, *supra*, 578. Each of two invoices must stand on its own footing, and the customary examination satisfactory to the merchant appraisers is sufficient. Id. 580. Congress has not imposed the increased duty upon a misstatement in the invoice of the quantity of articles imported, but upon an undervaluation of prices. *Manhattan Gas Light Co. v. Maxwell*, 3 Blatch. 405. See, further, *Ballard v. Thomas*, 19 How. 382; *Stairs v. Peaslee*, 18 Id. 521; *Maxwell v. Griswold*, 10 Id. 242; *Marriott v. Brune*, 9 Id. 619; 16 A. G. Op. 677. A reduction of price on account of prompt payment does not vary the invoice price of an imported article. *Ballard v. Thomas*, 19 How. 382; *Brown's Case*, 1 Ct. Cl. 377. The additional duty is not to be refunded, as a drawback, upon re-exportation. *Bartlett v. Kane*, 16 How. 271. See *Stairs v. Peaslee*, 18 How. 521. The word "country" in revenue laws means all possessions of a foreign state, subject to the same control. Id. 526. Appraisers cannot assess goods at less than the invoice or entered value even though their market value is lower at the time and place of exportation. *Kimball v. Collector*, 10 Wall. 436. When a valuation of molasses in casks in an invoice is correct, but the quantity is less than that found on gauging, there is no penalty; otherwise where the invoice does not specify the number of gallons, the case being one of undervaluation. *Yznaga v. Redfield*, 4 Blatch. 469. Previous to the act of 1851 (which is the foundation of the present law), the time when the value of the article in the foreign market was to be ascertained, was the time of purchase; by the act of 1851, it is the time of exportation. *Ballard v. Thomas*, 18 How. 382.

"*The duty shall not be assessed on an amount less than the invoice or entered value.*" These words do not refer to the deficiency under § 2921, but apply to the value only. *Brune v. Marriott*, Taney, 132; 9 How. 619. They were held applicable to the valuation of wools, to determine the rate of duty chargeable upon them under §§ 2907, 2908, and 17 St. 230. *Saxonville Mills v. Russell*, 116 U. S. 13; 1 F. R. 118. Whatever is put down in the invoice and entry cannot be diminished, although the cost of the goods and packing was included, unless the invoice or entry shows the cost and that it was included. *Oberteuffer v. Robertson*, 116 U. S. 516; 24 F. R. 852. The reduction of foreign coin named in the invoice to our money should conform to a statute, going into effect before entry, although after exportation. *Heinemann v. Arthur*, 120 U. S. 82. This provision is applicable to entries under the act of 1874, ch. 391, §§ 9, 10. 16 A. G. Op. 472. That this provision, with slight alterations, is to be found in all laws upon entries subject to *ad valorem* duties since the statute of 1846, ch. 74, see Id.; *Kimball v. Collector*, 10 Wall. 436. The intention was to prevent the appraisement from prevailing over the invoice, in case the latter disclosed a greater value than the former. 11 A. G. Op. 534; *Lillie v. Redfield*, 4 Blatch. 41. This provision is not found in the act of July 14, 1832. *Rankin v. Hoyt*, 4 How. 327; *Kimball v. Collector*, *supra*.

SECT. 2901. — The cited provision superseded a part of 4 St. 410, ch. 147, § 4, and § 14 of 4 St. 593, ch. 227. 2 Com. D. 1398. There must be, in substance and effect, a faithful personal examination by the reappraisers of the number of packages which are required to be examined and appraised, or such an examination of the samples drawn from such packages as is equivalent to an examination of the packages themselves. If such an examination is not had, the reappraisal is invalid, and, the excess of duty or the penalty that is imposed by reason of any increased valuations above those stated in the invoice is illegally imposed. *Ystalifera Iron Co. v. Redfield*, 21 Blatch. 311; 23 F. R. 650. It



has been held that where the jury find fraud, they may condemn the whole package or invoice, though containing other goods correctly valued. *Buckley v. United States*, 4 How. 261. The merchant appraiser must open, examine, and appraise the packages designated, and, in a suit for duties paid under protest, an importer may show that the provisions of the statute have not been complied with, and the merchant appraiser is a competent witness. *Oelbermann v. Merritt*, 123 U. S. 356; 22 Blatch. 41; 19 F. R. 408; *Mustin v. Cadwalader*, 123 U. S. 369; *Yznaga v. Peaslee*, 1 Cliff. 493; *Converse v. Burgess*, 18 How. 413; 2 Curtis, 216. For cases under early statutes, see *United States v. Ten Cases*, 2 Paine, 162; *Wright v. United States*, Id. 184; *United States v. One Case*, 5 N. Y. Leg. Obs. 247; *United States v. Twenty-eight Packages*, Gilpin, 306; *United States v. A Package*, Id. 338. See note, § 2930.

SECT. 2902. — See § 14 of St. 1874, cited § 2837, note, and notes, §§ 2906, 2907, 2908. The cited provision of 1842 superseded 4 St. 591, ch. 227, § 7, and 4 St. 273, ch. 55, § 8. 2 Com. D. 1399. The history of this section is touched upon in *Belcher v. Lawrason*, 21 How. 254. Where power is delegated and is to be exercised according to the party's discretion, the acts done are valid; the only questions between an individual claiming a right thereunder and the public, or any person denying their validity, being power in the officer and fraud in the party; all other questions are settled by the decision made or the act done, unless an appeal is provided for. *Bartlett v. Kane*, 16 How. 263, 272. See *Belcher v. Linn*, 24 How. 522; *Kimball v. Collector*, 10 Wall. 453; *United States v. Earnshaw*, 12 F. R. 283, 287. Evidence may be obtained wherever it is to be found. *Goodsell v. Briggs*, 1 Holmes, 299. The importer must rely upon the fairness and judgment of the appraisers. The fact that he was ignorant of the testimony and had no chance to meet it or cross-examine is no objection. *Auffmordt v. Hedden*, 30 F. R. 360. The postponement of a hearing is within the discretion of the appraisers. *United States v. Earnshaw*, 30 F. R. 672. If a defendant declines to answer a question which the appraisers transcend their authority in asking, no penalty is incurred. *United States v. Doherty*, 27 F. R. 730. There is nothing in 22 St. 488, that modifies, even by implication, the duties of appraisers, as declared in this section. *United States v. Gabriel*, 36 F. R. 888. It was held that an examination from samples drawn some weeks previously, is not a compliance with this section. *Converse v. Burgess*, 18 How. 413. Also that the cost of sacks, in which salt is shipped, must be added to the market value. *Barnard v. Morton*, 1 Curtis, 404. Duty should be assessed on the quantity imported, not on the quantity shipped. *Marriott v. Brune*, 9 How. 619; *United States v. Southmayd*, Id. 637. The Secretary of the Treasury has no legal power to direct the judgment of the appraisers. *Gray v. Lawrence*, 3 Blatch. 117. Under § 16 of the act of 1842, it was held that the collector might take the time of shipment from abroad as the time of purchase, unless otherwise notified. *Crowley v. Maxwell*, 3 Blatch. 401. If iron is purchased in Wales, sent to Liverpool, and thence shipped to New York, Liverpool is the "principal market" of the country of production. *Goddard v. Maxwell*, 3 Blatch. 131. See *Stairs v. Peaslee*, 18 How. 521. See *United States v. Gabriel*, 36 F. R. 888; S. T. D. 8137.

SECT. 2903. — The President cannot fix an arbitrary value to the depreciated foreign currency, without regard to its intrinsic value as compared with our money; and a consular certificate to an invoice, as to the value of the foreign currency, is only *prima facie* evidence. *De Forest v. Redfield*, 4 Blatch. 478. Where an importer gives a bond to produce a consular certificate as to the value of a depreciated foreign currency, he must, to recover, produce it within the time prescribed. *Cousinery v. Schell*, 34 F. R. 272. "The acts of the Treasury Department, to which matters affecting the revenue appropriately belong, are, in law, the acts of the President (*Wilcox v. Jackson*, 13 Pet. 498), and, accordingly the instructions given by the Secretary of the Treasury, either by general circulars to collectors, or by specific directions in a particular case, are to be regarded by



the court as regulations in that behalf established by the President." *Dutilh v. Maxwell*, 2 Blatch. 541, 544. See *Cramer v. Arthur*, 102 U. S. 612. It is not the duty of the collector to demand, but of the importer to present a consular certificate, or else offer a bond to produce one. *Rich v. Maxwell*, 3 Blatch. 127. Where an importer pays under protest without presenting or offering to present a certificate at entry, he cannot afterwards present one and recover the excess of duty paid on the difference between the paper value of the invoice and its specie value. *Dutilh v. Maxwell*, *supra*. Where the Treasury requires a consular certificate as to the value of depreciated currency in specie, it is not absolutely necessary that such certificate should be presented with the invoice at entry, but a bond may be given to produce it; and if the collector refuses to accept it, or if an offer is made to produce one and he does not exact a bond, the importer stands as if a certificate had been presented with his invoice upon making entry. *Craig v. Maxwell*, 2 Blatch. 545. It has been held that where goods are entered at specie value, being more than ten per cent less than paper value, the penal duty of twenty per cent cannot be exacted, though the appraisers return an assessment equal to the nominal or paper value. *Fiedler v. Maxwell*, 2 Blatch. 552. Where an importer imports from the same port twice within two months, the first invoice having a consular certificate refused by the collector, the second being without one, and no offer being made to produce it, he may recover the excess of duty on both importations, as it will be presumed that the collector the second time acted with knowledge of the certificate presented the first time, and with an understanding with the importer that the latter would not be allowed a deduction from the paper valuation stated in the entry, upon that or any other proof. *Reynolds v. Maxwell*, 2 Blatch. 555. Generally as to the government exacting duties only on the specie value of goods in the country of production or exportation, and as to the importer, when the purchase-price is exhibited in a depreciated currency, proving as a fact *in pais*, what was the actual value of the nominal currency in the foreign market, see *Dutilh v. Maxwell*, *supra*, 542; *Grant v. Maxwell*, 2 Blatch. 220; *Loewenstein v. Maxwell*, *Id.* 401. See also *Fiedler v. Maxwell*, *Id.* 552; *Alsop v. Maxwell*, *Id.* 557; *Riley v. Maxwell*, *Id.* 558, note.

SECT. 2905. — In proving the market value of goods in a foreign market letters offering to sell, written and received by persons not parties to the suit, are admissible without proof that the writers are dead, if written in the ordinary course of business and contemporaneously with the transactions forming the subject of the suit. *Fennerstein's Champagne*, 3 Wall. 145.

Under 5 St. 563, it was held that where sugars were shipped from Cuba to Halifax and thence imported into the United States, they must pay duty upon their market value in Cuba when shipped from Halifax with Halifax charges, but without adding freight from Cuba to Halifax. *Barnard v. Morton*, 1 Sprague, 186. See *Grinnell v. Lawrence*, 1 Blatch. 346.

SECT. 2906. — The cited provision superseded 9 St. 629, ch. 38, § 1, and 5 St. 563, ch. 270, § 16. 2 Com. D. 1402. See notes, §§ 2902, 2905, 2907, 2908. Under a usage for the trade to invoice goods at nominal values and reduce them by discounts or rebates, the appraisers having valued the goods according to instructions from the Treasury and not according to their judgment, it was held that the sum to which the invoice was reduced represents the real invoice price. *Gray v. Lawrence*, 3 Blatch. 117. Where the appraisers do not appraise or ascertain the market value, but simply construe the invoice, their valuation is not conclusive. *Arthur v. Goddard*, 96 U. S. 145; 13 Blatch. 438. See *Ballard v. Thomas*, 19 How. 382.

Various questions as to costs, charges, &c., arising anterior to the passage of the Revised Statutes are found in *Barnard v. Morton*, 1 Curtis, 404, 412; *Grinnell v. Lawrence*, 1 Blatch. 346, 350; *Belcher v. Linn*, 24 How. 533, 535; *Knight v. Schell*, *Id.* 526, 530; *Wilson v. Maxwell*, 2 Blatch. 16; *Cobb v. Hamlin*, 3 Cliff. 191. The period of exportation



is the day of sailing from the foreign ports. *Sampson v. Peaslee*, 20 How. 571; *Detrick v. Balfour*, 7 Sawyer, 353; 8 F. R. 468.

SECTS. 2907, 2908. — See notes to preceding sections of this chapter. Repealed by St. March 3, 1883, ch. 121, § 7 (22 St. 523), which also repeals § 14 of 18 St. 189 (see note, § 2837) and provides —

“that hereafter none of the charges imposed by said sections or any other provisions of existing law shall be estimated in ascertaining the value of goods to be imported, nor shall the value of the usual and necessary sacks, crates, boxes, or covering of any kind be estimated as part of their value in determining the amount of duties for which they are liable: — *Provided*, That if any packages, sacks, crates, boxes, or coverings of any kind shall be of any material or form designed to evade duties thereon, or designed for use otherwise, than in the bona fide transportation of goods to the United States, the same shall be subject to a duty of one hundred per centum ad valorem upon the actual value of the same.”

The cited act of 1866 superseded 9 St. 629, ch. 38, § 1 (last clause); 5 St. 563, ch. 270, § 16; 4 St. 593, ch. 227, § 15; 3 St. 732, ch. 21, § 5; 3 St. 369, ch. 51; and 13 St. 493, ch. 80, § 7. 2 Com. D. 1404.

The meaning of the above statute is touched upon in *Oberteuffer v. Robertson*, 116 U. S. 511, 512, reversing 24 F. R. 852. See *Morris v. Cadwalader*, 33 Id. 243. It has been held not to apply to cartons or boxes containing hosiery and gloves (*Oberteuffer v. Robertson, supra*); to boxes containing safety matches for use (*United States v. Thurber*, 28 F. R. 56); to various other small boxes and coverings (A. G. Op. Sept. 17, 27, 1886, in S. T. D. 7766, 7791); overruling various Treasury decisions; to brokerage commissions and packing (*Glanz v. Spalding*, 24 F. R. 20); to barrels in which Portland cement is imported. *Meyers v. Shurtleff*, 11 Sawyer, 50; 23 F. R. 577. In *United States v. Thurber, supra*, transportation, for the purposes of the case, is held to include transportation to the consumer so long as the boxes are unbroken. In *Elmes on Customs*, § 504 *et seq.*, it is said that it may be still questioned whether the coverings of many articles do not enter into the estimate of the dutiable value, not by addition to the actual market value but by merger. And in *Rosenstein v. Magone*, 34 F. R. 120 (which was a case of boxes containing matches), *Oberteuffer v. Robertson, supra*, is followed; but the statement that the proviso means that the boxes are not subject to duty if not of a material, &c., designed to evade it, and are designed for the bona fide transportation of the goods is severely criticised. See S. T. D. 8104.

This provision did not take effect until July 1, 1883. *Babson v. Robertson*, 34 F. R. 203. It has no reference to the specific duty imposed on tin cans containing any kind of fish and neither expressly nor by implication repeals the act of February 8, 1875, § 4 (18 St. 307). *Russell v. Worthington*, 23 F. R. 248. “When there has been a long acquiescence in a regulation, and by it rights of parties for many years have been determined and adjusted, it is not to be disregarded without the most cogent and persuasive reasons.” *Robertson v. Downing*, 127 U. S. 607, and cases cited. In this case the importation was in 1882, the year before 22 St. 523 was passed. See S. T. D. 8151, 8236, 8264, 8388, 8716.

SECT. 2909. — Repealed by 19 St. 247, ch. 69.

SECT. 2911. — The cited act was deemed to supersede 4 St. 409, ch. 147, § 3. 2 Com. D. 1406.

SECT. 2913. — The court will not enjoin appraisers of the value of gloves from carrying samples out of the district in which the importation was made for the purpose of securing evidence as to their value. *Goodsell v. Briggs*, 1 Holmes, 299.

SECT. 2914. — See Schedule E, p. 575. Color is made the sole test. *Merritt v. Welsh*, 104 U. S. 702, 703. The furnishing of standards by the Secretary is to insure certainty and uniformity. *Id.*

SECT. 2915. — See note, § 2914.

SECT. 2920. — Where the gauging is necessary to determine that the quantity was not accurately stated, the importer or merchant must bear the expense. *Casado v. Schell*, 33



F. R. 332. See *Balfour v. Sullivan*, 8 Sawyer, 648; 17 F. R. 231; *Manhattan Gas Light Co. v. Maxwell*, 2 Blatch. 405. See S. T. D. 7991.

SECT. 2921. — The importer is entitled under the statute to the exoneration, upon the fact of deficiency appearing, without showing how it occurred. *Balfour v. Sullivan*, *supra*.

SECT. 2922. — See note, § 2902. The act of 1842 was deemed to supersede 4 St. 592, ch. 227, § 8. 2 Com. D. 1408. Where no reasons appear, such as concealment or fraud, or the absence of the ordinary appropriate proofs, the inquiry is neither reasonable nor within the limits of the appraiser's authority as to the price in dollars at which the manufacturers contracted to deliver certain similar goods at the defendant's store in New York. *United States v. Doherty*, 27 F. R. 730. See *Belcher v. Lawrason*, 21 How. 255.

SECT. 2923. — See note, § 2922.

SECT. 2925. — See note, § 2825.

SECT. 2926. — See § 24 of St. 1874, under § 2837, note. By 20 St. 327, ch. 125, § 11, imported liquors are to be placed in public stores, inspected and stamped. By "proper officers" are meant "customs officers" and not port-wardens appointed under State laws. 13 A. G. Op. 244. For a case where it was held that the charges were legal, see S. T. D. 8993. See also *Tyack v. Brumley*, 1 Barb. (Chan.) 540; *Shelton v. Collector*, 5 Wall. 113; 1 Cliff. 388.

SECT. 2927. — See note, § 2928. "Port where such merchandise has been landed" means port of destination, and the words "after the landing of such merchandise" mean after the landing there. 15 A. G. Op. 8. See *Shelton v. Collector*, 5 Wall. 113; 1 Cliff. 388. See S. T. D. 8391, 8461.

SECT. 2928. — This relates only to merchandise from a wreck, and does not affect proceedings under § 2927. What was said in *Shelton v. Collector*, *supra*, to the contrary is disapproved. *United States v. Phelps*, 107 U. S. 320; 20 Blatch. 129. See *Peisch v. Ware*, 4 Cranch, 355; *The Waterloo*, Blatch. & H. 114. The voyage of importation has been held to include the period between actual departure from the port of exportation and actual arrival at the port of destination here. S. T. D. 3869. The bill of lading is only *prima facie* evidence of the shipment. *The Lady Franklin*, 8 Wall. 325. See *The Delaware*, 14 Id. 579; *The J. W. Brown*, 1 Biss. 76. See S. T. D. 8279.

SECT. 2929. — The collector can order a reappraisement of goods imported, after one appraisement, and permit of delivery to the importer, and the actual delivery of the same. *Iasigi v. Collector*, 1 Wall. 375; *United States v. McDowell*, 21 F. R. 563; 15 A. G. Op. 335. But the question might be different had the goods passed beyond the collector's reach. *Id.* For a case where the reappraisal was held to be invalid, see *Spring v. Russell*, 1 Lowell, 258.

SECT. 2930. — The cited acts superseded 3 St. 736, ch. 21, § 18. 2 Com. D. 1411. The merchant appraiser must be familiar with the character and value of the goods, and § 2901 requires him to open, examine and appraise the packages designated by the collector. An importer may show that these provisions have not been complied with, and the merchant appraiser is a competent witness for such purpose. *Oelbermann v. Merritt*, 123 U. S. 356; 22 Blatch. 41; 19 F. R. 408; *Mustin v. Cadwalader*, 123 U. S. 369. The remedy of the importer when dissatisfied only with the addition to the entry of items for cartons and packing, and not with the appraisement, is to protest and appeal, not to apply for a reappraisement. *Oberteuffer v. Robertson*, 116 U. S. 499; 24 F. R. 852. No charge for the services of a reappraisement by merchant appraisers can be imposed upon the importer either directly or indirectly except by act of Congress. Article 472 of the Treasury regulations of 1884 is void to the extent that it attempts to do so. *Hedden v. Iselin*, 24 Blatch. 455; 31 F. R. 266; 28 Id. 416, distinguishing *Fielden v. Lawrence*, 3 Blatch. 120. See, also, *Morrill v. Jones*, 106 U. S. 466; *Auffmordt v. Hedden*, 30 F. R. 360; S. T. D. 7235. It has been held that where the proceedings of the government appraisers were



not legal, the importer might refuse to pay on account of the defects, specifying them in his protest; but if he appealed to the merchant appraisers and their proceedings were regular, the defects in the proceedings of the government appraisers were rendered immaterial. *Burgess v. Converse*, 2 Curtis, 216; 18 How. 413. The right to be present at a reappraisement of his goods cannot be denied to an importer. *Auffmordt v. Hedden*, 30 F. R. 360. See *Bangs v. Maxwell*, 3 Blatch. 135; S. T. D. 6957. This section applies to goods imported both by the manufacturer and purchaser. *Bannendahl v. Redfield*, 4 Blatch. 233. It has been held lawful for the importer and collector to agree in writing to submit samples to the board of general appraisers and to abide by their decision, as though made by regular merchant appraisers; and in the absence of fraud such decision is final and conclusive. *Belcher v. Linn*, 24 How. 508. Where the appraisal was made from samples regularly drawn by the sampler, and, upon appeal to merchant appraisers, such samples were produced by one of the local appraisers, no objection as to their identity being taken by the importers, it was held that all objections which might have been taken at the appeal were waived. *Yznaga v. Peaslee*, 1 Cliff. 493. But see further as to reappraisement by samples, *Burgess v. Converse*, 2 Curtis, 216; 18 How. 413; *Sampson v. Peaslee*, 20 How. 571; *Gibb v. Washington*, McAll. 430. The merchant appraisers should be sworn by the collector. *Vaccari v. Maxwell*, 3 Blatch. 368, 376; S. T. D. 7978. But it has been held that whenever an oath is required to be administered by a collector, a deputy collector may administer it. *Schmaire v. Maxwell*, Id. 408. See *United States v. Barton*, Gilpin, 439, 446. To obtain reappraisement the notice should ask for it. *Fielden v. Lawrence*, 3 Blatch. 120. Construing the words "shall decide between them" to mean that the collector shall adopt a value of his own, makes the collector the actual appraiser. See S. T. D. 3840. "It is a reasonable supposition that the object of the provision is that the board of appraisers being thus constituted may determine the question by the voice of a majority, as in the case of any other board of chosen referees." *Elmes on Customs*, § 550. If the appeal is abandoned, the original appraisal is final and conclusive. *Schmaire v. Maxwell*, 3 Blatch. 408; *Bartlett v. Kane*, 16 How. 123. But a notice of dissatisfaction, accompanied by a condition not recognized by law, is no appeal, and the collector has no right to regard it. *Schmaire v. Maxwell*, *supra*. An appraisal may be had of goods not entered or invoiced, but there can be no reappraisement on appeal without entry and appraisal. *Twenty-eight Cases*, 2 Ben. 63. The decision of the merchant appraisers on appeal, or, if they do not agree, then that of the collector, as to the value of the goods, is final. The United States are bound equally with the importer, so that the valuation as thus fixed cannot be again inquired into, either by the Secretary or by the courts, in any subsequent suit. *United States v. Leng*, 18 F. R. 15, 22. See *Stairs v. Peaslee*, 18 How. 521, 527; *Tucker v. Kane*, Taney, 146; *Iasigi v. Collector*, 1 Wall. 375, 383; *Tappan v. United States*, 2 Mason, 398; *United States v. Campbell*, 18 F. R. 818; *United States v. McDowell*, 21 Id. 563; *Morris v. Maxwell*, 3 Blatch. 143; *Roller v. Maxwell*, Id. 142; *McCall v. Lawrence*, Id. 360; *Hilton v. Merritt*, 110 U. S. 97; *Yanada v. Spalding*, 24 F. R. 21; *Stewart v. Merritt*, 2 Id. 531; *Ystalifera Co. v. Redfield*, 23 Id. 650. A refusal to do his duty in having the appraisal revised would give the plaintiff a right of action against the collector. *Schmaire v. Maxwell*, 3 Blatch. *supra*, 412. If one appraiser reports to another that the goods are "merchantable" and the latter fixes the value, the appraisal is invalid. *Greely v. Thompson*, 10 How. 225. But see *Maxwell v. Griswold*, Id. 242; *McCall v. Lawrence*, 3 Blatch. 360. An appraiser is a quasi judge. *Gibb v. Washington*, McAll. 430. See *Rankin v. Hoyt*, 4 How. 327; *Greely v. Thompson*, 10 Id. 225; *Oelbermann v. Merritt*, *supra*; *Wills v. Russell*, 1 Holmes, 228. The denial of the right to bring an action at law to recover duties paid under an alleged excessive valuation of dutiable merchandise does not violate the Constitution. *Hilton v. Merritt*, 110 U. S. 97, 107. See *Tappan v. United States*, 2 Mason, 393. See S. T. D. 8137, 8295.



SECT. 2931. — See notes, §§ 2907, 2930, 2932, 2984, 3011, 3012, 3012½, 3013. The cited act was deemed to supersede 11 St. 195, ch. 98, § 5. 2 Com. D. 1412. By St. June 19, 1878, ch. 318 (20 St. 171), the provisions of this section are not to apply —

“to cases of the payment of tonnage-tax on vessels where the Secretary of the Treasury and Attorney-General shall be satisfied that the exaction of such tax was in contravention of treaty provisions; and he may draw his warrant for the refund of the tax so illegally exacted, as is provided in R. S. § 3012½: *Provided*, That this act shall not be construed to authorize the refunding of any tonnage-duties whatever exacted prior to June 1, 1862, nor shall it apply to cases of the payment of tonnage-tax heretofore made on vessels other than those of the Hanseatic Republics and Sweden and Norway.”

Where a tonnage-tax was collected in contravention of a treaty it was held that 20 St. 171 did not authorize an allowance of interest. 16 A. G. Op. 103, 275.

In early times the collector, on notice of dissatisfaction and protest, retained the money collected to await the result of the importer's common-law suit against him personally. By 5 St. 348, ch. 82, § 2, collectors were to pay the money into the Treasury, the Secretary to refund, by warrant, when satisfied of the illegal payment, &c. This was held to take away the common-law right of action. *Carey v. Curtis*, 3 How. 236. Immediately by 5 St. 727, ch. 22, (Rev. Stats. § 3011), Congress provided that nothing in 5 St. 348 should take away this common-law right and that the protest should be in writing and should set forth the grounds of objection. By 11 St. 195, ch. 98, § 5, the decision of the collector as to the liability to duty or exemption was to be conclusive against the owner, importer, &c., unless notice or protest was made within ten days after entry. It provided for appeal to the Secretary of the Treasury, whose decision was to be final unless suit was brought within 30 days. This act was the foundation of 13 St. 214, which corresponds to § 2931. The differences between 11 St. 195, § 5, and § 2931, are these: then the collector's decision was final as to “liability to duty or exemption therefrom” — now it is final “as to the rate and amount of duties” (see *Schneider v. Barney*, 13 Blatch. 37); then only “against the owner, importer or consignee, or agent” — now “against all persons interested;” then the protest was to be made “within ten days after such entry” — now “within ten days after the ascertainment and liquidation of the duties.” It was held under 5 St. 348, and 11 St. 195, that a prospective protest was legal, that is, that one protest as to a class of merchandise might, by its terms, be applied to all future importations of a similar class by the same importer. *Brune v. Marriott*, Taney, 132; 9 How. 619; *Steezman v. Maxwell*, 3 Blatch. 365; *Hutton v. Schell*, 6 Id. 48; *Wetter v. Schell*, 11 Id. 193; *Herman v. Schell*, 18 F. R. 891. See *Warren v. Peaslee*, 2 Curtis, 231; *Ullman v. Murphy*, 11 Blatch, 354; *Fauche v. Schell*, 33 F. R. 336; *Sorchan v. Schell*, Id. 580. This was changed by the present law to the effect that the notice should be given the collector “on each entry.” Some of the changes are adverted to in *Barney v. Watson*, 92 U. S. 449. The object of a written protest is to protect the collector and the government. *Hutton v. Schell*, 6 Blatch. 48, 56; *Curtis v. Fiedler*, 2 Black, 461, 480; *Warren v. Peaslee*, *supra*. If there is no protest the exaction is not illegal or the payment involuntary, but the importer is held to acquiesce. *Nichols v. United States*, 7 Wall. 122; *United States v. Campbell*, 10 F. R. 816; *United States v. Clement*, Crabbe, 499; *Lawrence v. Caswell*, 13 How. 488. The collector is not required to give the importer notice of the ascertainment and liquidation, and the ten days for protest run from the time appointed for liquidation, and not from the time of notice. *Westray v. United States*, 18 Wall. 322; S. T. D. 6895. So there is no obligation to give notice of the Secretary's decision on appeal; and if the importer does not get such notice, the time for the commencement of the period of limitation will nevertheless run against him. *Chung Wune v. Shurtleff*, 7 Sawyer, 468; 10 F. R. 239.

It has been held that despite the language of this section, the liquidation of the collector is not final and conclusive against the United States (*United States v. Phelps*, 17 Blatch. 312); otherwise as to the decision of the Secretary of the Treasury on the appeal. *United*



*States v. Leng*, 18 F. R. 15. But the provision of finality in the act of June 22, 1874, has been held to apply to the government. *United States v. Campbell*, 10 F. R. 816; *Porter v. Beard*, 15 Id. 380; 124 U. S. 437; *United States v. Phelps*, 17 Blatch. 312. The year named in said act has been held to run from the time of the presentation to the collector of the "entry" by the importer, and not from the time of the first liquidation. *United States v. Frazer*, 10 Ben. 347. But even within the year there can be no valid re-liquidation in the absence of the merchandise or of samples. *United States v. Frazer, supra*; *Iasigi v. Collector*, 1 Wall. 375. The phrase "the decision of the collector of customs" is synonymous with "ascertainment and liquidation of duties." *United States v. Cousinery*, 7 Ben. 251. And the ascertainment and liquidation by the proper officers in the collector's office or department is the decision of the collector. Id. 257. The construction that the decision of the collector is conclusive is not repugnant to the Fifth Amendment to the Constitution. Id. 258. See *Tappan v. United States*, 2 Mason, 393. "Final and conclusive" refer to a valid liquidation, not a void one; and in this case the liquidation and appraisement were held to be invalid. *United States v. Thurber*, 28 F. R. 56.

This and §§ 2931, 3011 are to be construed together. *Stewart v. Merritt*, 2 F. R. 531. "The opinion of the Solicitor of the Treasury is that the ascertainment and liquidation of the duties mentioned in this section is the liquidation which takes place on the original import entry, whether such entry be made for warehouse or consumption, and that whenever such liquidation is made on the import entry, the date of it is the time from which the statute begins to run." S. T. D. 6895. Protests and appeals are not valid if filed prior to the ascertainment and liquidation of the duties. *Watt v. United States*, 15 Blatch. 29. See S. T. D. 8398. And protests and appeals filed before the liquidation of the entry, and found on file at the date of such liquidation are invalid, notwithstanding the custom of the Department and of the customs officers to accept them as proper. 16 A. G. Op. 197. See S. T. D. 8476. Judge Shipman rendered a decision in the United States circuit court at New York in the case of *Keyser v. Arthur* (not reported), being subsequent to that in *Watt v. United States*, implying that "the exaction by the collector on entry of a duty, was such a liquidation as to justify the filing of protest and appeal therefrom, even although such first liquidation received a final revision on the part of the collector to complete the necessary accounts of his office." The Attorney-General, in 16 A. G. Op. 355, expresses reluctance to give an opinion on questions suggested by the decision of Judge Shipman. "The claimant must, in his protest, point out to the collector by positive and direct notice every particular of fact and of law which he relies upon as protecting his goods from the payment demanded." *Thomson v. Maxwell*, 2 Blatch. 385, 392. Technical precision is not required and the courts are liberal in their construction. *Arthur v. Dodge*, 101 U. S. 34; *Davies v. Arthur*, 96 Id. 148, 151; 13 Blatch. 34; *Arthur v. Morgan*, 112 Id. 495, 501. If a protest, "taken in connection with the other contents of the paper on which it is written, and to which it refers, makes known what was protested against, it satisfies the statute in this particular." *Swanston v. Morton*, 1 Curtis, 294, 296; *Kriesler v. Morton*, Id. 413. The importer is confined to the grounds of objection declared in his protest. *Davies v. Arthur, supra*; *Chung Yune v. Kelly*, 8 Sawyer, 415; 14 F. R. 639; *Brown v. United States*, 1 Ct. Cl. 377; *Norcross v. Greely*, 1 Curtis, 114; *Swanston v. Morton*, Id. 294; *Kriesler v. Morton*, Id. 413; *Burgess v. Converse*, 2 Id. 216; 18 How. 413; *Focke v. Lawrence*, 2 Blatch. 508; *Hertz v. Maxwell*, 3 Id. 137; *Fielden v. Lawrence*, Id. 129; *Crowley v. Maxwell*, Id. 401. The necessity of complying with the law as to the form of a protest is touched upon in *Mason v. Kane*, Taney, 173. A protest "against any greater rate of duties being charged upon hay shipped to or by us from Canada to the United States . . . than at the rate of ten per centum ad valorem, for the reason and on the grounds that no higher rate than ten per centum can lawfully or properly be



charged on hay imported under the laws of the United States concerning duties on imports," was held to be sufficient in *Frazee v. Moffitt*, 20 Blatch. 267; 18 F. R. 584.

A protest stated the rate which the merchandise should pay, without setting out under what section, schedule, clause, or paragraph, or under what name the merchandise was claimed to be dutiable. It was held that the protest was invalid, there being more than one clause or paragraph imposing the same rate of duty, and the merchandise not being specifically designated in the act by the same name used in the protest. *Cummins v. Robertson*, 27 F. R. 654. A protest is insufficient which leaves everything to speculation and conjecture. *Smith v. Schell*, Id. 648. See S. T. D. 8005, 8166. A protest "is sufficient if it shows fairly that the objection afterwards made at the trial was in the mind of the party and was brought to the knowledge of the collector." *Arthur v. Morgan*, *supra*, 501. See *Thomson v. Maxwell*, 2 Blatch. 385; *Durand v. Lawrence*, Id. 396; *Loewenstein v. Maxwell*, Id. 401; *Pierson v. Maxwell*, Id. 507; *Cornett v. Lawrence*, Id. 512; *Wilson v. Lawrence*, Id. 514; *Tucker v. Maxwell*, Id. 517; *Craig v. Maxwell*, Id. 545; *Christ v. Maxwell*, 3 Id. 129; *Goddard v. Maxwell*, Id. 131; *Sadler v. Maxwell*, Id. 134; *Bangs v. Maxwell*, Id. 135; *Hertz v. Maxwell*, Id. 137; *Stalker v. Maxwell*, Id. 138; *Roller v. Maxwell*, Id. 142; *Steezman v. Lawrence*, Id. 365; *Warburg v. Maxwell*, Id. 382; *Maillard v. Lawrence*, Id. 378; *Crowley v. Maxwell*, Id. 401; *Schmaire v. Maxwell*, Id. 408; *Schuchardt v. Maxwell*, Id. 397; *Boker v. Bronson*, 4 Id. 472.

The right to appeal and to bring an action to recover duties wrongfully exacted, given by §§ 2931 and 3011, does not have reference to alleged errors in the appraisement of goods, but to the rate and amount of duties imposed on them after the appraisement is made. *Hilton v. Merritt*, 110 U. S. 97; *Oelbermann v. Merritt*, 123 Id. 356; 22 Blatch. 41. An appeal under this or § 2932 is determined when the Secretary makes known his decision to the proper department. The appellant must inform himself of the decision at his peril, the Secretary not being bound to notify him. If the decision is not made within the time specified, the appellant may nevertheless institute suit. The ninety days, within which suit must be brought, begin to run from the date of the decision, if the duties were paid previous thereto, and from the date of payment where they are paid thereafter. 15 A. G. Op. 119. See *Arnson v. Murphy*, 115 U. S. 579; 24 F. R. 355; *Westray v. United States*, 18 Wall. 322; *Shaw v. Grinnell*, 9 How. 471; *Chase v. United States*, 9 F. R. 882; *United States v. Cobb*, 11 Id. 76; *United States v. Earnshaw*, 12 Id. 283; *United States v. Sowers*, 14 Phila. 525; *United States v. McDowell*, 21 F. R. 563; *McLean v. Hager*, 12 Sawyer, 473; 31 F. R. 602. If the decision of the Secretary of the Treasury is delayed more than ninety days after the date of the claimant's appeal, it is at the claimant's option either to sue, pending the appeal, treating the delay as a denial, or to wait until a decision is in fact made, and then sue within ninety days thereafter. The right to sue at all before the final decision of the appeal is permissive and not peremptory, for there is nothing which requires him to sue until such decision has been rendered. *Arnson v. Murphy*, 109 U. S. 238; s. c. 115 U. S. 579. See *James v. Hicks*, 110 Id. 272. And it has been recently held that a suit may be brought before the decision of the Secretary on the appeal. *Moller v. Merritt*, 24 Blatch. 214; 29 F. R. 678. The common-law action recognized as appropriate in *Elliott v. Swartwout*, 10 Pet. 137, has been converted into one based upon statutory liability instead of an implied promise. Among the statutory provisions are the conditions which fix the time when the suit may begin, and prescribe the period at the end of which the right to sue shall cease. The legislation of Congress is necessarily exclusive. Id. See *Arnson v. Murphy*, *supra*. On a liquidation the United States is entitled to recover, in a suit against the importer or consignee, the amount liquidated as duties; and evidence by the defendant to show that the decision of the collector was wrong, is inadmissible. The only remedy of the importer is in a suit to recover the duties, after paying them, in a case where such a suit is permitted by the statute. United



*States v. Phelps*, 17 Blatch. 312; *United States v. Cousinery*, 7 Ben. 251; *Westray v. United States*, 18 Wall. 322; *Watt v. United States*, 15 Blatch. 29. See *United States v. Schlesinger*, *infra*. The proceedings of the Secretary in hearing appeals are quasi judicial, and must be given the force and effect ordinarily given to such tribunals. *United States v. Leng*, 18 F. R. 15. When the decision of the Secretary upon an appeal has been lawfully promulgated and acted upon by a subsequent re-liquidation of duties, it is final and conclusive upon the government, and cannot then be legally recalled by the Secretary, and reversed or modified, either as a part of the same proceeding on appeal, or collaterally by any independent order, for the decision binds the government, as does the appraisal of value in the previous section. *Id.* The proper construction of this section, in view of the fact that § 3011 is in force concurrently with it, is, that the decision of the Secretary is not final and conclusive, except in a case where, after a protest and an appeal, a payment of duties is made in order to obtain possession of the goods, and then a suit is not brought to recover back the duties within the times and under the limitations prescribed by this section. Hence a decision of the Secretary is not final in a case where there have been a payment of estimated duties, a delivery of the goods, a re-liquidation assessing further duties, a protest, an appeal, and a suit against the importers by the United States to recover the further duties. But the defendant may show that the further duties were illegally assessed. *United States v. Schlesinger*, 120 U. S. 109; 14 F. R. 682, explaining *United States v. Cousinery*, *Watt v. United States*, *United States v. Phelps*, *Arnson v. Murphy* and *Westray v. United States*, all *supra*. In view of the provisions of § 3012 it is not indispensable that the declaration should state that the suit is brought within the statutory time. *Beard v. Porter*, 124 U. S. 443. The "suit" spoken of in this section is the "action" given in § 3011. *Arnson v. Murphy*, 115 U. S. 579; 24 F. R. 355. A plaintiff who has brought two suits for causes of action that might have been united in the first, and is met by a defence in the second, that it was not brought within the time required by this section, cannot be allowed to amend his pleadings in the first, and introduce as a new cause of action the one which he cannot sustain in the second suit. *Dieckerhoff v. Robertson*, 24 Blatch. 242; 29 F. R. 781.

In a suit against the collector the burden of proof is on the plaintiff. *Arthur v. Unkart*, 96 U. S. 118, overruling *Wilkinson v. Greely*, 1 Curtis, 429. As to interest, see *Erschine v. Van Arsdale*, 15 Wall. 75; *Redfield v. Ystalyferra Iron Co.*, 110 U. S. 174; *Bartells v. Redfield*, 27 F. R. 286; *Stewart v. Schell*, 31 Id. 65. As to the amount recovered being paid out of permanent appropriations, see § 989 and Title 41.

SECT. 2932. — See note, § 2931. "*All fees, charges, and exactions.*" See *Hedden v. Iselin*, 24 Blatch. 455; 31 F. R. 266; 28 Id. 416; *United States v. Bradley*, 28 Int. Rev. Rec. 75; *United States v. Seidenberg*, 29 Id. 190; S. T. D. 8993.

SECT. 2936. — Amended by 19 St. 247, ch. 69, by inserting the words "to make" after "situated" in the eighth line.

SECT. 2948. — The additional duty of fifty per cent imposed under the act of 1842 (5 Stat. 548) on goods valued at ten per cent or more than the appraised value, though in the nature of a penalty, is not to be so considered under this section, and cannot be distributed amongst the officers of the custom house. *Ring v. Maxwell*, 17 How. 147. *United States v. Collier*, 3 Blatch. 325.

SECT. 2949. — See note, § 3011. The cited provisions superseded 4 St. 592, ch. 227, § 9. 2 Com. D. 1421. The Secretary has no power to set aside the decisions of merchant appraisers, to review them, or to exercise any control over their judgment in arriving at a decision. He may prescribe rules and regulations which they must observe, but such rules are merely modes of proceeding by which the appraisers are to obtain evidence and ascertain the value. The valuation they make under these rules, must be the result of their own impartial judgment, and the Secretary cannot set it aside, because he is of



opinion that it is against the weight of evidence. *Tucker v. Kane*, Taney, 146; *Gray v. Lawrence*, 3 Blatch. 117. See *Aldridge v. Williams*, 3 How. 9; *Oelbermann v. Merritt*, 123 U. S. 356, 362; 22 Blatch. 41; 19 F. R. 408.

SECT. 2950. — See note, § 2549. See 16 A. G. Op. 266; *McCall v. Lawrence*, 3 Blatch. 360.

## CHAPTER VII.

### THE BOND AND WAREHOUSE SYSTEM.

It will be noted that many sections of this chapter confer liberal powers upon the Secretary of the Treasury as to the establishment of Regulations. Reference should also be had to 22 St. 525, § 10, see p. 587, *ante*.

SECT. 2954. — See note, § 2837 (§ 24 of St. 1874 there cited). St. March 24, 1874, ch. 65 (18 St. 24), provides: —

“That from and after the passage of this act importers’ bonded warehouses, to be used for the storage and cleansing of imported rice intended for exportation to foreign countries, may be established at any port of entry in the United States, under such rules and regulations as the Secretary of the Treasury may prescribe.”

St. Sept. 14, 1888, ch. 1018 (25 St. 479), authorizes and directs the Secretary of the Treasury to purchase, or acquire by condemnation, a site, and cause to be erected thereon a commodious fire-proof building, for the use of the United States appraiser, and for other government uses, in New York City; or, in his discretion, a single site for both a new custom-house building and said appraisers’ warehouse, or separate sites for each. St. Aug. 6, 1888, ch. 740 (25 St. 359), provides for the erection of a public building in Chicago, to be used as an appraiser’s warehouse, and for other purposes. St. June 6, 1888, ch. 361 (25 St. 169), provides for a building for the use of the custom-office at Vicksburg, Miss.

SECT. 2954. — See S. T. D. 8402.

SECT. 2960. — Goods, on which the duties remain unpaid, stored in a United States bonded warehouse, are in the possession of the United States, and an order by the owner and vendor directing the warehouseman to deliver them to the vendee, even though accepted by the warehouseman, does not constitute a constructive or symbolical delivery, or a receipt or acceptance of the goods, sufficient to satisfy the Statute of Frauds. *Re Clifford*, 2 Sawyer, 428. See *Harris v. Dennie*, 3 Pet. 292; *Corkle v. Maxwell*, 3 Blatch. 413. For an old case where an importer deposited the goods in his own store, see *Clark v. Peaslee*, 1 Cliff. 545.

SECT. 2961. — It is immaterial that the words of the bond and the statute are not identical. *Ellsworth v. United States*, 14 Ct. Cl. 382.

SECT. 2962. — Where an importer enters goods for warehousing, but before they are removed to the warehouse, applies for a permit to land them for consumption, which is granted upon condition that he pay one half month’s storage in conformity with instructions from the Treasury, it was held that such a charge is not legal, but that the payment was voluntary even though paid under protest, as the importer might have allowed the goods to go to the warehouse and have withdrawn them from there; and hence he could not recover. *Irvin v. Schell*, 5 Blatch. 157. It has been held that the collector is entitled to a charge of “half storage,” where goods are stored in private warehouses by the importer without expense to the government, where such an agreement is entered into between the collector and importer that the latter may derive the benefit of the warehouse system; and such goods are “warehoused.” *Atkins v. Peaslee*, 1 Cliff. 446; *Corkle v.*



Maxwell, 3 Blatch. 413. And an importer is not deprived of the right to deposit the goods in his own store by being required to pay half storage, for the store is a "private bonded warehouse" and the importer is bound to pay "appropriate expenses," such goods being in the custody of the United States and in charge of an inspector. *Clark v. Peaslee*, 1 Cliff. 545. This case (1860) gives an account of the Treasury regulations, and laws appertaining to private bonded warehouses.

SECT. 2964.—Unless appointed by the Secretary of the Treasury, no person has a right to keep a warehouse for the storage of dutiable goods, and the Secretary may revoke such appointment at his pleasure. *Corkle v. Maxwell*, 3 Blatch. 413. The government has a right to require the person whose warehouse is designated as a place for storage, to pay the salary of an inspector to superintend the receipt and delivery of goods stored therein. *Id.*

"Other stores."—See *Atkins v. Peaslee*, 1 Cliff. 446. A person keeping a private bonded cellar cannot recover money paid to a collector for the services of an inspector of the customs in connection with the receipt and delivery of goods therein stored. *Harriman v. Maxwell*, 3 Blatch. 421. Until the goods are delivered to the importer, on shipboard or in warehouse, they are subject to any duties on imports imposed by Congress, and to new legislation in relation to duties and to alteration in warehouse laws. *United States v. Benzon*, 2 Cliff. 512.

It has been held that this section applies to ports of entry, and does not include ports of delivery unless the regulations of the Secretary so provide, and the law independently of such regulations does not give an importer the right to warehouse at all. *Tremlett v. Adams*, 13 How. 295. Except as modified by the revenue laws, sureties under this section possess the same rights and are subject to the same liabilities as ordinary sureties. *United States v. De Visser*, 10 F. R. 642. The conditions in the bond and the liability of a surety must be construed in reference to the statutes providing for such bond, and they make a part of the contract with the surety, except in so far as they are directory to the agents of the government and do not affect the rights or liabilities of third parties. *Id.* For interesting statements in regard to sureties on these bonds, see *Id.* 656; *United States v. Campbell*, 10 Id. 816. Where warehoused goods have been lost, the plaintiff must affirmatively show personal negligence on the part of the defendant collector before he can recover, for a collector is not personally responsible for the negligence of his subordinates. *Brissac v. Lawrence*, 2 Blatch. 121; see *Minturn v. United States*, 106 U. S. 437; *Robertson v. Sichel*, 127 U. S. 507. Where a bond has been given for the payment of duties within three years, and the condition is not fulfilled, the amount of duties due must be computed as of the time of default, with interest. *United States v. Duvivier*, 12 Blatch. 449.

SECT. 2966.—Amended by striking out, in the second and third lines, the words "propelled in whole or in part by steam." 23 St. 58, ch. 121, § 24. See on this section, *The Egypt*, 25 F. R. 320, 327; *The Surrey*, 26 Id. 791, 797.

SECT. 2969.—Although 9 St. 53, ch. 84, § 1, expressly provides that nothing contained therein shall be construed to extend the time prescribed by law for selling unclaimed goods, yet the practice being to wait for one year, § 56 of 1 St. 669, ch. 22, and 3 St. 730, ch. 21, § 3, were omitted from the Revision. 2 Com. D. 1428. See *The Surrey*, *supra*.

SECT. 2970.—An importer entered certain goods and stored them in a bonded warehouse in November, 1869, where they remained till March 20, 1871, when they were withdrawn for consumption. It was held that they were subject to the additional duty of ten per cent, having remained in the warehouse more than one year, notwithstanding the act of July 14, 1870, § 26 (16 St. 269). *Fabbri v. Murphy*, 95 U. S. 191. The year begins as to goods transported from an exterior to an interior port, and there warehoused, at the time of their arrival at the interior port. The words "date of original importation," as



used in this section, mean the date of the arrival of the goods at the interior port of destination. *Farwell v. Spalding*, 24 F. R. 18. The provisions relating to the time in which importations may be withdrawn are not considered a contract between the importer and government. *United States v. Benzon*, 2 Cliff. 512. See S. T. D. 8585.

SECT. 2971. — See notes, §§ 2954, 2972, 3255. This act is not merely directory, but is mandatory; its design being to cut off peremptorily after three years the right of any person to pay the duties and withdraw the goods. Therefore the right of the surety to pay the debt and take the goods is cut off, and his right to pay any deficit and proceed for indemnity against his principal is also suspended until after the goods are sold. *United States v. De Visser*, 10 F. R. 642. Where goods were advertised for sale pursuant to law, and the Secretary, upon the request of a purchaser of the goods in bond, directed a postponement of the sale until further orders without the consent of the surety on the original bond, it was held that the latter was discharged, but the principal not. *Id.* But mere *laches* of government officers in postponing the sale will not discharge the surety. *Id.* The owner of merchandise may withdraw it from a public store or bonded warehouse for exportation to a foreign country, without regard to his object in doing so or to the disposition he may make of it after he has reached its destination. 14 A. G. Op. 574; see § 2979. For a construction of the act of July 14, 1862, see 11 A. G. Op. 516. The Treasury has decided that in the three years is included the time on shipboard, after the arrival in port. *Hartranft v. Oliver*, 125 U. S. 525, 529. For remarks on the act of July 14, 1870, § 26, see *United States v. Duvivier*, 12 Blatch. 449, 451. See also S. T. D. 8822, 8585.

SECT. 2972. — “The practice has arisen in the Treasury Department to allow the owner, at any time before the goods are advertised for sale, to remove the same upon the payment of duties and charges.” *Abbot v. United States*, 20 Ct. Cl. 280, 282. As to when the word “may” in a statute is regarded as giving a peremptory power, see *Supervisors v. United States*, 4 Wall. 435.

SECT. 2973. — See *United States v. De Visser*, 10 F. R. 642, 651; S. T. D. 8069.

SECT. 2975. — Where a statute gives one discretionary powers in the exercise of his opinion of certain facts, he is a judge of those facts, as the function is a quasi-judicial one. *Gould v. Hammon*, McAll. 235.

SECT. 2977. — The cited act was deemed to supersede 10 St. 271, ch. 30, § 4. 2 Com. D. 1431.

SECT. 2978. — Amended by 19 St. 247, ch. 69, by adding at the end of the section “except as provided in § 3025.” See 5 A. G. Op. 81.

SECT. 2979. — If the owner of merchandise in public store or bonded warehouse exercises his right to withdraw it under § 2971, the collector must permit it to be so withdrawn and shipped without payment of duties, proper security having been given, no matter what may be the owner's purpose in so withdrawing, or what he may intend to do with it after it reaches its destination. After such merchandise has been landed beyond the jurisdiction of the United States the bond of the owner is discharged, and if the merchandise is subsequently re-imported it must come in as though it were an original importation. 14 A. G. Op. 574. For a case exactly covered by this section, see *McLean v. Hager*, 12 Sawyer, 473; 31 F. R. 602.

SECT. 2981. — Amended by St. June 10, 1880 (21 St. 173), ch. 190, § 10, to read as follows:—

“That whenever the proper officer of the customs shall be duly notified in writing of the existence of a lien for freight upon imported goods, wares or merchandise in his custody, he shall, before delivering such goods, wares, or merchandise to the importer, owner, or consignee thereof, give seasonable notice to the party or parties claiming the lien; and the possession by the officers of the customs shall not affect the discharge of such lien, under such regulations as the Secretary of the Treasury may prescribe; and such officer may refuse the delivery of such merchandise from any public or bonded warehouse or other place



in which the same shall be deposited, until proof to his satisfaction shall be produced that the freight thereon has been paid or secured; but the rights of the United States shall not be prejudiced thereby, nor shall the United States or its officers be in any manner liable for losses consequent upon such refusal to deliver. If merchandise so subject to a lien regarding which notice has been filed, shall be forfeited to the United States and sold, the freight due thereon shall be paid from the proceeds of such sale in the same manner as other charges and expenses authorized by law to be paid therefrom are paid."

This section recognizes only the lien of the owner or consignee of the vessel or vehicle in which goods arrive. It differs from the act of 1866, ch. 201, § 17, which provided for the protection of all liens, including those of inland carriers. 16 A. G. Op. 74. In 600 Tons of Iron Ore, 9 F. R. 595, 598, 599, Nixon, D. J., says, in regard to the last clause beginning "If merchandise so subject," &c., "I am not prepared to affirm that when Congress explicitly gives to parties certain rights, upon their performance of certain antecedent acts and conditions, they are entitled to claim the rights, without showing that they have performed the acts and conditions." It has been held in admiralty that a cargo may be sold subject to the claims of the United States, if the seizure was sufficient to give jurisdiction, and the purchaser may pay the duties and obtain possession of the goods. 250 Tons of Salt, 5 F. R. 216. In *Wyman v. Lancaster*, 32 F. R. 720, a rule is stated as to the duty of the collector in possession of imported property, on which the duties have been paid, where there is a controversy between the consignee and the carrier who has transported them from the sea-coast in bond, as to the amount of freight due therefor.

SECT. 2983. — See 16 A. G. Op. 667, 674.

SECT. 2984. — See notes, §§ 989, 3009-3114. Amended by 19 St. 247, ch. 69, by changing "industry" to "injury" in the second line. St. March 3, 1875, ch. 136 (18 St. 469), provides —

"SEC. 1. That no moneys collected as duties on imports, in accordance with any decision, ruling, or direction previously made or given by the Secretary of the Treasury, shall, except as hereinafter provided, be refunded or repaid, unless in accordance with the judgment of a circuit or district court of the United States giving construction to the law, and from which the Attorney-General shall certify that no appeal or writ of error will be taken by the United States; or unless in pursuance of a special appropriation for the particular refund or repayment to be made: *Provided*, That whenever the Secretary shall be of opinion that such duties have been assessed and collected under an erroneous view of the facts in the case, he may authorize a re-examination and reliquidation in such case, and make such refund in accordance with existing laws as the facts so ascertained shall, in his opinion, justify; but no such reliquidation shall be allowed unless protest and appeal shall have been made as required by law [*White v. Arthur*, 20 Blatch. 237, 248; 10 F. R. 80]: *Provided further*, That the restrictive provisions of this act shall not apply to such personal and household effects and other articles, not merchandise, as are by law exempt from duty: *And provided also*, That this act shall not affect the refund of excess of deposits based on estimated duties nor prevent the correction of errors in liquidation, whether for or against the Government, arising solely upon errors of fact discovered within one year from the date of payment, and, when in favor of the Government, brought to the notice of the collector within ten days from the date of discovery.

"SEC. 2. That no ruling or decision once made by the Secretary of the Treasury, giving construction to any law imposing customs duties, shall be reversed or modified adversely to the United States, by the same or a succeeding Secretary, except in concurrence with an opinion of the Attorney-General recommending the same, or a judicial decision of a circuit or district court of the United States conflicting with such ruling or decision, and from which the Attorney-General shall certify that no appeal or writ of error will be taken by the United States: *Provided*, That the Secretary of the Treasury may in his discretion, decline to acquiesce in the judgment, decision, or ruling of an inferior court upon any question affecting the interests of the United States, when, in his opinion, such interests require a final adjudication of such question by the court of last resort. [14 A. G. Op. 559.]

"SEC. 3. That the Secretary of the Treasury shall have power to make such regulations, not inconsistent with law, as may be necessary to carry this act into effect.

"SEC. 4. That the Secretary of the Treasury, shall, in his annual report to Congress, give a detailed statement of the various sums of money refunded under the provisions of this act or of any other act of Congress relating to the revenue, together with copies of the rulings under which repayments were made: *Provided*, That in all cases where the Secretary of the Treasury shall so request, the Attorney-General shall take an appeal to the Supreme Court."



"This section (2984) refers only to damage after arrival at the port of entry. The former sections relate only to damage during the voyage from the foreign port of shipment to the port of entry at which the vessel first arrives." 15 A. G. Op. 9. See S. T. D. 8272, 8539. So far from conferring new powers, § 1 of 18 St. 469, restricts those already possessed to errors of fact instead of including both those of law and fact, as was done by §§ 3012½, 3013. It excludes all those cases in which the Secretary has made no ruling or decision. Before they are concluded, importers are entitled to a ruling of the Secretary, if they have protested, appealed, &c. After it has been made, such ruling can only be declared erroneous in law, as to duties actually paid under it, by the judgment of court, and § 2 authorizes the Secretary to modify, in concurrence with the Attorney-General, adversely to the United States, any construction of the tariff previously adopted; but no refund can be made of duties collected under such construction except in pursuance of a judicial decision. 15 A. G. Op. 126. See *United States v. Phelps*, 17 Blatch. 312, 317; *United States v. Comarota*, 2 F. R. 145. The questions as to how far 18 St. 469 affects the refund of duties collected *prior to* and *on or after* March 3, 1875, are further considered in 14 A. G. Op. 559. The words "under bond" in § 2984 have exclusive reference to the goods, wares, and merchandise, not to the warehouse. 12 A. G. Op. 430. "Freezing" has been held to be a casualty within the meaning of said section. S. T. D. 7968.

In executing 18 St. 469, the Secretary is not limited to an application of a decision of the Supreme Court to articles *specifically* embraced therein merely, but may extend his action to all other articles within its provision. 16 A. G. Op. 20.

SECT. 2986.—Informers are entitled to their share in the penalty provided for in this section. *United States v. George*, 6 Blatch. 406.

SECT. 2988.—Amended by 19 St. 247, ch. 69, by striking out all after "same" in the fifth line, and inserting a period in place of the semicolon at the end of the section.

SECT. 2989.—See notes, §§ 251, 2837, 2892, 2926, 2954. Amended by 19 St. 247, ch. 69, by changing, in the third line, the words "relating to warehouses" to "of this chapter." Under this section the Secretary can only make such regulations as he deems expedient and necessary, but he has ampler powers under § 251. 15 A. G. Op. 128, 132.

SECTS. 2990–2997.—The privileges of these sections were extended to the port of Genesee, New York, by 19 St. 7, ch. 23; and to the port of Bath, Maine, by 20 St. 63, ch. 109. See also note, § 2595, citing 19 St. 139, ch. 270, extending the same privileges to Saint Paul in the collection district of Minnesota. St. June 4, 1888, makes Grand Rapids, Mich., a port of delivery. See note, § 2599. These sections (2990–2997) were repealed by § 8 of 21 St. 173, ch. 190, which act, by § 11, took effect July 1, 1880; § 4 of which is stated in note § 2853, and § 10 in note § 2981, and the other provisions of which, as amended by the acts herein cited, are as follows: (the privileges of § 1 of this act being extended to the port of Portland, Oregon, and those of §§ 1, 7 to Port Townsend, Washington Territory, by 24 St. 16, ch. 69; by 24 St. 342, the privileges of §§ 1, 7, are extended to Key West, Fla., and those of § 7 to Tampa, Fla.; and by St. Feb. 13, 1889, the privileges conferred by St. 1880 were extended to the port of Sault Ste. Marie, Mich.; as to other ports, see notes, § 2559 *et seq.*)

"SEC. 1. That when any merchandise, other than explosive articles, and articles in bulk not provided for in § 4 [changed to § 5 by 21 St. 198, ch. 214] of this act, imported at the ports of New York, Philadelphia, Boston, Baltimore, Portland and Bath, in Maine, Chicago, Port Huron, Detroit, New Orleans, Norfolk ["Newport News" here inserted by 23 St. 48, ch. 103], Charleston, Savannah, Mobile, Galveston, Pensacola, Florida, Cleveland, Toledo, and San Francisco, shall appear by the invoice or bill of lading and manifest of the importing vessel to be consigned to and destined for either of the ports specified in the seventh section of this act, the collector at the port of arrival shall allow the said merchandise to be shipped immediately after the entry prescribed in section two of this act has been made.

"SEC. 2. That the collector at the port of first arrival shall retain in his office a permanent record of such merchandise so to be forwarded to the port of destination, and such record shall consist of a copy



of the invoice and an entry whereon the duties shall be estimated as closely as possible on the merchandise so shipped, but no oaths shall be required on the said entry. Such merchandise shall not be subject to appraisement and liquidation of duties at the port of first arrival, but shall undergo such examination as the Secretary of the Treasury shall deem necessary to verify the invoice; and the same examination and appraisement thereof shall be required and had at the port of destination as would have been required at the port of first arrival if such merchandise had been entered for consumption or warehouse at such port.

"SEC. 3. That such merchandise shall be delivered to and transported by common carriers, to be designated for this purpose by the Secretary of the Treasury, and to and by none others; and such carriers shall be responsible to the United States as common carriers for the safe delivery of such merchandise to the collector at the port of its destination; and before any such carriers shall be permitted to receive and transport any such merchandise, they shall become bound to the United States in bonds of such form and amount, and with such conditions, not inconsistent with law, and such security as the Secretary of the Treasury shall require.

"SEC. 5. [As amended by 24 St. 411, ch. 215. See also 23 St. 63.] 'That merchandise transported under the provisions of this act shall be conveyed in cars, vessels, or vehicles securely fastened with locks or seals, under the exclusive control of the officers of the customs; and merchandise may also be transported under the provisions of this act by express companies on passenger-trains, in safes, "pouches," and trunks, which shall be of such size, character, and description and secured in such manner as shall be from time to time prescribed by the Secretary; and in cases where merchandise shall be imported in boxes or packages too large to be included within the safes, trunks, or "pouches," as prescribed, such merchandise may be transported under the provisions of this act by such express companies, "corded and sealed," in such manner as shall from time to time be prescribed by the Secretary of the Treasury; and "passengers" baggage and effects arriving at any of the ports specified in section one of this act, which shall appear by the manifest of the importing vessel, or other satisfactory evidence, to be destined to any of the ports specified in the seventh section, may also be transported by express companies under the provisions of this act to any of the ports specified in the seventh section thereof, in such manner and under such rules and regulations as the Secretary of the Treasury may prescribe; and merchandise such as pig-iron, spiegle-iron, scrap-iron, iron-ore, railroad-iron, and similar articles commonly transported upon platform or flat cars may be transported under the provisions of this act upon such platform or flat cars; and the weight of such merchandise so transported shall be ascertained in all cases before shipment, and ordinary railroad seals may be used for such purposes; and inspectors shall be stationed at proper points along the designated routes, or upon any car, vessel, vehicle, or train, at the discretion of the Secretary of the Treasury, and at the expense of the companies, respectively. Such merchandise shall not be unladen or transhipped between the ports of first arrival and final destination, unless authorized by the regulations of the Secretary of the Treasury in cases which may arise from a difference in the gauge of railroads, or "where the route is bonded for both land and water carriage," or from accidents, or from legal intervention, or when, by reason of the length of the route, the cars, after due inspection by customs officers, shall be considered unsafe or unsuitable to proceed further, or from low water, ice, or other unavoidable obstruction to navigation; and in no case shall there be permitted any breaking of the original packages of such merchandise.'

"SEC. 6. [As amended by 23 St. 64.] That merchandise so destined for immediate transportation shall be transferred, under proper supervision, directly from the importing vessel to the car, vessel, or vehicle specified in the entry provided for in § 2 of this act.

"SEC. 7. That the privilege of immediate transportation shall extend to the ports of New York and Buffalo, in New York; Burlington, in Vermont; Boston, in Massachusetts; Providence and Newport, in Rhode Island; New Haven, Middletown ["Bridgeport" here added by 24 St. 392, ch. 123], and Hartford, in Connecticut; Philadelphia and Pittsburgh, in Pennsylvania; Baltimore, Crisfield, and Annapolis, in Maryland; Wilmington and Seaford, in Delaware; Salem, Massachusetts; Georgetown, in the District of Columbia; Norfolk 'Newport News' being added by 23 St. 48, ch. 103, Richmond, and Petersburg, in Virginia; Wilmington and Newberne, in North Carolina; Charleston and Port Royal, in South Carolina; Savannah and Brunswick, in Georgia; New Orleans, in Louisiana; Portland and Bath, in Maine; Portsmouth, in New Hampshire; Chicago, Cairo, Alton, and Quincy, in Illinois; Detroit, Port Huron, and Grand Haven, in Michigan; St. Louis, Kansas City, and Saint Joseph, in Missouri; St. Paul, in Minnesota; Cincinnati, Cleveland, and Toledo, in Ohio; Milwaukee and La Crosse, in Wisconsin; Louisville, in Kentucky; San Francisco, San Diego, and Wilmington, in California; Portland, in Oregon; Memphis, Nashville, and Knoxville, in Tennessee; Mobile, in Alabama; and Evansville, in Indiana; and Galveston, Houston, Brownsville, Corpus Christi, and Indianola, in Texas; Omaha, in Nebraska; Dubuque, Burlington, and Keokuk, in Iowa; Leavenworth, in Kansas; Tampa Bay, Fernandina, Jacksonville, Cedar Keys, Key West, and Apalachicola, in Florida: *Provided*, That



the privilege of transportation here conferred shall not extend to any place at which there are not the necessary officers for the appraisement of merchandise and the collection of duties.

"SEC. 9. That no merchandise shall be shipped under the provisions of this act after such merchandise shall have been landed ten days from the importing vessel, and merchandise not entered within such time shall be sent to a bonded warehouse by the collector as unclaimed, and held until regularly entered and appraised."

St. Feb. 23, 1887, ch. 218 (24 St. 414), amends the above 21 St. 173, so as —

"to allow merchandise liable to specific rates of duty only to be entered for immediate transportation without appraisement to any of the ports mentioned in the seventh section of said act, although the same may not appear by the invoice, bill of lading, or manifest of the importing vessel to be consigned to or destined for either of said ports, when the consignee at the port of first arrival shall make written application therefor to the collector, giving the name of the person at the port or destination to whom he desires the merchandise to be consigned; and whenever such application and entry shall be made, the original invoice presented by the consignee at the port of first arrival shall be forwarded, with a copy of the transportation entry, to the collector at the port of destination; and a copy of such invoice shall be retained on file at the port of first arrival. The original invoice so forwarded shall be treated as the only invoice of the merchandise upon which entry shall be made at the port of destination, and the person making such entry shall be held responsible for the statements contained therein in the same manner as if the merchandise had been originally consigned to him: *Provided, however,* That the privileges herein conferred shall not extend to any merchandise the duties upon which, or any portion thereof, depend upon the value of such merchandise: *And provided further,* That such privilege shall be granted only in cases where no part of the merchandise shall have been landed prior to entry for immediate transportation as aforesaid."

Sect. 2997 was amended by 18 St. 319, ch. 80, by inserting, in the tenth line, "Detroit in Michigan," after "Alabama."

It has been held under 21 St. 173 that it is not the official duty of a collector to receive the freights due to carriers, but if he agrees to receive such freight in lieu of giving notice to the carrier, he would be liable; and a deputy cannot make the collector liable for his acts by reason of his official relation merely. *Cleveland v. McClung*, 15 F. R. 905. The collection of duties on goods imported at New Orleans and intended for shipment to Mobile, is treated in *Guesnard v. Louisville R. Co.*, 76 Ala., 453. The act of 19 St. 7, ch. 23, extending the privileges of §§ 2990–2997 to Genessee, is not repealed by 21 St. 173, ch. 190. 16 A. G. Op. 548. The immediate transportation act (21 St. 173), has been held to apply to passenger's baggage. S. T. D. 6881. Damages sustained by merchandise during the voyage between the foreign port and the port of arrival, where it is entered at the latter for immediate transportation to an interior port of destination under § 2990 should be ascertained at such port. 15 A. G. Op. 7. It is clear from § 2991 that the port of destination, and not the port of first arrival, is the place where the examination, appraisement, and liquidation are to take place. *Id.* 11. The Secretary of the Treasury has no authority under § 2993 to protect the lien of an inland carrier, upon goods transported in bond, by a Treasury regulation. 16 A. G. Op. 74. Sect. 2994 does not apply to the transportation of appraised merchandise. The word "merchandise" at its beginning is limited in its signification to such merchandise as may, under §§ 2990–2993, be entered for immediate transportation to the port of final destination, without appraisement and liquidation of duties at the port of original importation. 15 A. G. Op. 128.

SECT. 2999. — The cited provision was deemed to supersede 9 St. 54, ch. 84, § 2. 2 Com. D. 1438.

SECT. 3000. — See *Spring v. Russell*, 1 Lowell, 258.

SECT. 3001. — See note, § 3385. Amended by St. Feb. 27, 1877, ch. 69 (19 St. 247), by adding —

"and the Secretary of the Treasury is hereby authorized to remit, in whole or in part, on such conditions, and under such regulations, not inconsistent with law, as he may prescribe, the additional duty secured by the bond given for the transportation of merchandise from a port in one collection district



to a port in another collection district prescribed by the preceding section: *Provided*, That it shall be proved to the satisfaction of the Secretary of the Treasury that the failure to transport and deliver the merchandise aforesaid according to the conditions of the bonds occurred without wilful negligence or fraudulent intent on the part of the obligors."

United States *v.* Pingree, 1 Sprague, 339, which treats of the act of March 28, 1854, ch. 30, § 6, was, according to the Reporter's note, reversed on appeal.

SECT. 3002. — Amended by 19 St. 247, ch. 69, by striking out "Point Isabel" in the ninth line and "Brownsville" in the eleventh line.

SECT. 3003. — Amended by the same act by changing "and" to "or" after "Del Norte" in the eighth line.

SECT. 3004. — The acts cited for the three preceding sections were deemed to supersede 5 St. 750, ch. 70, §§ 2, 3, 4, 5, 6, and 9 St. 409, ch. 122, §§ 3, 4, 5, 7. 2 Com. D. 1439.

SECT. 3005. — Amended by the same act by changing "Point Isabel" to "Brownsville" in the fourth line. See S. T. D. 8427.

## CHAPTER VIII.

### PAYMENT.

SECT. 3009. — See note, § 3513. Amended by 19 St. 247, ch. 69, by inserting "or coin certificates" after "coin" in the second line. See *Johnson v. United States*, 5 Mason, 425; 3 A. G. Op. 172, 174.

SECT. 3010. — The history and development of this section are treated in *White v. Arthur*, 20 Blatch. 237; 10 F. R. 80; *Cary v. Curtis*, 3 How. 236; *Sturges v. United States*, Dev. 222. See 3 A. G. Op. 392. The meaning of the terms "interest and costs in judgment cases," as employed in an act making appropriation to pay certain claims prior to July 1, 1875, is explained in 16 A. G. Op. 97.

SECT. 3011. — See notes, §§ 721, 989, 2930, 2932, 2984, 3012, 3012½, 3013. Substituted for the cited provision of 1845. 2 Com. D. 1442. Amended by 19 St. 247, ch. 69, by striking out all after "protest" in the eighth line, and by adding "and appeal shall have been taken as prescribed in § 2931." Also amended by the appropriation act of Feb. 1, 1888 (25 St. 6), by inserting, after "paid," in the seventh line, the following: "Together with costs of suit, and interest at the rate of three per cent per annum," this amendment not to affect existing suits and demands. "The protest required by the act of 1845 must be signed (*Florio v. Peaslee*, 2 Curtis, 452), but it is immaterial whether that signature is in writing, made with ink or pencil, stamped, or printed." It may be placed on the protest by the plaintiff or his agent. If affixed without authority, it would become the signature by adoption by the protest being properly affixed to the entry or served on the collector. *Bodart v. Schell*, 33 F. R. 825. See *Grandmange v. Schell*, 32 Id. 655; *Gray v. Lawrence*, 3 Blatch. 117. If the evidence is insufficient to show that a protest was properly served, a verdict for the plaintiff will be set aside and a new trial granted. *Bodart v. Schell*, *supra*. Where the complaint stated that the plaintiff paid "under protest," and a bill of particulars was served according to § 3012 showing that the protest and appeal were in writing and in time, it was held sufficient. *Muser v. Robertson*, 21 Blatch. 368; 17 F. R. 500. An importer guilty of laches cannot recover interest. *Bartells v. Redfield*, 27 F. R. 286. See note, § 2931. A petition which shows that all the statutory requirements have been complied with is not demurrable on the ground that it does not state a good cause of action. *Wedemeyer v. Lancaster*, 30 F. R. 670. The records of the custom house are competent evidence to show that a protest was served in time. *Fauche v. Schell*, 33 F. R. 336. And records kept under the regulations of the Treasury are competent evidence without the testimony of



those who made the entries. *Grandmange v. Schell*, 32 Id. 655. Where the whole duty is paid before the goods are delivered, the presumption is that it was paid in order to obtain possession of the goods. *Fauche v. Schell*, *supra*. Where an excess of duties is paid through a mutual mistake of importer and the revenue officers, owing to leakage before importation, and without protest, no recovery can be had. *Nichols v. United States*, 7 Wall. 122; *Elliott v. Swartwout*, 10 Pet. 137; see *Lawrence v. Caswell*, 13 How. 488; *Curtis v. Fiedler*, 2 Black, 461. For the purposes of a protest the reliquidation is the final liquidation of duties. *Robertson v. Downing*, 127 U. S. 607. As evidence that an appeal was taken, letters from the Secretary to a collector affirming an assessment of duty, and to an importer acknowledging the receipt of his appeal, may be introduced. *Robertson v. Downing*, *supra*. For a case where the single question was whether it was the duty of certain parties, under the circumstances of their employment, to have brought suit against the collector, see *Bowerman v. Rogers*, 125 U. S. 585.

The jurisdiction of the Court of Claims as to certain importations between 1847 and 1854 is stated in cases decided in that court in 1863. *Schlesinger v. United States*, 1 Ct. Cl. 16; *Nicoll v. United States*, Id. 70; *Ogden v. United States*, Id. 96. The general principles relative to protests are stated in the notes to § 2931. Numerous cases, especially in *Blatchford's Reports*, relating to the sufficiency of protests, are omitted as they merely present individual applications of the law.

SECT. 3012. — See notes, §§ 954, 2837, 2930, 2932, 2984, 3011, 3012½. The court having once acquired jurisdiction may, notwithstanding the provisions of this section, allow a bill of particulars of the plaintiff's demand to be served after the expiration of thirty days' notice of the appearance of the defendant and to allow a defective bill of particulars to be amended. *Pott v. Arthur*, 15 Blatch. 314. The statement in this case that the statute is "directory merely," is declared to be an *obiter dictum* in *Castner v. Magone*, 32 F. R. 578, and the contrary view is taken. See *Dieckerhoff v. Robertson*, 24 Blatch. 242; 29 F. R. 781. Under this section an amendment of a bill of particulars may be made as in any other case of reasonable excuse for a *bona fide* mistake. But the specific cause of error or mistake should be shown, and why the original was not made in proper form. *Dieckerhoff v. Robertson*, 32 F. R. 73. A judgment of *non pros* will be entered where the bill of particulars does not contain all the items required. *Sherman v. Hedden*, 32 F. R. 756. The court cannot grant leave to amend *nunc pro tunc*. Id.; see, also, *Rickard v. Barney*, Id. 581; *Schmieder v. Barney*, Id. 657. The conflict outlined above can be best understood by a careful examination of the decisions.

It has been held that the requirements of this section make it unnecessary to state substantially the same thing in the declaration. *Beard v. Porter*, 124 U. S. 437, 443. The action being statutory, a declaration is good which shows that the plaintiff has taken all antecedent steps under §§ 2931, 3011, and which contains a statement of all matters required to be contained in a "bill of particulars" under this section. *Wedemeyer v. Lancaster*, 30 F. R. 670. Where more particular information is needed, the remedy is by motion to make the complaint more definite; but the protest, appeal, and bill of particulars ordinarily furnish all necessary information. *Muser v. Robertson*, 21 Blatch. 368; 17 F. R. 500. Where the same question had been decided by the Secretary of the Treasury, on appeal, in June, 1863, against the plaintiff, and the Secretary had published a circular to that effect, and in September and October, 1863, the plaintiff presented the same question, on appeal to the Secretary, and he had made no response up to January, 1866, the plaintiff was justified in considering this appeal as having been decided against him. *Schneider v. Barney*, 13 Blatch. 37. The Secretary of the Treasury is not authorized by this section nor by ch. 318 of the act of June 19, 1878 to pay interest on the amounts exacted as tonnage tax in contravention of treaty provisions from steamers of the Norse American line and of the North German Lloyd's line. 16 A. G. Op. 103.



SECT. 3012 $\frac{1}{2}$ .—See notes, §§ 989, 2930, 2931, 2984, 3011, 3012. The first proviso of the act of March 3, 1875, § 1 (18 St. 469), does not authorize the Secretary in the absence of any pending protest and appeal to direct a reliquidation against the importer except for errors arising solely on matters of fact. A reliquidation cannot be made in such a case upon an erroneous construction of the tariff law, or classification of goods. *United States v. Leng*, 18 F. R. 15. This section applies where the money has been paid prior to the decision and the appeal is sustained. 15 A. G. Op. 119. Under this and § 3013, the Secretary of the Treasury has authority to refund to the owners of vessels taxes collected from them without authority of law after June 30, 1864. If payment was made before that time, the refunding, if it can be done at all, must be done under § 2, ch. 82 of St. 1839. 14 A. G. Op. 468; see also *Id.* 653, 672; 16 *Id.* 20, 94.

SECT. 3013.—See §§ 2930, 2931, 2984, 3011, 3012, 3012 $\frac{1}{2}$ . This section does not apply to any mistake of law, or to any omissions of the importer to inform himself (owing to a mistaken view of the law) of the result of his appeal. 15 A. G. Op. 119, 121.

SECT. 3014.—See *Cheang-Kee v. United States*, 3 Wall. 320.

## CHAPTER IX.

### DRAWBACK.

As to drawback on materials used in vessels built in the United States for foreign account, see note, § 2513.

SECT. 3015.—An alphabetical list of drawback rates will be found in S. T. D. 7702. As to bags, bagging, and salt, see S. T. D. 6708.

SECTS. 3016, 3017.—See note, § 3019; S. T. D. 8344.

SECT. 3018.—See S. T. D. 8513.

SECT. 3019.—See notes, § 2503, 3020. St. Feb. 8, 1875, ch. 36, § 10 (18 St. 307), provides,—

“That where bullets and gunpowder, manufactured in the United States and put up in envelopes or shells in the form of cartridges, such envelope or shell being made wholly or in part of domestic materials, are exported, there shall be allowed on the bullets or gunpowder, on the materials of which duties have been paid, a drawback equal in amount to the duty paid on such materials, and no more, to be ascertained under such regulations as shall be prescribed by the Secretary of the Treasury: *Provided*, That ten per centum on the amount of all drawbacks so allowed shall be retained for the use of the United States by the collectors paying such drawback respectively.”

St. March 3, 1875, ch. 127, § 3 (18 St. 339), contains the proviso,—

“that of the drawback on refined sugars exported, allowed by Rev. Stats. § 3019, only ten per centum of the amount so allowed shall be retained by the United States.”

An importer who is entitled to the drawback provided for in this section, may, upon the refusal of the United States to pay it, bring an action therefor in the Court of Claims which has jurisdiction over such a claim, because it is founded on a law of Congress, and, also, because there is an implied contract that the United States will refund to the importer the amount he paid to the government. *Campbell v. United States*, 107 U. S. 407; 12 Ct Cl 470. The second proviso in § 3, ch. 127, of the act of 1875, is amendatory of this section and must be construed in connection with it, not in connection with the remainder of the act of which it is part. The effect of it and of this statute is that ten per centum on the amount of all drawbacks allowed thereby shall be retained for the use of the United States, provided that of the drawback on refined sugars only one per centum of the amount so allowed shall be retained. The proviso applies to all refined sugars manufactured from



imported sugars, notwithstanding the other provisions of the chapter in which it is found. 14 A. G. Op. 578. See p. 575. It has been held that manufactured articles entitled to drawback under this section are not subject to the limitations of time and amount stated in §§ 3016, 3017. S. T. D. 6748; see 7997, 8240, 8505, 8612, 8678, 8772, 8800, 8934.

SECT. 3020.— See note, § 3019. St. March 10, 1880, ch. 37 (21 St. 67), adds:—

“And where cans, manufactured in whole or in part of imported material, filled with products grown or produced in the United States, are exported for benefit of such drawback, the same shall, in all cases, be entitled to the drawback provided for in the preceding section where the imported material used in the manufacture of such cans shall equal seventy per centum of the value of all the material used in the manufacture thereof.”

To be entitled to a drawback on fire-arms under this and § 3019 it is not required that they shall have been made entirely of imported material, excepting only their stocks. It is enough if imported material has been used in their manufacture exceeding in value one-half of the value of the whole of whatever kinds of material have been so used, including their stocks, the latter being of wood of American growth. 15 A. G. Op. 147.

SECT. 3025.— See note, § 2978.

SECT. 3027.— See note, § 2900.

SECT. 3037.— The application provided for by this section may be made by the attorney in fact of the exporter, under proper circumstances; and he may make the oath and give the bond. 2 A. G. Op. 260. Non-residents generally may perform by agents the acts necessary to obtain the drawback. Id. 260; see 1 Id. 707.

SECT. 3038.— See 3 A. G. Op. 279; Jones v. Moore, 1 Edw. Ch. 632; Morton v. Ludlow, Id. 639.

SECT. 3040.— See note, § 3038.

SECT. 3049.— See note, § 2837. Goods on a ship were entered for exportation, but no bond under § 3043 was given and no debenture issued. Upon being put on a lighter lying alongside of the ship, they were seized. A suit was brought to enforce the forfeiture, and a verdict for the United States was directed. The claimant moved for a new trial. It was held that placing the goods in the lighter amounted to a relanding within this section; that a landing in the port of exportation before the ship had broken ground was also within the section; and that the forfeiture attached notwithstanding no bond had been given or debenture issued. Nor would evidence that the claimant caused the goods to be relanded solely to correct a mistake by which he had been led to enter for export a different quality of goods from that intended to be exported afford any defence. 2000 Tin Cans, 7 Ben. 34. See *Re Leszynsky*, 16 Blatch. 9, 17, 19.

SECT. 3050.— If goods are entered by a false denomination, then they are subject to forfeiture, unless the party can bring himself within the exceptions of the statute, and the *onus probandi* rests on the plaintiff to extract the case from the penal consequences of an infraction of the law (*Barlow v. United States*, 7 Pet. 404, 409); and ignorance of the law is of no avail. Id.

SECT. 3051.— The words “mistake or accident” are restricted to mistake of some matter of fact, and do not include mistakes as to the application or construction of the law; and if the entry is by design, the legal consequence is that it was to defraud the revenue. *United States v. 85 Hogsheads of Sugar*, 2 Paine, 54.

SECT. 3057.— See notes, §§ 3015, 3019.



## CHAPTER X.

## ENFORCEMENT OF DUTY-LAWS AND PUNISHMENT FOR VIOLATIONS.

SECT. 3058. — Amended by act of Feb. 23, 1887, ch. 221 (24 St. 415), by striking out all after "consigned" in the third line, and substituting the following: —

"But the holder of any bill of lading consigned to order and properly indorsed shall be deemed the consignee thereof; and in case of the abandonment of any merchandise to the underwriters, the latter may be recognized as the consignee; and under such regulations as the Secretary of the Treasury may prescribe, merchandise saved from a vessel wrecked or abandoned at sea, or on or along the coasts of the United States, and promptly brought into a port of the United States by or in possession of the salvors of the same, can, for the purpose of its title, be regarded as the property of such salvors, and the valuation thereof and payment of duties thereon can be made accordingly and with due reference to the condition of the said merchandise as thus saved and the necessities of the case: *Provided, however, That such bringing in by salvors shall be in good faith and without intent to evade the just payment of duty: And provided further, That nothing herein contained shall be so construed as to prejudice in any other respect the rights of property, or of or through abandonment or allowance of the owner, or any other person interested in said merchandise.*" [See S. T. D. 8105.]

The following cases were decided before the passage of 24 St. 415: The intent was to compel the original consignee to enter the goods; and if a delinquent, to pay his prior bonds or to relinquish all credit for the duties accruing upon the goods so consigned to him. It does not purport to create any lien upon such goods for any duties due upon other goods; but merely ascertains the owner, for the purpose of entering the goods and securing the duties. *Harris v. Dennie*, 3 Pet. 292, 303. This case "decided no more than that no creditor could, by any attachment or process, take the goods, upon their importation, out of the possession of the United States, until the lien of the United States for the duties accruing thereon was actually discharged, either by payment of the duties or by giving security therefor, according to the requirements of law on the part of the importer." *Conard v. Pacific Ins. Co.*, 6 Pet. 262, 281. A sub-purchaser after importation cannot enter goods at the custom house, and the fact that a collector takes a bond from him for the payment of duties does not estop the United States from bringing an action of debt against the importer; first, because the collector is not authorized to take such a bond from any one but the consignee; and second, because a bond taken for the security of duties does not extinguish the original debt. *United States v. Lyman*, 1 Mason, 482; see *Knox v. Devens*, 5 Id. 380, 390; 1 A. G. Op. 658; *Guesnard v. Louisville R. Co.*, 76 Ala. 453, 456; *Von Cotzhausen v. Nazro*, 11 Biss. 44, 54. It has been held that an executor may enter his testator's goods and give bonds for the duties, and if the executor wastes the goods, the United States have a remedy against the sureties on the probate bond. *United States v. Aborn*, 3 Mason, 126. See *Childs v. Shoemaker*, 1 Wash. 494. This section creates no general lien by which any imported goods are made security for the duties due upon any antecedent importations of the consignee, and he may by sale or otherwise pass a good title to the same, subject only to the payment of the duties thereon. *Howland v. Harris*, 4 Mason, 497. See *Harris v. De Wolf*, 4 Pet. 147; 4 Mason, 515. In the opinion of the Solicitor of the Treasury of November 29, 1886 (S. T. D. 7890), most of the above decisions are considered, and it is held that the provisions of § 3058 do not restrain the indorsee or assignee of a bill of lading duly held by him from the right to make entry. See S. T. D. 7092.

SECT. 3059. — See note, § 3104. At common law, any person may, at his peril, seize for a forfeiture to the government, and if the government adopts his seizure, and the property is condemned, then he is justified. *Gelston v. Hoyt*, 3 Wheat. 246; *Bolina and Cargo*, 1 Gall. 75; *Taylor v. United States*, 3 How. 197. A vessel licensed for the coast-



ing trade, which engages in an illegal traffic, loses the protection of her license, and is forfeited. *United States v. Schooner Mars*, 1 Gall. 237. The authority to seize is limited to cases of forfeiture, and is not extended to other cases by § 3072. *The Joshua Leviness*, 9 Ben. 339; see *S. T. D.* 8011, 8084.

SECTS. 3061, 3062. — See note, § 3104; *S. T. D.* 8011, 8084.

SECT. 3063. — See notes, §§ 2837, 3104. The whole legislation of Congress shows a disposition and intention, under different circumstances, to distinguish between forfeiting the thing itself and forfeiting particular rights or interests in the thing. This observation is illustrated by comparing the phraseology used in §§ 3260 and 3305 with that employed in §§ 3063 and 3281. *Heidritter v. Elizabeth Co.*, 6 F. R. 138, 141; see *The Saratoga*, 9 Id. 322, 330.

SECT. 3066. — Amended by St. April 25, 1882, ch. 89 (22 St. 49), by inserting, after "peace" in the fifth line, —

"or district judge of cities, police justice, or any judge of the circuit or district court of the United States, or any Commissioner of the United States circuit court."

It has been held that under 1 St. 677, § 68, all the government is bound to show, to make out a *prima facie* case, is that the goods were subject to duty, were searched for, were found concealed, and were seized by an authorized officer, and that where dutiable goods were found in trunks under a berth in a passenger's stateroom they were found concealed within the meaning of the statute, it appearing that the trunks were falsely marked, that the goods were not on the ship's manifest; that no declaration had been made as to the contents of the trunks, and that they contained no articles of personal baggage; that there was no invoice of them, and that they were not landed with the rest of the baggage. *United States v. 2 Trunks*, 6 Ben. 218.

The concealment applies only to articles intended to be secreted and withdrawn from public view on account of the duties not having been paid, or secured to be paid, or from some other fraudulent motive. The forfeiture does not extend to a case where, the duties not having been paid or secured in any other manner than by giving the general bond, and storing the goods according to § 62 of the act of March 2, 1799, the goods were fraudulently removed from the storehouse agreed upon by the collector and the importer, by some person other than the claimants, who were *bona fide* purchasers of the goods, and without their knowledge and consent, to another port, where the goods were found stored on board the vessel in which they were transported, in the usual manner of stowing such goods when shipped for transportation. *United States v. 350 Chests of Tea*, 12 Wheat. 486. It has been held that the concealment need not be with the concurrence, knowledge, or consent of the owner or consignee, and that the forfeiture may be enforced before the time has passed for the owner to enter the goods. *United States v. 58,850 Cigars*, 21 Law Rep. 267; see *Taylor v. United States*, 3 How. 197; *651 Chests of Tea*, *v. United States*, 1 Paine, 499; *Caldwell v. United States*, 8 How. 366; *United States v. Certain Hogsheads*, 1 Curtis, 276; *Friedenstein v. United States*, 125 U. S. 224. It has been held that the government must prove that the goods were concealed, and the fact that they were not entered on the manifest is not sufficient; and that the concealment must be from the officers of the customs. *United States v. 26 Diamond Rings*, 1 Sprague, 294.

SECT. 3067. — See note, § 3066.

SECT. 3068. — No indictment lies for resisting an officer of the customs while making a seizure without probable cause. *United States v. Gay*, 2 Gall. 359.

SECT. 3072. — See notes, §§ 3059, 3104, and see § 3073. The lien of the government for duties attaches upon the articles at the moment of their importation, and is not discharged by the unauthorized and illegal removal of the goods from the custody of the



custom-house officers. *United States v. 350 Chests of Tea, 12 Wheat, 486*; see *S. T. D. 8011, 8084*.

Any citizen may seize any property forfeited to the use of the government, either by municipal law or as prize of war, in order to enforce the forfeiture, and it depends upon the government whether it will act upon the seizure; if it proceeds to enforce the forfeiture by legal process, this is a sufficient confirmation of the seizure. *The Caledonian, 4 Wheat. 100*. See *Gelston v. Hoyt, 3 Id. 246*; *Taylor v. United States, 3 How. 197, 205*; *Bolina and Cargo, 1 Gall. 75*; *Burke v. Trevitt, 1 Mason, 96*; *McGuire v. Winslow, 23 Blatch. 425*; *26 F. R. 304*. The United States are not bound down by the acts of the seizers to the causes which influenced them, or by any irregularity on their part in conducting it, if, in point of fact, the seizure can be maintained, as founded upon an actual forfeiture of the goods at the time of seizure. *Wood v. United States, 16 Pet. 342, 359*. The acts which are necessary to constitute a seizure are set forth in the *Josefa Segunda, 10 Wheat. 312*.

SECT. 3073. — See *Gelston v. Hoyt, 3 Wheat. 246*.

SECTS. 3074–3079. — A claimant's remedy is the statutory one, and an action of trover by him against the seizing officer will not lie, based on the ground that the property was not subject to forfeiture. *McGuire v. Winslow, supra*.

SECT. 3080. — The words "as hereinbefore provided" necessarily refer to the manner of making the claim as previously directed, and not to the time within which the claimant of property, not perishable, could interfere; therefore the collector need not give the twenty days allowed by previous sections in the case of non-perishable property, for the claimant to prefer his claim to it, and allow fifteen days' notice of sale, but may publicly advertise it for sale at once, on seizure, and proper certificate as to its value and character by the appraisers, and after not less than one week's notice, may sell it. *Conway v. Stannard, 17 Wall. 398*.

SECT. 3082. — See notes, §§ 2837, 2839, 2865. Made applicable, by 22 St. 116, ch. 253, to goods admitted free of duty for, and sold in the buildings of, the Exhibition of Art and Industry at Boston, Mass. Sect. 19 of 5 St. 565, ch. 270, was deemed superseded by the cited act of 1866, except as to so much as punished false invoices, &c.; § 2 of 3 St. 781, ch. 58, was substantially incorporated in the text pursuant to the decision in 13 Wall. 531. 2 Com. D. 1480. In this case of *Stockwell v. United States, 13 Wall. 531*; 3 Cliff. 284, this act was held to be cumulative rather than substitutionary, and that it did not repeal § 2 of the act of March 3, 1823. In *United States v. Clafin, 97 U. S. 546*; 13 Blatch. 184; 14 Id. 55, the case of *Stockwell v. United States* is fully discussed, and held to be correctly decided, although the court doubts "the correctness of the opinion we expressed when the case of *Stockwell* was before us." The case of *United States v. Clafin* also holds that this section contemplates a criminal proceeding and not a civil remedy; that an action of debt will not lie by the United States against a person violating, and that it repeals § 2 of the act of 1823 referred to. This section comprehends any merchandise imported contrary to law, and is not limited to merchandise sent or received for sale. *Cotzhausen v. Nazro, 107 U. S. 215*; 15 F. R. 891, 898; 11 Biss. 44. The evidence necessary to convict is discussed in *Boxes of Opium, 9 Sawyer, 259*; 8 Id. 129; 23 F. R. 367; 12 Id. 402. See *United States v. 90 Demijohns, 4 Woods, 637*; 8 F. R. 485. *Friedenstein v. United States, 125 U. S. 224*. The provision that the possession shall be deemed evidence, &c., unless explained, does not impair the right to trial by jury. *Tilley v. Savannah R. Co., 4 Woods, 427*; 5 F. R. 641, 659. In *The Henrietta Esch, 12 F. R. 483*, the case largely turned upon the credibility of the witnesses.

For a case where it was decided that an indictment could not be upheld, as the alleged offence was committed before the act of 1866 was passed, see *United States v. Nolton, 5 Blatch. 427*; also *United States v. Smith, 2 Id. 127*. "Importing goods subject to



duties, without an invoice and consular certificate, and without entry in the manifest, is not such an importation as the law permits to be made." *United States v. 9 Trunks*, 22 Int. Rev. Rec. 317; criticising *United States v. Thomas*, 4 Ben. 370, and *United States v. 95 Boxes*, 19 Int. Rev. Rec. 101. See *United States v. Jordan*, 2 Lowell, 537, which is in harmony with *United States v. 9 Trunks*, and which gives the history of this section. See also *United States v. 2419 Sheepskins*, 2 Haskell, 394, 402; *United States v. 3 Cases*, 18 Int. Rev. Rec. 173; *The Ariel and Cargo*, 1 Haskell, 65, 76. A later case holds that bringing in merchandise "contrary to law" does not include frauds or illegalities concerning the invoicing of the same, or the payment of duties thereon, which can only occur after the importation is accomplished, and the merchandise brought within the cognizance of the customs officers. *United States v. Kee Ho*, 33 F. R. 333; *United States v. Clafin*, 13 Blatch. 178; 97 U. S. 546. See *Lewey v. United States*, 15 Blatch. 1. It is the secret and clandestine manner of the importation, coupled with the intent to defraud the revenue, and not the non-payment of or not accounting for the duties prior to the importation, that constitutes the gist of the offence of smuggling under this section. *United States v. Thomas*, 4 Ben. 370; 2 Abb. U. S. 114. Mere possession of the goods is not sufficient to authorize a conviction under this section. It is necessary to prove in addition that the goods were imported contrary to law, and that the party importing them had knowledge of that fact. *United States v. A Lot of Jewelry*, 13 Blatch. 60. An indictment under this section must state with reasonable certainty in what the illegality of the importation consists. It is not sufficient to charge in the language of the section that the goods were imported "contrary to law," or with having received or bought the same after being so imported. *United States v. Kee Ho*, 33 F. R. 333; *United States v. Thomas*, 4 Ben. 370, 375; 2 Abb. U. S. 114; *United States v. Clafin*, 13 Blatch. 178; 97 U. S. 546. An indictment for buying goods which have been brought into the United States contrary to law need not set out the offence committed in the original importation, with the same particularity of time, place, and circumstances that would be required in an indictment for the original offence. *United States v. Clafin*, *supra*. Where words are added, in an indictment, to the words of the statute, the charge must be confined to the illegality thus described. *Id.*; citing *United States v. Thomas*, *supra*. Merchants who bought wrecked goods on which no duty was paid, were held not liable to a penalty in *United States v. Cook*, 1 Sprague, 213. It was held under the old statute that the mere acts of resisting the officers of the customs, and of casting packages of goods out of a window, whereby they were entirely removed from their possession and custody, do not constitute *per se* in point of law a concealment of the goods. The defendant may have concurred in either or both of these acts, and yet may not have been a party to the subsequent removal and concealment. *United States v. Farnsworth*, 1 Mason, 1. It has been held that a vessel on which an iron cable was smuggled is not liable to forfeiture *in rem*, the penalty attaching to the person. *Clark v. Insurance Co.*, 1 Story, 109. The forfeiture of the goods is to secure indemnity to the government for the wrong done, and the fine and imprisonment are superadded as a vindication of public justice. *Re Leszynsky*, 16 Blatch. 9, 14; *United States v. Clafin*, *supra*.

SECT. 3083. — See note, § 938. Amended by 19 St. 248, ch. 69, by changing "solicitor" in the third line to "solicitor."

SECT. 3084. — S. T. D. 8035, 8112.

SECT. 3086. — The cited provision superseded a part of § 69 of 1 St. 678, ch. 22. 2 Com. D. 1482.

The property is merely held in the custody of the collector as keeper. *The G. G. Ring*, 16 F. R. 921. The law before the passage of this section (July 18, 1866), is stated in *Burke v. Trevitt*, 1 Mason, 96; 2 A. G. Op. 477, 496; *Ex parte Hoyt*, 13 Pet. 278; *United States v. One Case*, 4 Ben. 526; *United States v. Segars*, 3 Phila. 517. His lia-



bility for goods lost while in possession of the collector is stated in two cases involving an interpretation of the law previous to July 18, 1866; see *Schmalz v. United States*, 4 Ct. Cl. 142; 5 Id. 294. Where a decision was rendered in favor of a claimant whose goods were seized for an alleged violation of the revenue laws, it was held that duties unpaid were a lien the same as before seizure. *United States v. Five Hundred Boxes of Pipes*, 2 Abb. U. S. 500; see S. T. D. 8011.

SECT. 3087.—See note, § 1839. Portions of the cited provisions were here omitted as belonging to the title "The Judiciary." 2 Com. D. 1483. "Collector" means collector for the time being only. *Shore v. Jones*, 1 Brock. 285, 288. See *United States v. The Brig Henry*, 4 Blatch. 359; *United States v. Segars*, 3 Phila. 517; *Sailly v. Cleveland*, 10 Wend. 158.

SECT. 3088.—See notes, §§ 2809, 2837, 2873, 3104. A suit to enforce a lien provided for in this section is a civil case of admiralty and maritime jurisdiction and may be prosecuted in a court having admiralty jurisdiction. *United States v. The Missouri*, 9 Blatch. 433; 3 Ben. 508; *United States v. The Queen*, 11 Blatch. 416; 4 Ben. 237. A proceeding *in rem* may be taken against the vessel in the absence of any proceedings against the master or owner. *United States v. The Missouri*, *supra*; *United States v. The Queen*, *supra*.

"Seized" refers not to a revenue seizure, but to that seizure by the marshal, under process of the court, which forms part of every proceeding *in rem*; in the admiralty, therefore it is not necessary in a libel under this section to aver a prior seizure within the district. *The Missouri*, 3 Ben. 508; see *United States v. The Snow Drop*, 30 Fed. Rep. 72. It has been held that the word "seizure" used in the act of Feb. 8, 1881 (see § 3104), includes seizures by the marshal under legal process for the enforcement of a penalty under this section, as well as seizures by revenue officers for the purposes of forfeitures. *The Saratoga*, 9 F. R. 322; 15 Id. 382; see *United States v. Curtis*, 16 Id. 184.

Where a suit is against a vessel because goods on board were not on the manifest, proof that the master had no actual knowledge of their being on board is not sufficient to exempt the vessel from liability. *United States v. The Queen*, *supra*. But see note, § 3104. Where a suit in admiralty is against a vessel and her master jointly to recover a penalty, it is proper to dismiss the suit as to the master, for the reason that he is entitled to a jury trial, and to proceed with it as against the vessel. *United States v. The Queen*, *supra*; see *The Strathairly*, 124 U. S. 558, 578.

SECT. 3089.—The terms of this section apply as well when the case arises under the internal revenue laws as when under the customs laws, any regulations of the Treasury Department to the contrary notwithstanding. *One Large Water Tub*, 3 Ben. 436. And the provisions are general in their effect, applicable to all cases. Id.

SECT. 3090.—See notes, §§ 976, 1059, 2837, 2985, 2986, 2987, 3011. Amended by 19 St. 248, ch. 69, by changing "dedcted" to "deducted" in the third line, and in the twenty-fourth line by inserting the initial letter "i" in "including." And see note, § 3689. The awarding of shares of forfeitures under this section was repealed by 18 St. 186, ch. 391, § 2. See notes, §§ 3091–3093.

The definition of an informer within the meaning of this section is given in *Bradley v. United States*, 12 Ct. Cl. 578. See *United States v. Simons*, 7 F. R. 709. And the right to sue in the Court of Claims is there stated. See *Shelton v. United States*, 8 Ct. Cl. 487. See p. 358. The various acts relating to the distribution of the proceeds of fines, penalties, and forfeitures, and the practice under them are commented on in *United States v. George*, 6 Blatch. 37. The following cases besides those in the margin of the Rev. Sts. (2d edition) relate to this section before the above repeal: *Shore v. Jones*, 1 Brock. 285; 1 Wheat. 462; *United States v. Morris*, 10 Wheat. 246; *The Monte Christo*, 6 Ben. 327; *Re Jayne*, 28 F. R. 419; *Jayne v. United States*, 21 Ct. Cl. 311; *Kellogg v. United States*,



15 Ct. Cl. 372; *Hahn v. United States*, 107 U. S. 402; 14 Ct. Cl. 305; 1 A. G. Op. 259; 12 Id. 291; 13 Id. 115, 253; 14 Id. 336, 377; 15 Id. 386; *United States v. Ramsay*, 120 U. S. 214; 21 Ct. Cl. 443; S. T. D. 8144.

SECTS. 3091–3093. — Repealed by St. June 22, 1874, ch. 391, § 1 (18 St. 186); other sections of which act (see also note, § 2837) provide as follows:—

“SEC. 2. That all provisions of law under which moiety of any fines, penalties, or forfeitures, under the customs-revenue laws, or any share therein, or commission thereon, are paid to informers, or officers of customs, or other officers of the United States, are hereby repealed; and from and after the date of the passage of this act the proceeds of all such fines, penalties, and forfeitures shall be paid into the Treasury of the United States.

“SEC. 3. That it shall hereafter be the duty of the Secretary of the Treasury, out of any money specifically appropriated by Congress, to make suitable compensation in certain cases under the customs-revenue laws, as hereinafter provided, and not otherwise; and for the purpose of making such compensation for the next fiscal year, the sum of \$100,000 is hereby appropriated out of any money in the Treasury not otherwise appropriated; and he shall annually report to Congress, in detail, all payments by him for such purpose.

“SEC. 4. That whenever any officer of the customs or other person shall detect and seize goods, wares, or merchandise, in the act of being smuggled, or which have been smuggled, he shall be entitled to such compensation therefor as the Secretary of the Treasury shall award, not exceeding in amount one-half of the net proceeds, if any, resulting from such seizure, after deducting all duties, costs, and charges connected therewith: *Provided*, That for the purposes of this act smuggling shall be construed to mean the act, with intent to defraud, of bringing into the United States, or, with like intent, attempting to bring into the United States, dutiable articles without passing the same, or the package containing the same, through the custom house, or submitting them to the officers of the revenue for examination. And whenever any person not an officer of the United States shall furnish to a district attorney, or to any chief officer of the customs, original information concerning any fraud upon the customs-revenue, perpetrated or contemplated, which shall lead to the recovery of any duties withheld, or of any fine, penalty, or forfeiture incurred, whether by importers or their agents, or by any officer or person employed in the customs-service, such compensation may, on such recovery, be paid to such person so furnishing information as shall be just and reasonable, not exceeding in any case the sum of \$5000; which compensation shall be paid, under the direction of the Secretary of the Treasury, out of any money appropriated for that purpose.

“SEC. 5. That in all suits and proceedings other than criminal arising under any of the revenue-laws of the United States, the attorney representing the Government, whenever, in his belief, any business-book, invoice, or paper, belonging to or under the control of the defendant or claimant, will tend to prove any allegation made by the United States, may make a written motion, particularly describing such book, invoice, or paper, and setting forth the allegation which he expects to prove; and thereupon the court in which suit or proceeding is pending may, at its discretion, issue a notice to the defendant or claimant to produce such book, invoice, or paper in court, at a day and hour to be specified in said notice, which, together with a copy of said motion, shall be served formally on the defendant or claimant by the United States marshal by delivering to him a certified copy thereof, or otherwise serving the same as original notices of suit in the same court are served; And if the defendant or claimant shall fail or refuse to produce such book, invoice, or paper in obedience to such notice, the allegations stated in the said motion shall be taken as confessed unless his failure or refusal to produce the same shall be explained to the satisfaction of the court. And if produced, the said attorney shall be permitted, under the direction of the court, to make examination (at which examination the defendant or claimant, or his agent, may be present) of such entries in said book, invoice, or paper as relate to or tend to prove the allegation aforesaid, and may offer the same in evidence on behalf of the United States. But the owner of said books and papers, his agent or attorney, shall have, subject to the order of the court, the custody of them, except pending their examination in court as aforesaid.

“SEC. 6. That no payment shall be made to any person furnishing information in any case wherein judicial proceedings shall have been instituted, unless his claim to compensation shall have been established to the satisfaction of the court or judge having cognizance of such proceedings, and the value of his services duly certified by said court or judge for the information of the Secretary of the Treasury; but no certificate of the value of such services shall be conclusive of the amount thereof. And when any fine, penalty, or forfeiture shall be collected without judicial proceedings, the Secretary of the Treasury shall, before directing payment to any person claiming such compensation, require satisfactory proof that such person is justly entitled thereto.



"SEC. 7. That except in cases of smuggling as aforesaid, it shall not be lawful for any officer of the United States, under any pretence whatever, directly or indirectly, to receive, accept, or contract for any portion of the money which may, under any of the provisions of this or any other act, accrue to any such person furnishing information; and any such officer who shall so receive, accept, or contract for any portion of the money that may accrue as aforesaid shall be guilty of a misdemeanor, and, on conviction thereof, shall be liable to a fine not exceeding \$5000, or imprisonment for not more than one year, or both, in the discretion of the court, and shall not be thereafter eligible to any office of honor, trust, or emolument. And any such person so furnishing information as aforesaid, who shall pay to any such officer of the United States, or to any person for his use, directly or indirectly, any portion of said money, or any other valuable thing, on account of or because of such money shall have a right of action against such officer or other person, and his legal representatives, to recover back the same, or the value thereof."

SECT. 2.—See *Re Jayne*, 28 F. R. 419, 423. *Ex parte Gans*, 5 McCrary, 393; 17 F. R. 471.

SECT. 4.—Amounts recovered on forfeited bail-bonds are not "fines, penalties, or forfeitures" within this section. *Re Brittingham*, 5 F. R. 191. An informer is defined in *United States v. Simons* (7 F. R. 709), and the words "an officer of the United States" are also commented upon. It is claimed in *Ex parte Gans* (5 McCrary, 393; 17 F. R. 471), that this section is inconsistent with § 6 and that the entire act contains anomalies.

SECT. 5.—This section is unconstitutional under the Fourth and Fifth Amendments of the Constitution so far as applied to suits for penalties, or to establish a forfeiture of the party's goods. *Boyd v. United States*, 116 U. S. 616, 621; 14 Blatch. 317. See *United States v. Three Tons*, 6 Biss. 379, 388.

SECT. 6.—See notes, § 2837, § 4. This section has no application to a case of expenses incurred by the Secretary under 21 St. 265. *Re Brittingham*, 5 F. R. 191; *United States v. Simons*, 7 Id. 709. "What is smuggling for the informer when he claims his reward must also be smuggling for the goods as to which he informs." *United States v. Claffin*, 13 Blatch. 178, 185. The construction of this and § 26 as to information given leading to suits already commenced before the passage of this act of 1874 is treated in *Re Jayne*, 28 F. R. 419, 423.

## CHAPTER XI.

### PROVISIONS APPLYING TO COMMERCE WITH CONTIGUOUS COUNTRIES.

SECT. 3095.—See notes, §§ 938, 3086. This section should be read in connection with § 3097. *United States v. The Theophile*, 11 F. R. 696.

SECT. 3097.—See note, § 3095.

SECT. 3098.—See note, § 3099. A forfeiture is incurred if either a false manifest is presented or none at all, and the officer to whom it is to be presented has no power to waive a compliance with the law. 134,901 Feet of Timber, 4 Blatch. 182. The person whose duty it is to present the manifest is not entitled to the twenty-four hours. He must present it at once. *Id.* The relations between this and § 2865 are referred to in *United States v. Nolton*, 5 Blatch. 427; *United States v. Smith*, 2 Id. 127; and see note, § 2837. It should be noted that this section may be modified by Reciprocity Treaties.

SECT. 3099.—See note, § 3098. The terms "other person" and "other importer" are used in a comprehensive sense. *Steinham v. United States*, 2 Paine, 168. It is not essential that the person whose duty it is to deliver a manifest should be on board the vessel, boat, or vehicle at the moment of crossing the line in order to subject him to the penalty. *Id.* It is sufficient if the declaration pursues substantially the words of the act, and it need not state to whom the foreign country belonged. *Id.* See *Stockwell v. United States*, 13 Wall. 531; *United States v. Claffin*, 97 U. S. 546.



SECT. 3100. — See note, § 3104. Amended by 19 St. 248, ch. 69 (see, also, 18 St. 319), by transposing the eighth and ninth lines.

SECT. 3101. — See note, § 3104.

SECT. 3104. — See notes, §§ 2837, 2867, 2872, 2873, 2874, 2887, 3059, 3063, 3072, 3088. St. Feb. 8, 1881, ch. 34 (21 St. 322), provides, —

“that no vessel used by any person or corporation, as common carriers, in the transaction of their business as such common carriers, shall be subject to seizure or forfeiture by force of the provisions of Rev. Stats. Title 34 unless it shall appear that the owner or master of such vessel, at the time of the alleged illegal act, was a consenting party or privy thereto.”

The consent or privity of the owner or master must be alleged and proved. *United States v. The Snow Drop*, 30 F. R. 79; *The Saratoga*, 15 Id. 382; 9 Id. 322. “Seizure” as herein used embraces seizures by the marshal under legal process to enforce a penalty under § 3088 as well as seizures by revenue officers for the purposes of forfeitures. *The Saratoga, supra*; see *United States v. Curtis*, 16 Id. 184, 191.

SECT. 3105. — Amended by striking out “in” after “affixing” in the seventh line. 19 St. 248, ch. 69. To warrant a forfeiture under § 3106 it must be shown that the removal of the seal was wilful, in the same way as to sustain a conviction, &c., under this section. *United States v. Three Railroad Cars*, 1 Abb. (U. S.) 196.

SECT. 3106. — See note, § 3105.

SECT. 3114. — See S. T. D. 8099.

SECT. 3120. — Amended by St. Feb. 27, 1877, ch. 69 (19 St. 248), by adding: —

“And that the Secretary of the Treasury be, and he is hereby, authorized, in his discretion, to make such regulations as shall enable vessels engaged in the coasting trade between ports and places upon Lake Michigan exclusively, and laden with American productions and free merchandise only, to unlade their cargoes without previously obtaining a permit to unlade.”

SECT. 3125. — See *United States v. The Queen*, 4 Ben. 237; 11 Blatch. 416; *The Missouri*, 3 Ben. 508; 9 Blatch. 433.

SECT. 3126. — See *The Ariel and Cargo*, 1 Haskell, 65, 76.

SECT. 3129. — The provisions of 1 St. 701, ch. 22, §§ 104, 105, 107, 108, 109, and 12 St. 572, ch. 169, § 3, appear to have been dependent upon treaties since expired. 2 Com. D. 1499.



## TITLE XXXV.

## INTERNAL REVENUE.

## CHAPTER I.

## OFFICERS OF INTERNAL REVENUE.

As to the meaning of the term revenue law, see *United States v. Hill*, 123 U. S. 681. Laws for raising a revenue are to be so construed as to give full effect to the intention of Congress to provide a revenue. *United States v. Olney*, 1 Abb. U. S. 275; *Cliquot's Champagne*, 3 Wall. 114; *United States v. 28 Casks of Wine*, 7 Int. Rev. Rec. 4. As to prosecution of frauds on the revenue and the statute of limitations applicable thereto, see notes, §§ 838, 1043. An information for a violation of the internal revenue laws cannot be taken from the Circuit to the Supreme Court on appeal, but must be by writ of error *United States v. Emholt*, 105 U. S. 414.

SECT. 3140. — See note, ch. 4, *post*.

SECT. 3141. — See note, § 3153. Amended by 19 St. 248, ch. 69, by changing "is" to "was," after "State," in the fourteenth line. The Supreme Court will take judicial notice that by law the country is divided into collection districts for internal revenue purposes. *United States v. Jackson*, 104 U. S. 41. Prior to 13 St. 224, the President had no power to alter the collection districts (10 A. G. Op. 469; 12 Id. 55); and the restriction as to the number of such districts is still in force notwithstanding 16 St. 239. 14 A. G. Op. 215.

SECT. 3142. — *Pickering v. Day*, 3 Houst. (Del.) 519; *United States v. Jackson*, 3 Hughes, 231; *King v. United States*, 99 U. S. 229.

SECT. 3143. — St. March 1, 1879, ch. 125, § 2 (20 St. 327), substitutes the following in place of the last sentence of this section:—

"And he shall execute a new bond whenever required so to do by the Secretary of the Treasury, with such conditions as may be required by law or prescribed by the Commissioner of Internal Revenue, with not less than five sureties; which new bond shall be in lieu of any former bond or bonds of such collector in respect to all liabilities accruing after the date of its approval by the Solicitor of the Treasury. Said bonds shall be filed in the office of the First Comptroller of the Treasury."

The collector's bond is a contract for the indemnity of the United States alone and not for the indemnity of private persons. *Clark v. United States*, 60 Ga. 156. It should identify the district in which the officer is to act, the kind of taxes he is to collect, and state under what act of Congress it is given. *United States v. Jackson*, 3 Hughes, 231. Money paid for taxes past due and received by the collector as such is public money. *King v. United States*, 99 U. S. 229. The direction of the Commissioner to execute a new bond must be considered as the direction of the Secretary of the Treasury. *Soule v. United States*, 100 U. S. 8. The bond required from the collector as disbursing agent is separate from and additional to his bond as collector. *Hall v. United States*, 17 Ct. Cl. 39. See *Chadwick v. United States*, 3 F. R. 750.

SECT. 3144. — 20 St. 327, ch. 125, § 2, strikes out "such" in the first line, and the first ten words of the second line. In the bond of a collector as disbursing agent the condition to account is general, and is applicable to payment of certain store-keepers, authorized by



an act of Congress, which is enacted subsequently to the execution of such bond. *United States v. McCartney*, 1 F. R. 104. The collector of internal revenue is now, as such, a bonded disbursing officer. *Hartson v. United States*, 21 Ct. Cl. 451. See *Hall v. United States*, 17 Ct. Cl. 39.

SECT. 3145. — See note, § 3148. 19 St. 248, ch. 69, changes "entitled" to "entitled" in the thirty-first line. St. March 1, 1879, ch. 125, § 2 (20 St. 327), repealing 18 St. 307, ch. 36, § 13, repeats the second, third, and fourth sentence of this section with the following changes: in the twenty-third line of the section, it inserts "approved or" before "allowed," and in the twenty-fourth line, changes "is" to "shall be;" it inserts "provided" after "collector" in the twenty-fifth line, and in place of "may" there inserts the words "on the recommendation of the Commissioner of Internal Revenue, be authorized to;" in the twenty-seventh line it inserts "from" before "the amount" and changes "where, by reason of" to "in which, from." At the end of that sentence it inserts:—

"But no such allowance shall be made if more than one year has elapsed since the close of the fiscal year in which the services were rendered."

In the thirty-second line it further changes "he" to "such collector."

In respect to allowances the judgment of the Secretary of the Treasury is final unless reversed by Congress, and cannot be judicially revised; and a claim for an allowance by a collector in addition to his salary cannot be admitted by the accounting officers of the Treasury unless sanctioned by the Secretary. *United States v. Hall*, 2 Dillon, 426; s. c. 91 U. S. 559, 566. When the Secretary of the Treasury under this section has granted a further allowance and the same has been paid to an officer, the Secretary cannot exact a return of any portion of it. *Patton v. United States*, 7 Ct. Cl. 362. This section does not indicate how the allowances are to be made, but elsewhere (Rev. Stats. § 161) power is conferred upon the heads of departments to make regulations for the government of the departments. *Landram v. United States*, 16 Ct. Cl. 74. Where the Secretary of the Treasury makes an allowance to a collector for the employment of deputies, no privity of contract is thereby created between the government and the deputies. *Herndon v. United States*, 15 Ct. Cl. 446; see *Hedrick v. United States*, 16 Id. 88; *Ryan v. United States*, 17 Id. 47; *Landram v. United States*, 21 Id. 128; *United States v. Landram*, 118 U. S. 81; *United States v. Flanders*, 112 Id. 88.

SECT. 3147. — The word "or" in the second line of this section is erroneously printed "of."

SECT. 3148. — See notes, §§ 3145, 3149. St. March 1, 1879, ch. 125, § 2 (20 St. 327), amending 18 St. 309, ch. 36, § 12, amends this section by striking out all after "proper" in the third line, and substituting therefor the following:—

"To be compensated for their services by such allowances as shall be made by the Secretary of the Treasury, upon the recommendation of the Commissioner of Internal Revenue. Allowances shall also be made in like manner for salary and office expenses of collectors, all of which shall be in lieu of the salary and commissions heretofore provided by law: *Provided, however*, That the salaries of collectors shall be fixed at \$2000 each per annum where the annual collections amount to \$25,000 or less, and shall, by the Secretary, on the recommendation of the Commissioner, be graduated up to the maximum limit of \$4500, which latter sum shall be allowed in all cases where the collections amount to \$1,000,000 or upward; and the collector shall have power to revoke the appointment of any such deputy, giving such notice thereof as the Commissioner of Internal Revenue may prescribe, and to require and accept bonds or other securities from any deputy; and actions upon such bonds may be brought in any appropriate district or circuit court of the United States; which courts are hereby given jurisdiction of such actions concurrently with the courts of the several States. Each such deputy shall have the like authority in every respect to collect the taxes levied or assessed within the portion of the district assigned to him which is by law vested in the collector himself; but each collector shall, in every respect, be responsible, both to the United States and to individuals, as the case may be, for all moneys collected, and for every act done or neglected to be done, by any of his deputies while acting as such."



A deputy collector is not an employé of the government. *Herndon v. United States*, 15 Ct. Cl. 446; *Landram v. United States*, 16 Id. 74; *Hedrick v. United States*, Id. 88. See *Schuster v. Weissman*, 63 Mo. 552; *Chadwick v. United States*, 3 F. R. 750. See *United States v. Landram*, 118 U. S. 81. Aside from 20 St. 327, ch. 125, § 2, giving the district and circuit courts concurrent jurisdiction with the courts of the several States, an action by a collector of internal revenue on the official bond of a deputy may be removed from the State into the Federal court as arising under the laws of the United States. *Orner v. Saunders*, 3 Dillon, 284. See *Farden v. United States*, 13 Ct. Cl. 353; 99 U. S. 10.

SECT. 3149. — St. March 1, 1879, ch. 125 (20 St. 328), substitutes the following in place of the first sentence of this section: —

“In case of the sickness or absence of a collector, or in case of his temporary disability to discharge his duties, they shall devolve upon his senior deputy, unless he shall have devolved them upon another of his deputies; and for the official acts or defaults of such deputies the collector and his sureties shall be held responsible to the United States.”

In the eighth line, after “collector,” it adds “and also the duties of disbursing agent.” In the eleventh line it strikes out “*Provided that*” and changes the colon after “appointed” to a period. It changes the sentence next to the last to read as follows: —

“For the official acts and defaults of the deputy upon whom said duties are devolved, remedy shall be had on the official bond of the collector, as in other cases; and for the official acts and defaults of such deputy as acting disbursing agent, remedy shall be had on the official bond of the collector as disbursing agent.”

In the eighteenth line it changes “the preceding section” to “§ 12 of 18 St. 307, ch. 36.” See note, § 3148.

This section sets forth the only two cases in which a deputy can act as collector, but where a collector is suspended for fraud and the Secretary of the Treasury recognizes the suspension and designates a deputy to act as collector vice the collector suspended, there is a vacancy in the office within the meaning of this section and § 4150, and the deputy will be entitled to the compensation of a collector. *Farden v. United States*, 13 Ct. Cl. 347, affirmed in 99 U. S. 10.

SECT. 3150. — See note, § 3149. And for such salary and commissions he may maintain an action against the United States. *Herndon v. United States*, 15 Ct. Cl. 446, 453. The last clause of 15 St. 282, § 1, is repealed by being omitted from this section. *United States v. Farden*, 99 U. S. 10.

SECT. 3151. — Repealed by St. Aug. 4, 1886, ch. 896 (24 St. 218), which took effect Sept. 1, 1886, and which provided, —

“That manufactured tobacco, snuff, and cigars may be removed for export to a foreign country without payment of tax, under such regulations, and the making of such entries, and the filing of such bonds and bills of lading as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe.”

An inspector of tobacco and cigars appointed by the Secretary of the Treasury is a civil officer. *Hartson v. United States*, 21 Ct. Cl. 451.

SECT. 3152. — See notes, §§ 3436, 5448. 20 St. 178, ch. 329, permitted the employment of thirty-five agents in lieu of the number here named. The same number of thirty-five is given in 20 St. 329, ch. 125, which adds the following at the end of this section:

“The agents whose employment is authorized by this section shall be known and designated as internal-revenue agents, and they shall have all the powers of entry and examination conferred upon any officer of internal revenue, by R. S. §§ 3177, 3277, 3286, 3318; and all the provisions of said sections, including those imposing fines, forfeitures, penalties, or other punishments for the enforcement thereof, are hereby made applicable to the action of internal-revenue agents, in the same manner as if such agents were specially named in each of said sections. And all the provisions of R. S. §§ 3167, 3168, 3169, 3171 shall apply to internal-revenue agents as fully as to internal-revenue officers.”



St. March 3, 1885, ch. 343 (23 St. 404), provides,—

“That the number of deputy collectors, gaugers, storekeepers, and clerks employed in the collection of internal revenue shall not be increased, nor shall the salary of said officers and employees be increased beyond the salaries paid during the last fiscal year. [See, also, 23 St. 172; 24 St. 187, 610; and St. July 11, 1888 (25 St. 272), which last act contains the same provision, adding, at the end thereof, “exclusive of the number employed under the act of Aug. 2, 1886, defining butter, and so forth.”] . . . And hereafter storekeepers, or storekeepers and gaugers, who are assigned to distilleries whose registered capacity is 20 bushels or less, shall receive \$2 per day for their services; and no collector in any district shall recommend, nor shall there be appointed or commissioned, more deputy collectors, storekeepers, storekeepers and gaugers, gaugers, inspectors, or other officers, or allowed to remain in commission more of any of said officers, at any one time, than 15 per centum in excess of the number actually engaged in performing duty at the time and indispensably necessary for the performance of said duty: *Provided further*, That the compensation of the chief of the internal-revenue agents shall not exceed \$10 per day, and of the other agents not exceeding \$7 per day each; and for per diem in lieu of subsistence, while travelling on duty, said agents shall receive at a rate to be fixed by the Secretary of the Treasury, not exceeding \$3 per day.”

And a reward may be offered for information leading to the forfeiture of illicit distilleries and the conviction of the persons operating them. *Williams's Case*, 12 Ct. Cl. 192. See 13 A. G. Op. 228, as to informers' shares under internal revenue laws.

SECT. 3153. — See preceding note. St. Aug. 15, 1876, ch. 287, § 1 (19 St. 143), provides,—

“Hereafter no storekeeper shall receive a greater compensation than \$4 per day; and said gaugers and storekeepers, respectively shall only receive compensation when rendering actual service. And it shall be the duty of the President, and he is hereby authorized and directed, to reduce the number of internal revenue districts to not exceeding 131 in the manner heretofore provided by law, which reduction shall take effect on September 1, 1876, or as soon thereafter as may be practicable. And Rev. Stats. §§ 3159, 3160, and all laws and parts of laws in conflict with the provisions of the foregoing paragraphs relating to the internal revenue service, are hereby repealed. The powers of transfer, and of suspension, of officers conferred upon supervisors by Rev. Stats. § 3163, are hereby vested in the Commissioner of Internal Revenue; and all other powers conferred, and duties imposed, by said section upon supervisors, are hereby conferred and imposed upon collectors of internal revenue within their respective districts. In case of the supervision [*i. e.* suspension] of a collector, under the power hereby conferred, the Commissioner of Internal Revenue shall, as soon thereafter as practicable, report the case to the President through the Secretary of the Treasury for such action as he may deem proper. And Rev. Stats. §§ 2649, 2650, 2651, and all laws and parts of laws authorizing the Secretary of the Treasury to appoint special agents to be employed in the customs service and classifying them and regulating the duties of said agents, shall be so modified as to authorize the appointment of only 20 special agents, each of whom shall receive a compensation of not exceeding \$8 per day, in the discretion of the Secretary of the Treasury, and actual travelling expenses when actually employed in the duties of such agency. And Rev. Stats. §§ 3321, 3323, so far as the latter relates to wholesale liquor-dealers' packages filled on the premises of wholesale liquor dealers, shall, from and after 10 days from the passage of this act, be repealed; and packages of distilled spirits filled on the premises of any wholesale liquor dealer shall thereafter be stamped under such rules and regulations as the Commissioner of Internal Revenue may prescribe. That the Secretary of the Treasury may, upon the recommendation of the Commissioner of Internal Revenue, impose the duties of storekeeper and gauger upon one officer, where the amount of spirits produced at the distillery, to which such officer may be assigned, is not sufficient, in the judgment of the Commissioner to warrant the employment of two officers to perform the separate duties of storekeeper and gauger. The Secretary of the Treasury may issue a commission to such officer as storekeeper and gauger, but the compensation for his services as storekeeper and gauger shall be that of storekeeper only. And the said officer shall before entering upon the discharge of such duties, give a bond in the penal sum of not less than \$5000 for the faithful performance of the combined duties of storekeeper and gauger.”

St. June 21, 1879, ch. 34, § 2 (21 St. 23), provides,—

“That hereafter storekeepers at distilleries that mash less than 60 bushels of grain per day shall be allowed not exceeding \$50 per month. But when one person acts as storekeeper and gauger, his salary shall not exceed \$4 per day for the time actually employed.”

He is not entitled to compensation during intervals when he is not assigned to duty. *McNeil v. United States*, 23 Ct. Cl. 413. The official bond of a distiller and his sureties



does not bind them to make reimbursement of money expended by the United States for storekeepers' fees before the joint resolution of March 29, 1869, supplying certain omissions in the appropriation acts. *United States v. Singer*, 15 Wall. 111, 122. See *United States v. McCartney*, note § 3144.

SECTS. 3154, 3156. — See notes, §§ 3152, 3153, *supra*. An internal revenue gauger is an officer under the Rev. Stats. § 3267. *Hedrick v. United States*, 16 Ct. Cl. 101. The right of action on the bond prescribed by Rev. Stats. § 3156 is reserved to the government, notwithstanding an indictment, conviction, and sentence under § 3169, unless there is an averment of satisfaction of the latter. *United States v. Cullerton*, 8 Biss. 166.

SECT. 3157. — See notes, §§ 74, 3153; *Hedrick v. United States*, 16 Ct. Cl. 102. 20 St. 187, ch. 329, § 1, superseding 18 St. 93, ch. 328, § 1, par. 9; and *Id.* 352, ch. 129, § 1, par. 2, provides, —

“Hereafter the compensation of gaugers shall not exceed \$5 per day while actually employed.”

SECT. 3158. — 18 St. 319, ch. 80, inserts “two” after “than” in the thirteenth line. See *United States v. Finlay*, 1 Abb. U. S. 364; 3 Pittsb. R. 126.

SECTS. 3159, 3160. — Repealed by 19 St. 152. See note, § 3153.

SECT. 3163. — See note, § 3153. St. March. 1, 1879, ch. 125 (20 St. 328), changes this section to read as follows:—

“Every collector within his collection-district and every internal-revenue agent shall see that all laws and regulations relating to the collection of internal taxes are faithfully executed and complied with, and shall aid in the prevention, detection, and punishment of any frauds in relation thereto. And it shall be the duty of every collector and of every internal-revenue agent to report to the Commissioner in writing any neglect of duty, incompetency, delinquency, or malfeasance in office of any internal-revenue officer or agent of which he may obtain knowledge, with a statement of all the facts in each case, and any evidence sustaining the same. The Commissioner may also transfer any inspector, gauger, storekeeper, or storekeeper and gauger, from one distillery or other place of duty, or from one collection-district, to another.”

As to the extent of the powers of a supervisor to summon persons before him for examination, to order production of books and papers and as to the powers of a district court to punish disobedience to such order, and the constitutionality of the provision, see *Matter of Meador*, 1 Abb. U. S. 317; 2 Am. Law T. (U. S. Cts.) 140; *Stanwood v. Green*, 2 Id. 184; *Perry v. Newsome*, 10 Int. Rev. Rec. 20; *Stanwood v. Fordyce*, 13 Id. 77. See cases also under note, § 3174. As to the rights and privileges of persons so summoned to testify, see *Matter of Lippman*, 3 Ben. 95. As to the effect of the suspension of a collector for fraud, see *Farden v. United States*, 13 Ct. Cl. 347, affirmed 99 U. S. 10; *Matter of Archer*, 9 Ben. 427; *United States v. Rhawn*, 11 Phila. 521; 22 Int. Rev. Rec. 235.

SECT. 3164. — This confers on the district attorney no supervision over circuit court commissioners or the warrants issued by them. *United States v. Scroggins*, 3 Woods, 529.

SECT. 3165. — 20 St. 328, ch. 125, inserts “or regulation authorized by law” after “by law” in the last line.

SECTS. 3167–3169. — See notes, §§ 3152, 3429; *United States v. Shonse*, 31 Int. Rev. Rec. 120. See note, § 3244. 19 St. 248, ch. 169 changes “spritits” to “spirits” in the third line of § 3168. St. Feb. 8, 1875, ch. 36, § 23 (18 St. 307), provides, —

“SEC. 23. That all acts and parts of acts imposing fines, penalties, or other punishment for offences committed by an internal revenue officer or other officer of the Department of the Treasury of the United States, or under any bureau thereof, shall be, and are hereby, applied to all persons whomsoever, employed, appointed, or acting under the authority of any internal revenue or customs law, or any revenue provision of any law of the United States, when such persons are designated or acting as officers or deputies, or persons having the custody or disposition of any public money.”



Officials and private persons may not be joined in one indictment under § 3169. *United States v. McDonald*, 3 Dillon, 543. But counts for a conspiracy to defraud and for having a knowledge of a violation of the internal revenue laws may. If both charges, however, constitute substantially but one offence, the court should render but one judgment on the verdict. *Ex parte Joyce*, 23 Int. Rev. Rec. 297. In order to find an officer or agent guilty of demanding or receiving greater sums than he is entitled to, the jury must be satisfied that he knew he was violating the law. *United States v. Highleyman*, 22 Int. Rev. Rec. 138. Terms of compromise proposed to the Commissioner before trial on an indictment under § 3169, do not come within the purview of § 3229. 14 A. G. Op. 43. See *United States v. Cullerton*, note, § 3156. And for construction of § 3169 and evidence, see *United States v. McKee*, 3 Dillon, 546 and 551; *United States v. Babcock*, Id. 581. As to extortion, oppression, compromise of charge, or complaint, see *United States v. Deaver*, 14 F. R. 595; 4 Crim. Law Mag. 209; *Clark v. United States*, 60 Ga. 156.

SECT. 3170. — The cited provision of 1867 was reported in a form which gives it a general and permanent application; § 98 of St. July 20, 1868, though probably intended to supersede this provision, failed in strictness to do so, so far as the latter relates to district attorneys and marshals. 2 Com. D. 1542.

SECT. 3171. — See note, § 3152. 20 St. 329, ch. 125, changes "for or on account of any act by him done" to "in the discharge of his duty."

## CHAPTER II.

### OF ASSESSMENTS AND COLLECTIONS.

SECT. 3172. — This section and Rev. Stats. §§ 3173, 3174, 3175, 3176, 3182 construed in *Matter of Archer*, 9 Ben. 427. See also *Brown v. Goodwin*, 75 N. Y. 409.

SECTS. 3173, 3174. — The theory of the internal revenue laws was that parties liable for taxes should themselves take certain steps to secure their liability, and that the officers were to look after cases of delinquency occurring by neglect of those steps. 2 Com. D. 1545.

20 St. 330, ch. 125, § 3, strikes out all after "for" in the third line, through "of levy" in the fifth line, and substitutes therefor the following: —

"In case of a special tax, on or before the 30th day of April in each year, and in other cases before the day on which the taxes accrue."

For extent of the power of the collector under § 3174, see *United States v. Hodson*, 14 Int. Rev. Rec. 100. Under this and the two following sections a judge or commissioner has power to issue a rule to show cause why an attachment should not issue as for a contempt against a person summoned to give testimony as therein provided. But said sections do not authorize the production of the books of a corporation in which the taxpayer is a shareholder, those books not being such as relate to the trade or business of the shareholder. *Re Chadwick*, 1 Lowell, 439. The power to summon a person and to compel production of books is constitutional. *Re Phillips*, 10 Int. Rev. Rec. 107; 2 Am. Law T. (U. S. Cts.) 154, and see also § 3163, *ante*, notes. Disclosures and admissions so compelled cannot be used before any court of the United States in a criminal or quasi-criminal prosecution. *Re Phillips*, *supra*; *Landram v. United States*, 16 Ct. Cl. 74, 85; *Re Strouse*, 1 Sawyer, 605; *Re Lippman*, 3 Ben. 95; *United States v. Fordyce*, 13 Int. Rev. Rec. 77.

SECT. 3175. — Applies only to persons summoned under §§ 3173, 3174. *Matter of Archer*, 9 Ben. 427.



SECT. 3176. — 20 St. 331, ch. 125, § 3, strikes out "in all cases" in the nineteenth line, and inserts, after "tax," in the twentieth line, the words —

"unless the neglect or falsity is discovered after the tax has been paid, in which case the amount so added shall be collected in the same manner as the tax."

The imposition of the penalty of one hundred per cent for a false return is constitutional (*Doll v. Evans*, 9 Phila. 364); and it is not necessary that the return should be wilfully false. *Savings Bank v. Archbold*, 15 Blatch. 398. See, however, s. c. 104 U. S. 708. But the power to add this penalty terminates on the transmission of the lists to the collector. 11 A. G. Op. 280 (1865). As to the production and examination of books, and the privileges of a witness, see *Matter of Lippman*, 3 Ben. 95; *Haffin v. Mason*, 15 Wall, 671; *Wright v. Blakeslee*, 101 U. S. 174, 178; *Landram v. United States*, 16 Ct. Cl. 85; *Re Chadwick*, 1 Lowell, 439; 11 Int. Rev. Rec. 133.

SECT. 3177. See note, § 3152. National banks are not exempt from examination by any internal revenue officer here mentioned. But a supervisor's clerk is not such an officer. *United States v. Rhawn*, 11 Phila. 521; 22 Int. Rev. Rec. 235. In an action by the United States to recover a forfeiture of \$500 under this section, for a refusal to allow a collector to examine paid bank checks, it was held that as the information did not allege that the said checks were not duly stamped, it was insufficient. *United States v. Mann*, 95 U. S. 580. An indictment charging in the words of the statute that the defendant "did forcibly attempt to rescue" property seized by a revenue collector does not specify with sufficient certainty what acts were done which constituted the attempt. *United States v. Ford*, 34 F. R. 26. A person may be guilty under this section of the offence of obstructing or hindering an officer from entering a building for the purpose of examination, even though he does not own the building or the articles subject to tax, and did not make, produce, or keep them. *United States v. Fears*, 3 Woods, 510. See also the same case as to the requisites of an indictment under this section. An internal revenue officer who has obtained information of the violation of an internal revenue law, in the manner authorized by this section, is entitled to an informer's share of the proceeds of the fine or forfeiture. 13 A. G. Op. 369.

SECT. 3178. — *United States v. Erie R. R. Co.*, 24 Int. Rev. Rec. 76.

SECT. 3179. — Where two persons composing a partnership make and sign, in their partnership name, a false return to the collector or his deputy, they may be jointly indicted therefor. *United States v. McGinnis*, 1 Abb. U. S. 120.

SECT. 3181. — 18 St. 319, ch. 80, changes "last" to "list," in the fourth line.

SECT. 3182. — In an action upon a distiller's bond for an assessment made by the Commissioner the defendant may give evidence showing the incorrectness of the assessment, although he has not first appealed to the Commissioner. *United States v. Myers*, 3 Hughes, 239; 5 Rep. 364. An earlier case (*United States v. Black*, 11 Blatch. 538), held, however, that, under these circumstances, the only remedy of the distiller and his sureties is to pay the tax under protest, appeal to the Commissioner, and if the appeal is rejected, bring an action against the collector to recover the amount unjustly exacted. And until an action in his behalf has been brought, the person liable to taxation is bound by the assessment. *United States v. Hodson*, 14 Int. Rev. Rec. 100.

In *Daniels v. Tarbox*, 9 Blatch. 176, the question whether a reassessment under this section is authorized, where the return of the party liable to taxation contains truly every fact which it is his duty to return or which is material to a correct assessment, was raised but not decided. But in *Barker v. White*, 11 Blatch. 445, a reassessment was held to be authorized, though the list is imperfect by reason of an omission, understatement, or undervaluation arising from a mistake of the Commissioner himself. The list made out,



certified, and delivered to the collector is a sufficient warrant to him to demand and collect the tax charged therein and constitutes a justification of the seizure of the goods of the person liable to the tax. *Doll v. Evans*, 9 Phila. 364. The power of reassessment is to be exercised independently of the fact of payment or non-payment of the tax charged in the original list. *Id.*

In an action against the collector to recover taxes paid under protest upon a reassessment, the mere existence of such a reassessment cannot raise a presumption that an error or omission, such as is provided for by this section, existed in the original list. It must be shown by distinct proof to have existed in the return of the party taxed or in the act of the Commissioner himself, in order to prove that he had authority to make the reassessment. *Barker v. White*, *supra*.

"*Within fifteen months.*" This limitation does not apply to an action against a corporation for taxes imposed by statute. *United States v. Little M. C. & X. R. R. Co.*, 1 F. R. 700; *United States v. O'Neill*, 19 Id. 567; *Matter of Archer*, 9 Ben. 427; *Dandeleit v. Smith*, 18 Wall. 642; *Bergdoll v. Pollock*, 95 U. S. 337. See notes, § 3309.

SECT. 3183. — *Landram v. United States*, 16 Ct. Cl. 74, 85. Amended by St. March 1, 1879, ch. 125, § 3 (20 St. 331), by adding —

"excepting only when the same are in payment for stamps sold and delivered; but no collector or deputy collector shall issue a receipt in lieu of a stamp representing a tax."

SECT. 3184. — Notice is not part of the assessment or a condition precedent thereto, but it is necessary before the taxpayer can be charged with the penalty of five per cent or one per cent interest, or before his property can be distrained for the tax. *United States v. Bristow*, 20 F. R. 378; *Brown v. Goodwin*, 75 N. Y. 409. This section and § 3185 are to be strictly construed. Demand is essential. It must be formal and specific and be shown to have been duly made. The notice must be in writing and must strictly comply with the requirements of the statute. *United States v. Allen*, 14 F. R. 263.

SECT. 3185. — See note, § 3184; *United States v. Allen*, 14 F. R. 263; *United States v. Wilson*, 118 U. S. 86, 88; *United States v. Black*, 11 Blatch. 538.

SECT. 3186. — 20 St. 331, ch. 125, § 3, strikes out the four words following "time" in the third line, and substitutes therefor —

"when the assessment list was received by the collector, except when otherwise provided, until."

Formerly, demand having been made, it was held that the lien for delinquent taxes had relation back to the time when the tax became due, but attached only to such property as belonged to the delinquent tax payer when payment of the tax was demanded. *United States v. Pacific R. R.*, 1 McCrary, 1; 1 F. R. 97; 9 Rep. 566, and 10 Cent. Law J. 269; *Brown v. Goodwin*, 75 N. Y. 409. It is a lien not only upon land, but also upon personal property, and upon all rights to property depending upon contracts and upon unexecuted contracts, as well as upon property in possession. *United States v. Pacific R. R.*, 4 Dillon, 71.

The withdrawal of spirits for export renders the exporters liable to a tax if the gauging before shipment shows a deficiency as regards the amount of spirits withdrawn. And for the payment of this tax a lien will attach under this section as well as under § 3251. 16 A. G. Op. 634. And see note, § 3330.

SECT. 3187. — *United States v. Howell*, 9 F. R. 674; *Brown v. Goodwin*, 75 N. Y. 409; *Deposit Savings Assoc. v. Mayer*, 23 Int. Rev. Rec. 241.

SECT. 3188. — *Landram v. United States*, 16 Ct. Cl. 74, 85; *Hartman v. Bean*, 99 U. S. 393, 397.

SECT. 3196. — *Landram v. United States*, 16 Ct. Cl. 74, 85.

SECT. 3197. — *Brown v. Goodwin*, 75 N. Y. 409; *United States v. Mackoy*, 2 Dillon, 299. 19 St. 248, ch. 69, strikes out "to be" before "seized" in the twelfth line.



St. March 1, 1879, ch. 125, § 3 (20 St. 331), strikes out the seventeen words following "United States" in the twenty-sixth line, and substitutes the following in place of the last two sentences of the section:—

"And in case the same shall be declared to be purchased for the United States, the officer shall immediately transmit a certificate of the purchase to the Commissioner of Internal Revenue, and, at the proper time, as hereafter provided, shall execute a deed therefor, after its preparation and the indorsement of approval as to its form by the United States district attorney for the district in which the property is situate, and shall without delay, cause the same to be duly recorded in the proper registry of deeds, and immediately thereafter shall transmit such deed to the Commissioner of Internal Revenue. And said sale may be adjourned from time to time by said officer for not exceeding 30 days in all, if he shall think it advisable so to do. If the amount bid shall not be then and there paid, the officer shall forthwith proceed to again sell said estate in the said manner. And it is hereby provided, That all certificates of purchase, and deeds of property purchased by the United States under the internal-revenue laws, on sales for taxes, or under executions issued from United States courts, which now are, or hereafter may be, found in the office of any collector, United States marshal, or United States district attorney, shall be immediately transmitted by such officers respectively to the Commissioner of Internal Revenue. And it is hereby further provided, That for the preparation and approval by the United States district attorney of each deed as above required, a fee of five dollars shall be allowed to that officer, to be paid by the United States, and which he shall account for in his emolument returns."

SECT. 3198. — See note, § 3199.

SECT. 3199. — The deed given in pursuance of Rev. Stats. § 3198, is *prima facie* evidence only of the facts which are there required to be stated, and of such facts as are required to be stated by the law of the State wherein the land is situated. *Brown v. Goodwin*, 75 N. Y. 409. All other acts prerequisite to a sale of the land must be proved by evidence *dehors* the deed, and the burden of such proof rests on the purchaser. *Fox v. Stafford*, 90 N. C. 296.

SECT. 3203. — 20 St. 332, ch. 125, § 3, inserts after the first sentence of this section:

"And on or before the fifth day of each succeeding month he shall transmit a copy of such record of the preceding month to the Commissioner of Internal Revenue."

SECT. 3207. — *United States v. Mackoy*, 2 Dillon, 299. The remedies here given may be pursued concurrently with those given by § 3153. *Alkan v. Bean*, 8 Biss. 83. While an assessment is *prima facie* valid it is not conclusive as against all parties to a bill filed pursuant to this section. Such as are not directly affected by the assessment may contest its validity. *United States v. Rindskopf*, 8 Biss. 507; 8 Rep. 426.

SECT. 3208. — St. March 1, 1879, ch. 125, § 3 (20 St. 332), changes the first section of this section to read as follows:—

"The Commissioner of Internal Revenue shall have charge of all real estate which is now or shall become the property of the United States by judgment or forfeiture under the internal-revenue laws, or which has been or shall be assigned, set off, or conveyed by purchase or otherwise to the United States in payment of debts or penalties arising under the laws relating to internal revenue, or which has been or shall be vested in the United States by mortgage or other security for the payment of such debts, and of all trusts created for the use of the United States in payment of such debts due them; and, with the approval of the Secretary of the Treasury, may, at public vendue, and upon not less than 20 days' notice, sell and dispose of all real estate owned or held by the United States as aforesaid; and until such sale the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may lease such real estate owned as aforesaid on such terms and for such period as they shall deem expedient."

This section refers to real estate derived under provisions relating to fines, taxes, penalties, and forfeitures incurred under the internal revenue laws themselves, and not to such as is acquired by virtue of proceedings against a collector of internal revenue upon his official bond. 16 A. G. Op. 143. The charge of real estate forfeited under the internal revenue laws, where the forfeiture is enforced by proceedings *in rem*, does not devolve



upon the Commissioner, but only such real estate as is acquired in satisfaction of a pecuniary forfeiture. *Id.* 185.

SECT. 3213. — See notes, § 1047, 3436; *Coffey v. United States*, 116 U. S. 427. Taxes assessed pursuant to § 3309 may be sued for under this section. *United States v. Bristow*, 20 F. R. 378.

SECT. 3214. — This section does not prevent the defendant in a suit brought by government to collect taxes from setting up that they are erroneous or illegal. *Clinkenbeard v. United States*, 21 Wall. 65.

SECT. 3216. — The "costs" are only such sums of money as have been expended by the government during the progress of a suit and do not include officers' fees which may be retained by them. *United States v. Cigars*, 2 F. R. 494; 15 A. G. Op. 386.

SECT. 3217. — This and §§ 3624, 3625 have for their object the enforcement of the liabilities of officers who are accountable for public money, and though extending to revenue officers, they cannot properly be regarded as revenue laws. 16 A. G. Op. 143.

SECT. 3218. — In an action against a collector upon his official bond evidence of dereliction in making collections is not competent where the alleged breach consists of a failure to account for and pay over money to the United States. *United States v. Glenn*, 1 Woods, 400. The collector is entitled to a credit for uncollected taxes transferred by him to his successor in office if he shows that due diligence was used by him for their collection. And though the certificate of the Commissioner is a condition precedent to a credit before suit, it is not such to a defence upon the facts if suit is brought. *United States v. Kimball*, 101 U. S. 726.

SECT. 3220. — The decisions of the Commissioner of Internal Revenue are in the nature of awards made by arbitrators. An allowance made by him may be impeached for fraud, want of jurisdiction, mistake apparent upon the certificate of allowance, and generally, so far as the proceedings are similar, for such irregularities as would avoid an award made by arbitrators (*Bank of Greencastle v. United States*, 15 Ct. Cl. 225; *Davidson v. United States*, 21 Id. 298); but not for a mistake of judgment or discretion. *Nixon v. United States*, 18 Ct. Cl. 448. It belongs to him alone to decide whether a tax has been erroneously or illegally assessed or collected, or whether it should be refunded; and the statutory requirement that the case shall be submitted to the Secretary of the Treasury gives the Commissioner the benefit of his suggestions and advice, but does not control his final decision. *Sybrandt v. United States*, 19 Ct. Cl. 461. While an award of the Commissioner remains in his office, it is subject to his correction, revision or revocation. *Stotesbury v. United States*, 23 Ct. Cl. 285. Accordingly, he may, without exhausting his authority, allow a judgment recovered against a collector for a tax which, upon appeal to him, he had previously refused to refund (*Nixon v. United States*, *supra*), and may, at any time before payment, if suit has not been previously brought and there has been no change in the head of the bureau, reconsider and revoke an allowance by him certified for the refund of taxes. *Ridgway v. United States*, 18 Ct. Cl. 707.

A regulation of the Treasury Department that the Commissioner shall transmit claims for a refund of the taxes to the Secretary of the Treasury "for his consideration and advisement" is not repugnant to this section. *Du Passeur v. United States*, 19 Ct. Cl. 1. See further as to the extent of the Commissioner's powers, *Woolner v. United States*, 13 Ct. Cl. 355; *Savings Bank v. United States*, 16 Id. 335; 104 U. S. 728; 14 A. G. Op. 275.

The Court of Claims may entertain suits to enforce allowances by the Commissioner where payment is refused, but it has no power to review his action or allow claims which he has disallowed. *Boehm v. United States*, 21 Ct. Cl. 290; *Ridgway v. United States*, 18 Id. 707; *United States v. Savings Bank*, *supra*. Nor can it enforce an allowance when the Commissioner has exceeded his jurisdiction. *Seat v. United States*, 18 Ct. Cl. 458.



And it is unnecessary for the claimant in said court to re-establish the material facts determined by the Commissioner, *e. g.*, the time of the presentation of a claim. His finding thereon, in the absence of fraud, is conclusive. *Kaufman v. United States*, 11 Ct. Cl. 659, 96 U. S. 567; *Dorsheimer v. United States*, 7 Wall. 166. See note, § 1059.

The damages and costs which may be recovered against any officer named in this section, shall be repaid to him if he has satisfied the judgment himself; but if not, they may be paid to him, or directly to the judgment creditor. *Dunnegan v. United States*, 17 Ct. Cl. 247; *Nixon v. United States*, *supra*; *United States v. Frerichs*, 21 Ct. Cl. 16; 124 U. S. 315.

Where a stamp required by law has been destroyed, and the taxpayer in consequence forced to affix a new one, the Commissioner may hereunder direct that the tax thus a second time exacted be refunded. 13 A. G. Op. 574. As to refunding taxes on distilled spirits which have been lost by leakage, see 16 A. G. Op. 667.

The powers granted in this section and in 20 St. 340, ch. 125, § 6 (see note, § 3309), are essentially identical. *Barnett v. United States*, 16 Ct. Cl. 515; 17 Id. 434. The limitation in Rev. Stats. § 3228, applies only to claims named in this section, and not to those in § 3426. 15 A. G. Op. 426; overruling 14 Id. 513.

The clause, "and also compromise such suits and all others relating to internal revenue," contained in the act of 1864, § 44, is construed in *Dorsheimer v. United States*, 2 Ct. Cl. 103. Other cases on this section are *Savings Institution v. Blair*, 116 U. S. 200; *White v. Arthur*, 10 F. R. 80.

SECT. 3221. — See note, § 3293. St. March 1, 1879, ch. 125, § 6 (20 St. 341), adds to this section, —

"And when any distilled spirits are hereafter destroyed by accidental fire or other casualty, without any fraud, collusion, or negligence of the owner thereof, after the time when the same should have been drawn off by the gauger and placed in the distillery-warehouse provided by law, no tax shall be collected on such spirits so destroyed, or, if collected, it shall be refunded upon the production of satisfactory proof that the spirits were destroyed as herein specified."

The provision of a mode of relief by application to the Secretary of the Treasury indicates a purpose to exclude any other. Therefore the court will not consider evidence of the accidental destruction of spirits offered in an action on a distiller's bond for recovery of unpaid taxes. *Farrell v. United States*, 99 U. S. 221. Where the facts give the Secretary of the Treasury jurisdiction, his decision is final and conclusive. *Hoffheimer v. United States*, 20 Ct. Cl. 371. See note, § 3223. Where the Secretary of the Treasury under this section abated taxes, and the Commissioner notified the principal and sureties of this decision, it was held to operate as a virtual cancellation of the bond. *United States v. Alexander*, 110 U. S. 325.

SECT. 3223. — 20 St. 333, ch. 125, § 3, inserts after "insurance," in the third line, —

"for a sum greater than the actual value of the distilled spirits before and without the tax being paid."

The proper construction of a contract of insurance is, unless there is something in the contract, or in the course of dealing between the parties to the contrary, to make it cover the entire interest of the assessed in the property, including the tax. *Hedger v. Union Ins. Co.*, 17 F. R. 498.

SECT. 3224. — This provision is constitutional, neither due process of law or trial by jury being denied. *Pullan v. Kinsinger*, 2 Abb. U. S. 94; 9 Am. Law Reg. s. s. 557. It is intended to apply only to taxes levied by the United States. *State Railroad Tax Cases*, 92 U. S. 575, 613; *R. R. & Bridge Co. v. D. C.*, 1 Mackey, 217. Therefore, neither a Federal or State court has power to stay by injunction the collection of a national tax (*Schulenberg Co. v. Hayward*, 20 F. R. 422), and if an injunction restraining the assessment and collection of a national tax is granted by a State court, it will, on removal of the



cause to the circuit court, be dissolved. *Kissinger v. Bean*, 7 Biss. 60. The reasons are as strong against the Federal courts enjoining the collection of State taxes. *Schulenberg Co. v. Hayward*, *supra*; *sed quære*, *Wells v. Central Vermont R. R.* 14 Blatch. 426.

The word "tax" as here used is not restricted in its meaning to a *legal* tax, but includes anything having the form and color of a tax, the collection of which is authorized by law. *Snyder v. Marks*, 109 U. S. 189; *Kensett v. Stivers*, 18 Blatch. 397; 10 F. R. 517; *Howland v. Soule*, Deady, 413; *Delaware R. R. Co. v. Prettyman*, 17 Int. Rev. Rec. 99. Therefore, so long as the Commissioner acts within the limits of his jurisdiction, so that his acts are not mere nullities, the assessment or collection cannot be restrained, though it be erroneous, or irregular or void, or be enforced against an innocent purchaser. The remedy to recover back a tax by suit is exclusive. *Alkan v. Bean*, 8 Biss. 83; *Snyder v. Marks*, *supra*; *Pullan v. Kinsinger*, *supra*. But there are circumstances under which officers may be restrained from claiming moneys of citizens, and levying for them as if for taxes. *Frayser v. Russell*, 3 Hughes, 227. The word "any" in the second line was inserted by the Revisers. *Snyder v. Marks*, *supra*.

Other cases on this section are *Robbins v. Freeland*, 14 Int. Rev. Rec. 28; *United States v. Hodson*, Id. 100; *United States v. Black*, 11 Blatch. 538; *United States v. Pacific R. R.*, 4 Dillon, 66; *United States v. Myers*, 3 Hughes, 239; *Cutting v. Gilbert*, 5 Blatch. 259.

SECT. 3225.—It being assumed that "recovered" here referred to recovery by suit, this provision was separated from the section relating to refundment (§ 3220). 2 Com. D. 1565. In order to prove that the returns contain no understatement, the books of the party should be produced as the best evidence, and until this is done or cause shown, resort cannot be had to the recollection of witnesses. *Bergdoll v. Pollock*, 95 U. S. 337.

SECT. 3226.—19 St. 248, ch. 69, strikes out "the" before "Internal" in the sixth line. An appeal to the Commissioner for a refund is a condition precedent to the claimant's right to bring an action for the recovery of taxes paid (*Nixon v. United States*, 18 Ct. Cl. 448, 455), but not to any other action where such action is permissible. *Erschine v. Hohnbach*, 14 Wall. 613. Therefore, an action for money had and received may be maintained against a collector for duties or taxes erroneously or illegally assessed and collected, when payment has been made under protest, with notice of an intention to bring a suit to test the validity of a claim. *Philadelphia v. Collector*, 5 Wall. 720; *Nelson v. Carman*, 5 Blatch. 511. This section has no application to a suit brought by the government for collecting a tax. In such a case the defendant may show that the tax was illegally assessed, although he may not have first appealed to the Commissioner. *Clinkenbeard v. United States*, 21 Wall. 65; *United States v. Myers*, 3 Hughes, 239; see note, § 3182. To entitle the claimant to an action, the claim must have been rejected by the Commissioner on its merits, and not for mere irregularity of form. *Hicks v. James*, 4 Hughes, 470; 110 U. S. 272. If appeal is taken before payment and decided against the appellant, a second appeal need not be taken after payment before bringing suit. *San Francisco Savings Society v. Cary*, 2 Sawyer, 333. In *Cheatham v. United States*, 92 U. S. 85, the plaintiffs had appealed from the first assessment, and upon a reassessment had paid the taxes under protest. On action brought they were not permitted to recover, because suit was not begun within the prescribed time after the first assessment, and because they had not duly appealed from the second. The appeal dates from the time the application for the refund of tax is filed with the Commissioner, and not from the time it is filed with the collector. *Cotton Press Co. v. Collector*, 1 Woods, 296. The claimant is not bound to sue until a decision on the appeal has actually been made. *James v. Hicks*, 110 U. S. 272. An early case decided pursuant to the proviso held that the suit must be brought within twelve months from the date of the appeal. *Francis v. Slack*, 16 Int. Rev. Rec. 134.



Upon action brought, there must be due proof of the appeal and of the Commissioner's decision thereon. An indorsement, "examined and rejected," signed by a person unknown to the court, with no evidence of the Commissioner's adoption thereof, is not due proof (*Lauer v. United States*, 5 Ct. Cl. 447); nor is parol evidence of the appeal to the Commissioner sufficient unless good cause is shown for the absence of the written appeal or an authentic copy thereof. *Hubbard v. Kelly*, 8 W. Va. 46. That proof of such appeal is not necessary, and that failure to make it should be set up by plea, see *Hendy v. Soule*, Deady, 400. This section operates on all actions brought subsequent to the time when it took effect, whether in State or Federal courts (*Collector v. Hubbard*, 12 Wall. 1), and suspends the operation of a State statute of limitations during the time the appeal is pending, or during the time the claimant is not allowed to bring suit. *Braun v. Sauerwein*, 10 Wall. 218; *Alkan v. Bean*, 8 Biss. 83, 91, see note, § 3224; *Wright v. Blakeslee*, 101 U. S. 174, see note, § 3227. For the object of this section, see further *Coblens v. Abel*, Woolw. 293; *Nichols v. United States*, 7 Wall. 122, 130. Other cases on this section are: *Watt v. United States*, 15 Blatch. 29, 34; *Deposit Savings Assn. v. Mayer*, 23 Int. Rev. Rec. 241; *Bank of Greencastle v. United States*, 15 Ct. Cl. 225; *United States v. Savings Bank*, 16 Id. 335; 104 U. S. 728; *Cutting v. Gilbert*, 5 Blatch. 259; *United States v. Black*, 11 Id. 538, 543; *Northrup v. Shook*, 10 Id. 243.

SECT. 3227. — The right of action hereunder accrues when the Commissioner renders his decision against the claimant, and suit brought within two years from such decision is seasonably brought (*Wright v. Blakeslee*, 101 U. S. 174); but for an appeal pending when this section took effect, the time is limited to one year after the decision. *James v. Hicks*, 110 U. S. 272. See *Hicks v. James*, note, § 3226; *Bank of Greencastle v. United States*, 15 Ct. Cl. 225.

SECT. 3228. — An application, though informal and defective, may nevertheless be regarded as a claim within the meaning of this section, so far, at any rate, as to be capable of amendment. 14 A. G. Op. 615. The Commissioner's decision as to whether a claim was duly presented, in the absence of fraud or irregularity, is conclusive, and cannot be set aside in the Court of Claims. *Bank of Greencastle v. United States*, 15 Ct. Cl. 225. But the lodging of the appeal made out in due form with the proper collector of internal revenue, for the purpose of transmission to the Commissioner in the usual course of business, under the requirements of the regulations of the Secretary of the Treasury, is in legal effect a presentation to the Commissioner. *United States v. Savings Bank*, 16 Ct. Cl. 335; 104 U. S. 728; *contra*, 14 A. G. Op. 615. A protest written upon a check with which payment of taxes is made, or upon the return for taxation, is not such a claim for the refunding of a tax as is required by law. *Savings Institution v. Blair*, 116 U. S. 200. Claims for an allowance for stamps under Rev. Stat. § 3426 are not within the provisions of this section. 15 A. G. Op. 426; overruling 14 Id. 513. Unless the claim for the refund of a tax is presented to the Commissioner within two years after the cause of action accrued, the right to demand repayment of the tax is lost, the Commissioner has no authority to refund it, and the right of action is gone. Such a presentation is a condition on which alone the government consents to litigate the validity of the original tax, and it cannot be made until after the taxes have been paid. *Savings Institution v. Blair*, 116 U. S. 200; 16 A. G. Op. 249. See note, § 3220.

SECT. 3229. — For the course of proceeding relative to the compromise of suits under this section, see 12 A. G. Op. 472. The power of compromise ceases when a judgment has been rendered upon an action brought. 13 A. G. Op. 479. As to the compromise of a case arising on an export bond covering distilled spirits, see 13 A. G. Op. 115. This section (St. July 20, 1868), repeals § 179 of St. June 30, 1864, amended by St. July 13, 1866. 13 A. G. Op. 525. It applies to a compromise with tax-payers only, and not with a tax



collector or any other officer charged with embezzlement. 14 A. G. Op. 8; Id. 43. It does not permit the voluntary relinquishment of a part of a tax lawfully assessed upon and due from a solvent person or corporation. 16 A. G. Op. 248. But the Commissioner may direct the dismissal of a judicial proceeding under the internal revenue laws without the concurrence of the Attorney-General. 12 A. G. Op. 552. It cannot be dismissed upon payment of costs by the claimant and the entry of a certificate of probable cause of seizure, unless with the approval of the three officers named herein. 12 A. G. Op. 536. See *United States v. Bayand*, 21 Blatch. 217; 23 F. R. 721.

SECT. 3230. — Generalized from the cited provision, which also included "compromises;" disposed of by the later act of July 20, 1868. 2 Com. D. 1568.

## CHAPTER III.

### SPECIAL TAXES.

SECT. 3232. — See note, § 3238. 24 St. 209, ch. 840, defining butter, and imposing a tax upon and regulating the manufacture and sale of oleomargarine, extends, so far as applicable, §§ 3232–3241, 3243, to the special taxes imposed by § 3 of that act.

This section is constitutional (*License Tax Cases*, 5 Wall. 462); but it conveys no authority to carry on the licensed business within a State by whose laws it is prohibited. Id. The tax must be paid in advance. *United States v. Clare*, 2 F. R. 55; 14 Phila. 543. Brewers are to be regarded as within the prohibition of this section. *United States v. Glab*, 1 McCrary, 166; 99 U. S. 225. Where a firm has paid the special tax, and subsequently one of the partners purchases the entire interest and becomes sole owner of the business, he may carry it on at the same place for the balance of the term for which the tax is paid without again paying such tax. Id. See also *United States v. Pressy*, 1 Low. 319; *United States v. Nelson*, 29 F. R. 208; *United States v. Kaufman*, 11 Ct. Cl. 659; 96 U. S. 567; *United States v. Feigelstock*, 14 Blatch. 321; *Gormely v. Gymnastic Assn.* 13 N. W. Rep. 244; *Pervear v. The Commonwealth*, 5 Wall. 475.

SECT. 3234. — *United States v. Glab*, 1 McCrary, 166; 99 U. S. 225. See note, § 3232.

SECT. 3235. — *Crisp v. Proud*, 4 Hughes, 57; *Tucker v. Slack*, Holmes, 485; 23 Wall. 321.

SECT. 3236. — *Crisp v. Proud*, *supra*. Upon consideration of this section and Rev. Stats. §§ 3244, 3362, 3363, 3387, 3390, and 3392, it was held that the manufacture of cigars and tobacco, and the sale of cigars and manufactured tobacco at retail, cannot be lawfully carried on at the same time in the same place, and that the manufacturer of these articles is not authorized to sell from broken packages under a retail dealer's license at the place of manufacture. 16 A. G. Op. 89. See also *Ludloff v. United States*, 108 U. S. 176.

SECT. 3237. — *United States v. Clare*, 2 F. R. 55, 57.

SECT. 3238. — *United States v. Kaufman*, 11 Ct. Cl. 659; 96 U. S. 567. 18 St. 319, ch. 80, changes "thirteen" to "twelve" in the fifth line. 19 St. 213, Res. 10 (May 8, 1876), provides, —

"That nothing contained in Rev. Stats. Title 35, ch. 3, shall prevent the issue, under such regulations as the Commissioner of Internal Revenue may prescribe, of special-tax stamps to persons carrying on the business of retail dealers in liquors, retail dealers in malt liquors, or dealers in tobacco, upon passenger railroad-trains or upon steamboats or other vessels engaged in the business of carrying passengers."



SECT. 3239. — 19 St. 248, ch. 69, changes "stamp" to "stamps" in the sixth line. *United States v. Clare*, 2 F. R. 55, 57.

SECT. 3240. — Such book is *prima facie* evidence of the facts properly contained therein, and either the original or a duly authenticated copy may be received in evidence. *State v. Gorham*, 65 Maine, 270.

SECT. 3241. — *United States v. Glab*, 1 McCrary, 166; 99 U. S. 225. See note, § 3232.

SECT. 3242. — The several kinds of business here referred to were enumerated in § 79 of St. June 30, 1864, and were withdrawn by subsequent legislation, except the business of a brewer, here specifically named. Sect. 73 of the act of 1864 was amended by § 9 of St. March 2, 1867. 2 Com. D. 1572. St. Feb. 8, 1875, ch. 36, § 16 (18 St. 310), provides, —

"That any person who shall carry on the business of a rectifier, wholesale liquor-dealer, retail liquor-dealer, wholesale dealer in malt-liquors, retail dealer in malt-liquors, or manufacturer of stills, without having paid the special tax as required by law, or who shall carry on the business of a distiller without having given bond as required by law, or who shall engage in or carry on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him, or any part thereof, shall, for every such offence, be fined not less than \$100 nor more than \$5000 and imprisoned not less than 30 days nor more than two years. And all distilled spirits or wines, and all stills or other apparatus, fit or intending to be used for the distillation or rectification of spirits, or for the compounding of liquors, owned by such person, wherever found, and all distilled spirits or wines and personal property found in the distillery or rectifying establishment, or in any building, room, yard, or inclosure connected therewith, and used with or constituting a part of the premises; and all the right, title, and interest of such person in the lot or tract of land on which such distillery is situated, and all right, title, and interest therein of every person who knowingly has suffered or permitted the business of a distiller to be there carried on, or has connived at the same; and all personal property owned by or in possession of any person who has permitted or suffered any building, yard, or enclosure, or any part thereof, to be used for purposes of ingress or egress to or from such distillery which shall be found in any such building, yard, or enclosure, and all the right, title, and interest of every person in any premises used for ingress or egress to or from such distillery, who has knowingly suffered or permitted such premises to be used for such ingress or egress, shall be forfeited to the United States."

It has recently been held that violations of this section must be prosecuted by presentment or indictment, and not by information. *United States v. Johannesen*, 35 F. R. 411. If the indictment charges the defendant with carrying on the business of a retail liquor dealer continuously between certain dates at a certain place, it need not state the means or circumstances by which he did so. *United States v. Howard*, 1 Sawyer, 507. And the same rule holds in the case of a wholesale dealer. *United States v. Page*, 2 Sawyer, 353. It need not aver that a defendant, who is charged with carrying on the business of a distiller, in any of the ways specified in Rev. Stats. § 3247, without having paid the special tax or given bond, has registered his still or given notice of his intention to distil. *United States v. Mathoit*, 1 Sawyer, 142. A count for retailing liquor without payment of the special tax, and a count for dealing in manufactured tobacco without payment of the special tax, cannot be joined in one indictment, the penalty for each being different. *United States v. Gaston*, 28 F. R. 848. An affidavit which is the basis of an information should conform substantially to the language of the statute alleged to have been violated. One which states that a party sold tobacco will not support an information charging him with carrying on the business of a retail dealer in tobacco without payment of the special tax. *United States v. Strickland*, 25 F. R. 469. Distilled spirits cannot lawfully be sold in any quantity or for any purpose by any person who has not paid the special tax. Doctors and druggists who sell distilled spirits as medicine are within the prohibition. *United States v. Stafford*, 20 F. R. 720. As to who is a retail liquor dealer, see *United States v. Rennecke*, 28 F. R. 847; *United States v. Angell*, 11 F. R. 34, cited in note, § 3244. The janitor of a club which owned liquors and kept them for the use of its



members, who used them on paying him the price thereof, is a retail dealer. *United States v. Woods*, 3 Cin. L. Bul. 59. One is not who sells an occasional drink of spirits out of a bottle not in a bar-room. *United States v. Jackson*, 1 Hughes, 531. Nor is one who sells a lot of spirits taken for debt. *United States v. Feigelstock*, 14 Blatch. 321. A grocer, who purchases a barrel of whiskey to oblige a customer, and who enters on his books a charge against the customer of exactly the same amount as he paid for the whiskey, is not a wholesale dealer under obligation to pay the special tax. *United States v. Howell*, 20 F. R. 718. As to what acts will constitute a retail liquor dealer a wholesale dealer, see *United States v. Kallstrom*, 30 F. R. 184. As to wholesale dealers in malt liquors, see *United States v. Schneider*, 35 F. R. 107. The special tax must be paid in advance. *United States v. Clare*, 2 F. R. 55; 14 Phila. 543. An assessment of the tax, and a demand and refusal to pay by the person carrying on business as described in this section, are not a condition precedent to the imposition of a penalty. *United States v. Rectifying Establishment*, 11 Int. Rev. Rec. 46, overruling *United States v. 35 Barrels*, 9 Id. 67. That provision is constitutional which declares real property forfeited which is employed in the violation of a revenue law. *United States v. A Distillery*, 2 Abb. U. S. 192. Such real estate as pasture, orchard, wood lots, or homestead of the family, &c., which have no connection with the unlawful business, were not used in it, and contributed in no degree to facilitate its prosecution, are not liable to forfeiture. *United States v. Spreckens*, 1 Sawyer, 84. If a person having a wash and also a still on his premises, the latter not being an authorized distillery, distils fermented liquors, the personal property found on the premises shall be forfeited though the product of the establishment be not spirits but vinegar. *United States v. Steen*, 6 Ben. 172. This section is construed and the distinction between the distiller's property and the property of others as regards forfeiture pointed out in *United States v. A Distillery at Spring Valley*, 11 Blatch. 255. The limitation for the prosecution of the offences of carrying on the business of distilling without having paid the special tax, given a bond, or provided a bonded warehouse, is, by act of March 26, 1804, extended to five years. *United States v. Wright*, 3 Am. L. T. U. S. Ct. 17; 3 Pittsb. 192. See note, § 838. Other cases on this section are: *Gregory v. United States*, 17 Blatch. 325; *United States v. Logan*, 12 Int. Rev. Rec. 146; 11 Id. 181; *Re 2000 Bottles*, 5 Ben. 265.

SECT. 3243. — See note, § 3232. A State law taxing or prohibiting a business already taxed by Congress is constitutional. *Pervear v. The Commonwealth*, 5 Wall. 475. Other cases on this section are: *McGuire v. The Commonwealth*, 3 Wall. 387; *License Tax Cases*, 5 Wall. 462; *Commonwealth v. Sheckels*, 78 Va. 36.

SECT. 3244. — See note, § 3238. St. March 1, 1879, ch. 125 (20 St. 342), adds to the second subdivision:—

“Upon all stills manufactured for export, and actually exported, there shall be allowed a drawback, where the tax thereon has been paid, under such rules and regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall prescribe.”

By St. May 28, 1880, ch. 108, § 18 (21 St. 145), this subdivision —

“shall not apply to distillers in registered distilleries who manufacture for their own use wooden stills, but each of said distillers shall give notice to the collector of the district in which his distillery is located of each still manufactured before the same is used.”

Subd. 3. 18 St. 319, ch. 80 changes “section” to “proviso” in the last sentence. St. March, 1879, ch. 125 (20 St. 333), inserts after the first “*Provided*” —

“That any person who rectifies, purifies, refines, or manufactures as aforesaid less than 500 barrels a year, counting 40 gallons of proof spirits to the barrel, shall pay \$100. *And provided*”

The same act amends § 18 of the earlier act of Feb. 8, 1875 (18 St. 307), to read as follows:—



"SEC. 18. That retail dealers in liquors shall pay \$25. Every person who sells, or offers for sale, foreign or domestic distilled spirits, wines, or malt liquors, otherwise than as hereinafter provided, in less quantities than five wine gallons at the same time, shall be regarded as a retail dealer in liquors. Wholesale liquor-dealers shall each pay \$100. Every person who sells, or offers for sale, foreign or domestic distilled spirits, wines, or malt liquors, otherwise than as hereinafter provided, in quantities of not less than five wine-gallons at the same time, shall be regarded as a wholesale liquor-dealer. But no distiller who has given the required bond and who sells only distilled spirits of his own production at the place of manufacture in the original packages to which the tax-stamps are affixed, shall be required to pay the special tax of a wholesale liquor-dealer on account of such sales. Retail dealers in malt liquors shall pay \$20. Every person who sells, or offers for sale, malt liquors in less quantities than five gallons at one time, but who does not deal in spirituous liquors, shall be regarded as a retail dealer in malt liquors. Wholesale dealers in malt liquors shall pay \$50. Every person who sells, or offers for sale, malt liquors in quantities of not less than five gallons at one time, but who does not deal in spirituous liquors at wholesale, shall be regarded as a wholesale dealer in malt liquors: *Provided*, That no brewer shall be required to pay a special tax as a dealer by reason of selling in the original stamped packages whether at the place of manufacture or elsewhere, malt liquors manufactured by him, or purchased and procured by him in his own casks or vessels, under the provisions of Rev. Stats. § 3349; but the quantity of malt liquors so purchased shall be included in calculating the liability to brewer's special tax of both the brewer who manufactures and sells the same and the brewer who purchases the same: *And it is hereby provided*, That no further collection of special tax as retail dealers in malt liquors shall be made from brewers for selling malt liquors of their own manufacture in the original stamped eighth-barrel package: *Provided further*, That any assessments of additional special tax against wholesale liquor-dealers or retail liquor-dealers, or against brewers for selling malt liquors of their own production at the place of manufacture in the original casks or packages, made by reason of an amendment to § 59 of the internal-revenue act approved July 20, 1868, as amended by § 13 of the act approved June 6, 1872, further amending said § 59 by striking out the words 'malt liquor', 'malt liquors', 'brewer', and 'malt liquors' in the three several paragraphs in which they occur, shall be on proper proofs, remitted; and if such assessments have been paid, the amounts so paid shall be, on proper proofs, refunded by the Commissioner of Internal Revenue."

Subd. 5. The special provisions of the original exemption in § 59 of the act of 1868 were omitted as rendered immaterial by the proviso added by the act of 1872. 2 Com. D. 1574. 20 St. 333, ch. 125, adds to this clause as follows:—

"But no special tax shall be held to accrue on a sale of distilled spirits, wines, or malt liquors made by a person who is not otherwise a dealer in liquors, where such spirits, wines, or liquors have been received by the person so selling as security for or in payment of a debt, or as executor, administrator, or other fiduciary, or have been levied on by any officer, under order or process of any court or magistrate, and where such spirits are sold by such person in one parcel only, or at public auction in parcels not less than 20 wine-gallons, nor shall such tax be held to accrue on a sale made by a retiring partner, or the representatives of a deceased partner to the incoming, remaining, or surviving partner or partners of a firm; nor shall the special tax of a wholesale liquor-dealer or wholesale dealer in malt liquors be held to apply to a retail dealer in liquors or a retail dealer in malt liquors, because of such retail dealer selling out his entire stock of liquors in one parcel, or in parcels embracing not less than his entire stock of distilled spirits, of wines, or of malt liquors; and Rev. Stats. § 3319 shall not be held to prohibit a rectifier or liquor-dealer from purchasing, in quantities greater than 20 wine-gallons, the distilled spirits sold in one parcel as aforesaid."

Subd. 6. Amended by 20 St. 343, ch. 125, § 14, by striking out all the third sentence as far as "Provided," and substituting, in place of the words thus stricken out, the first paragraph quoted below; by adding the second paragraph quoted below after "export" at the end of the first paragraph of this subdivision; and by adding the third paragraph quoted below at the end of the subdivision—

"But no farmer or planter, nor the executor or administrator of such farmer or planter, nor the guardian of any minor, shall be required to pay a special tax as a dealer in leaf-tobacco, for selling tobacco produced by said farmer or planter, or by said executor, administrator, or guardian, or received by either of them as rents from tenants who have produced the same on the land of said farmer, planter, or minor."

"No sheriff or other officer acting under order or process of any court or magistrate, nor trustee, or other fiduciary, legally acting under the powers vested in him, shall be liable to said special tax as a



dealer or retail dealer in selling tobacco under such authority. And no purchaser at any sale by such sheriff, officer, trustee, or fiduciary, shall be held liable to any other tax or restriction as to a sale of tobacco so purchased than he would have been had such purchaser been the producer thereof on his own land."

"*Provided*, It shall be lawful for any licensed manufacturer of cigars to purchase leaf-tobacco of any licensed dealer or other licensed manufacturer in quantities less than the original package, for use in his own manufactory exclusively."

St. June 16, 1880, ch. 250 (21 St. 291), adds the following at the end of this subdivision:—

"*Provided further*, that dealers in leaf-tobacco (other than retail dealers as defined in the 7th subdivision of the section) who do not deal in leaf-tobacco otherwise than to sell, or offer for sale, or consign for sale on commission, to an amount not exceeding 25000 pounds in any one special-tax year, only such leaf-tobacco as they purchase or receive in the hand directly from farmers or planters who have produced the same on land owned, rented, or leased by them, or received the same as rent from their tenants, who have produced the same on such lands, shall each be required to pay for carrying on such business a special tax of \$5 only. If any person who has paid such special tax shall be found to have purchased or received and sold, or consigned for sale on commission, more than 25000 pounds of leaf-tobacco, such as is herein provided for, in any one special-tax year, the Commissioner of Internal Revenue is authorized and directed to assess such person an amount of tax equal to the difference between the special tax paid by him and the special tax of \$25 hereinbefore imposed upon a dealer in leaf-tobacco."

Subd. 1. Where a brewer, at the close of the year, found that he had manufactured less than five hundred barrels and was allowed by the Commissioner a refund of \$50 of the special tax, it was held, after application to the Treasury and refusal of payment there, that the Court of Claims had jurisdiction of a suit by the brewer against the United States to recover the amount. *United States v. Kaufman*, 11 Ct. Cl. 659; 96 U. S. 567; see *United States v. Dooley*, 21 Int. Rev. Rec. 115.

Subd. 4. If the article sold is a compound containing such a quantity of spirits as to be intoxicating and is sold as a beverage and is drunk as such and not as a medicine, the seller is liable to the payment of the special tax hereunder. *United States v. Cota*, 17 F. R. 734. A person, having paid the special tax as a retail liquor dealer at a particular place, who fills orders received by mail to ship liquors in retail quantities to another town to be delivered to the person so ordering upon payment of the charges, renders himself liable to the payment of the special tax as a retail liquor dealer at the latter place also. *United States v. Shriver*, 23 F. R. 134; 19 Repr. 391; *United States v. Cline*, 26 F. R. 515. And if, having paid the special tax as a retail liquor dealer in one place, he shipped goods to another place without any contracts made or orders received for the sale of such goods, but to be held by the express company there subject to future sales at that place, he may be convicted of selling liquor in the latter place without the required license. *United States v. Ott*, 31 Int. Rev. Rec. 79. One who has paid the special retail tax for retailing at the distillery may receive and fill orders there and send the liquor to persons residing at a distance, but he may not make sales in small quantities from barrels to persons along the road who pay him on receipt of the liquor. *United States v. Durham*, 33 F. R. 834. Under St. 1875, ch. 36, § 18, a social or literary club or association of persons not incorporated, which delivers beer to its members, receiving checks in exchange therefor which were originally sold to members of the club, is a dealer hereunder and liable to be taxed as such. *United States v. Wittig*, 2 Lowell, 466. Where one purchases liquor in his own name, and has it billed to him in his name, and deals it out from time to time as called for, he is a retail dealer in liquor, though the money for the purchase of the liquor was advanced by others, and he dealt it out without profit to himself. *United States v. Angell*, 11 F. R. 34; *New York Rectifying Co. v. United States*, 14 Blatch. 549. See *Underhill v. Pleasanton*, 8 Blatch 260. A retail liquor dealer who sells to one person two or more packages in one sale, aggregating more than five gallons of distilled spirits, is



liable as a wholesale dealer hereunder, although the liquors are of different brands. *United States v. Shouse*, 31 Int. Rev. Rec. 120; see *United States v. Bonham*, 31 F. R. 808.

Subd. 5. A vendor who sells more than five gallons of malt liquors at one time is a wholesale dealer, although the liquors sold are not all in one package. *United States v. Clare*, 2 F. R. 55; 14 Phila. 543. A brewer selling at a place other than the place of manufacture is liable to taxation as a wholesale dealer. *Underhill v. Pleasanton*, *supra*; *United States v. Schneider*, 35 F. R. 107. As to the distinction between wine gallons and proof gallons, see *United States v. Wangerien*, 11 Int. Rev. Rec. 181.

Subd. 8. Employers who deal out tobacco to their employes for their accommodation at cost price are subject to the special tax. *United States v. Vinson*, 8 F. R. 507. This provision and Subds. 8 and 10 have no other effect than not to require that a manufacturer of tobacco, snuff, or cigars, who sells his own products at the place of manufacture in such manner as is consistent with other provisions of law as to the manner of the sale of such products, shall pay a special tax as a dealer in manufactured tobacco and cigars. They have relation solely to the exaction of a tax, and not to the conferring of authority to sell. *Ludloff v. United States*, 108 U. S. 176. For the following cases: *United States v. Johanneson*, *United States v. Feigelstock*, *United States v. Howard*, *United States v. Page*, see note, § 3242. See also note, § 3236, and *United States v. Nelson*, 29 F. R. 202, 208; *United States v. McCullough*, 22 Int. Rev. Rec. 202.

SECT. 3246. — Amended by 20 St. 334, ch. 125, § 5, by striking out all after "growth" in the second line, and adding the following: —

"Or manufacturers who sell wine produced from grapes grown by others, at the place where the same is made or at the general business office of such vintner or manufacturer: *Provided*, That no vintner or manufacturer shall have more than one office for the sale of such wine that shall be exempt from special tax under this act; nor shall any special tax be imposed upon apothecaries as to wines or spirituous liquors which they use exclusively in the preparation or making-up of medicines."

SECT. 3247. — Not only persons carrying on the actual work of manufacturing distilled spirits, but all other persons having an interest in the business of distilling, or directly aiding in the production of spirits for their use or benefit, are considered distillers under the law. *United States v. Howard*, 11 Int. Rev. Rec. 119. See *One Vaporizer*, 2 Ben. 438. One in possession of a still who keeps mash, wort, or wash is not a distiller unless the mash, wort, or wash is such as will produce spirits on distillation. *United States v. Frerichs*, 16 Blatch. 547. Mash, wort, or wash from which alcohol might be separated by distillation is "fit for distillation." *United States v. Prussing*, 2 Biss. 344. See also on this section, *United States v. Mathoit*, 1 Sawyer, 142; *United States v. Steen*, 6 Ben. 172, and note, § 3242.

SECT. 3248. — "Distilled spirits" include that substance in all its forms, rectified as well as non-rectified spirits, unless in the particular provision of law some repugnancy appears from attributing this sense to the words. They are used in a general sense, embracing all sorts of distilled spirits, in Rev. Stats. §§ 3289, 3299, 3312, 3316, 3323, 3327. *Boyd v. United States*, 14 Blatch. 317; see also *United States v. Anthony*, Id. 92. The distiller becomes liable for the tax as soon as the spirits are produced. *United States v. Farrell*, 8 Biss. 259, 262.

SECT. 3249. — As to what regulations of the Commissioner are within the purview of the statute, see *Thacher's Distilled Spirits*, 15 Blatch. 15; 103 U. S. 679. He has power, in estimating the producing capacity of a distillery, to fix as the true fermenting period any other than that which the distiller in his notice has declared he would use for fermentation and which he actually did use. *Pahlman v. The Collector*, 20 Wall. 189. He has no power to pay for meters which may be left on hand, after discontinuance of the use of the meter adopted and prescribed under the provisions of this section. *Tice v. United States*, 13 Ct. Cl. 115. As to the liability of the government for meters, see *Sausser v. United States*, 11 Ct. Cl. 538; *Finch v. United States*, 12 Id. 364.



## CHAPTER IV.

## DISTILLED SPIRITS.

THE word "person" as used in this chapter includes partnerships and corporations where such a construction is necessary to give it effect. 19 St. 248; 15 A. G. Op. 230. Congress has constitutional power to prescribe rules and regulations in conformity to which the business of a distiller may be lawfully carried on. *United States v. Simmons*, 96 U. S. 360.

SECT. 3251. — See note, § 3271. St. March 3, 1875, ch. 127, § 1 (18 St. 339), repeals so much of this section as is inconsistent therewith, and provides that —

"there shall be levied and collected on all distilled spirits thereafter produced in the United States, a tax of 90 cents on each proof gallon, or wine gallon when below proof, to be paid by the distiller, owner, or person having possession thereof, before removal from the distillery bonded warehouse."

A survey of a distillery and an estimate of its producing capacity having been made, and a copy thereof furnished to the distiller, are conclusive on him as to the producing capacity of the distillery and fix the minimum tax due from him. *United States v. Ferrary*, 93 U. S. 625. A proprietor liable for the tax within this section is such an one as has, whether in personal possession or not, the exclusive right to and control over the premises. When the premises are leased, the lessee is such a proprietor, and the lessor is not. *United States v. Van Slyke*, 8 Biss. 227. Such interest should be direct, and not merely an indirect interest in the success of the business as belonging to other persons. *Id.* A grantee of premises formerly used as a distillery is charged with notice that the premises are liable for all taxes and penalties incurred by the grantor or his tenant in respect of spirits produced thereon. *Milan Distilling Co. v. Tillson*, 26 Int. Rev. Rec. 5. Stockholders in a private corporation engaged in distilling for gain are proprietors and possessors within the statute. 15 A. G. Op. 559. They cannot, therefore, properly be accepted as sureties upon a bond required by § 3293. 16 A. G. Op. 10. The tax on distilled spirits is made by the statute a first lien thereon, and when spirits are seized by the government and sold for any reason whatever, the proceeds shall be first applied to the payment of the tax. And the sureties on the distiller's bond may insist on this. The government cannot apply the proceeds on some other account and collect the tax of them. *United States v. Ulrici*, 111 U. S. 38. And it is the same where a distillery and fixtures, on which the United States have a lien for taxes, are sold on an execution issuing from a State court. *Dungan's Appeal*, 68 Penn. St. 204. The lien is absolute and unconditional, even as against an innocent purchaser without notice. *United States v. Turner*, 18 Int. Rev. Rec. 5. The lien is not lost by a release of a distillery on bond pursuant to Rev. Stats. § 3331, after the commencement of proceedings for its condemnation, they being subsequently abandoned without a forfeiture being declared. *Alkan v. Bean*, 8 Biss. 83. The special provision for a lien here given does not forbid the application of the general provisions of Rev. Stats. § 3186 to all cases where there is nothing in such special provision to contradict. 16 A. G. Op. 634. In a proceeding against a distillery, a claimant has a constitutional right to a trial by jury when the issues are made up. *United States v. Distillery*, 6 Biss. 483; *United States v. Boecker*, 21 Wall. 652; see note, § 3259. Other cases on this section are: *United States v. Distillery at Spring Valley*, 11 Blatch. 255; *Henderson's Distilled Spirits*, 14 Wall. 44; *Hartman v. Bean*, 99 U. S. 393.

SECT. 3253. — *United States v. Allen*, 14 F. R. 267; *United States v. O'Neill*, 19 F. R. 572; *Hartman v. Bean*, 99 U. S. 393. The remedy here provided is evidently concurrent with that provided in Rev. Stats. § 3207. *Alkan v. Bean*, 8 Biss. 83, 89. A municipal corporation is liable hereunder in the same manner as an individual, even though its charter



does not authorize the acts by means of which it received the money. *Salt Lake City v. Hollister*, 3 Utah, 200; 118 U. S. 256. As to compelling the production of papers in the office of the Commissioner and their use at the trial, see 16 A. G. Op. 24.

SECT. 3254. — *United States v. Anthony*, 14 Blatch. 92.

SECT. 3255. — *United States v. 35 Barrels of Brandy*, 11 Int. Rev. Rec. 125. See notes, §§ 2971, 3293, 3330. St. March 3, 1877, ch. 114, § 1 (19 St. 393), provides: —

"That the Commissioner of Internal Revenue shall be, and hereby is, authorized in his discretion, and upon the execution of such bonds as he may prescribe, to establish warehouses, to be known as special bonded warehouses, not exceeding ten in numbers in any one collection-district, exclusively for the storage of brandy made from grapes, each of which warehouses shall be in the charge of a storekeeper, to be appointed, assigned, transferred, and paid in the same manner that storekeepers for distillery-warehouses are now appointed, assigned, transferred, and paid. Every such warehouse shall be under the control of the collector of internal revenue of the district in which such warehouse is located, and shall be in the joint custody of the storekeeper and the proprietor thereof and kept securely locked, and shall at no time be unlocked or opened or remain open except in the presence of such storekeeper or other person who may be designated to act for him, as provided in the case of distillery-warehouses. And such warehouses shall be under such further regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe."

By St. Oct. 18, 1888, ch. 1194 (25 St. 560), the act of 1877 is —

"extended and made applicable to brandy distilled from apples or peaches, or from any other fruit the brandy distilled from which is not now required or hereafter shall not be required to be deposited in a distillery warehouse: *Provided*, That each of the warehouses established under said act, or which may hereafter be established, shall be in charge either of a storekeeper or of a storekeeper and gauger, at the discretion of the Commissioner of Internal Revenue."

SECT. 3257. — This section does not repeal St. July 13, 1866, § 23, although in that act the minimum punishment is regulated by the amount of spirits unlawfully distilled. *United States v. Cushman*, 1 Lowell, 414. An indictment under said statute, which alleges that the defendant was then and there distilling and manufacturing spirits to a large amount, to wit, to the amount and number of 1000 gallons of proof spirits, is sufficient. *United States v. Fox*, 1 Lowell, 199. An information need not set forth the particular means by which the claimant defrauded or attempted to defraud the United States of the tax or specify the particular spirits covered by the tax. *Coffey v. United States*, 116 U. S. 427. See also *Coffey v. United States*, Id. 436. *United States v. Staton*, 25 Int. Rev. Rec. 10, *contra*. But in *United States v. Fox*, *supra*, it was held that if the manner of paying the special tax is changed during the time the alleged illicit distilling was carried on, the indictment should aver that neither statute has been complied with. It is not necessary that the owner of premises which have been leased for distilling purposes should have knowledge that the lessee and distiller was committing a fraud on the revenue in order to warrant a forfeiture. *Dobbins's Distillery v. United States*, 96 U. S. 395. The acts of a servant or agent of the claimant are to be imputed to the principal, so far as they may work the forfeiture of the property used for unlawful purposes. *Bush v. United States*, 24 F. R. 917. A person employed by one engaged in the business of distilling cannot be punished under this section. *United States v. Cooper*, 12 Int. Rev. Rec. 145, 146. When an act is committed whereby a forfeiture of a distillery is incurred, the forfeiture may be enforced as against a subsequent innocent purchaser. 16 A. G. Op. 41. "Shall forfeit" in the third line means that the property shall be subject to forfeiture whether owned by the distiller or not. *United States v. Distillery at Spring Valley*, 11 Blatch. 255. Where the same section describes the offence, prescribes the civil penalty and a criminal punishment, the two latter being connected by the copulative "and," no other construction is proper than that the whole is one punishment, and that the whole cannot be satisfied by a part. *Re Leszynsky*, 16 Blatch. 9. The forfeiture is to be enforced by a civil suit *in rem* and the fine and imprisonment in a criminal proceeding. *Coffey v. United States*,



*supra*; *Origet v. United States*, 125 U. S. 240. See *United States v. A Distillery*, 22 Int. Rev. Rec. 195; *199 Barrels of Whiskey v. United States*, 94 U. S. 86.

SECT. 3258. — *United States v. The Distillery at Spring Valley*, 11 Blatch. 255; *Re Leszynsky*, 16 Blatch. 9, 14.

SECT. 3259. — 20 St. 341, ch. 125, § 8 (§ 7 of that act being repealed by 21 St. 145, ch. 108, § 9), provides that:—

“When any rectifier intends to rectify or compound any distilled spirits, he shall give notice in duplicate to the collector of the district, in such form, and giving such particulars as the Commissioner of Internal Revenue may prescribe; one of such notices to be forwarded by the collector to said Commissioner.”

Where a distiller's bond recites that the distillery is in a given place when, in fact, it is in another place, the sureties are not liable for the taxes in respect of the business carried on at the latter place though there is no distillery whatever at the first named place. *United States v. Boecker*, 21 Wall. 652. A stockholder in a corporation engaged in the business of distilling spirits is a person “interested in the business” and is individually liable for assessments. *Kissinger v. Bean*, 7 Biss. 60. See further note, § 3257; *Pahlman v. The Collector*, 20 Wall. 189; *United States v. Hosmer*, 17 Int. Rev. Rec. 38.

SECTS. 3260, 3262. — See note, § 3271. St. May 28, 1880, ch. 108, § 1 (21 St. 145), amends § 3260 by striking out “double” in the fourteenth line, and by inserting after “days” in the fifteenth line: “But in no case shall the bond exceed the sum of \$100,000.” Section 2 of that act amends § 3262 by adding:—

“And provided also, That the collector may at any time, at the discretion of the Commissioner, accept such bond as is authorized to be given by the distiller in lieu of the written consent of the owner of the fee in the case of a distillery erected prior to July 20, 1868, notwithstanding such distillery has since been increased by the addition of land or buildings adjacent or contiguous thereto, not owned by the distiller himself in fee; such bond to be given for and in respect of such addition only, if the distillery be one which the distiller owns in fee or in respect to which he has procured the written consent of the owner of the fee or other incumbrance, otherwise to be for and in respect of the entire distillery as increased by such addition.”

The requirement of § 3260 that the distiller shall give a bond is constitutional. *Mason v. Rollins*, 2 Biss. 99. A distiller's bond for the payment of a tax is a contract or security and not a penalty, and when given under St. July 13, 1866, is not affected by the repealing act of January 11, 1868, nor are suits or prosecutions instituted upon such suit abated. *United States v. Dutcher*, Id. 51. Such bond conditioned faithfully to comply with all the provisions of law in relation to the business of distillers is prospective as well as present, and embraces such provisions of law relating to the said business as may be in force during the term for which the bond is given, whether enacted before or after its execution. *United States v. Powell*, 14 Wall. 493. The fact that at the time a distiller's bond was approved certain incumbrances existed upon the distillery premises does not discharge the sureties, the bond not having been delivered as an escrow. *Osborne v. United States*, 16 Int. Rev. Rec. 141; 19 Wall. 577. Laches of a government official is no defence to an action against a surety on a distiller's bond. *United States v. Hosmer*, 17 Int. Rev. Rec. 38. Neglect to file the plans and descriptions prescribed in Rev. Stats. § 3263 does not bring the distiller within the penalty of this section for failure to give the bond required by law. *United States v. 35 Barrels of Spirits*, 2 Biss. 88. It seems to have been the intention of Congress in this section to forfeit the thing offending without regard to the owner's culpability or to the interest of outside parties. *Heidritter v. Elizabeth Oil Cloth Co.* 6 F. R. 138. The decree of forfeiture relates back to the time of the commission of the offence. Id. After a seizure by the United States, a State court cannot enforce a mechanic's lien against the property seized. Id. As to opening a judgment against a surety upon a distiller's bond, see *United States v. Millinger*, 7 F. R. 187. As to the construction of certain distillers' bonds, see *United States v. Hodson*, 10 Wall. 395.



See further *United States v. Boecker*, 21 Wall. 652, in note, § 3259; *United States v. Black*, 11 Blatch. 538, in note, § 3182; *United States v. Spreckens*, 1 Sawyer, 84, in note, § 3242; *Re Leszynsky*, 16 Blatch. 9, 14, in note, § 3257.

SECT. 3261. — *United States v. 35 Barrels of Spirits*, 2 Biss. 88.

SECT. 3262. — The bond given pursuant to this section as a substitute for real estate is intended as a penalty and not as a security. Therefore judgment against the sureties should be for the full amount of the bond, and the sureties are not entitled to a deduction by way of set-off of the proceeds realized from the sale of the distiller's personal property. *United States v. Loeb*, 21 Blatch. 196; 14 F. R. 688. See further *United States v. Spreckens*, 1 Sawyer, 84, in note, § 3242; *Osborne v. United States*, 19 Wall. 577, in note, § 3260; *United States v. The Distillery at Spring Valley*, 11 Blatch. 255; *Milan Distilling Co. v. Tillson*, 26 Int. Rev. Rec. 5.

SECT. 3263. — See *United States v. 35 Barrels*, 2 Biss. 88, in note, § 3260; *United States v. Singer*, 15 Wall. 111, 119; *Pahlman v. The Collector*, 20 Wall. 189. St. March 1, 1879, ch. 125, § 5 (20 St. 336), provides:—

"The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may exempt distillers whose distilleries have a daily spirit-producing capacity of 30 gallons of proof spirits, or less, from such of the provisions of existing law in regard to grain distilleries which require the processes of distillation to be carried on through continuous closed vessels and pipes, or which require the cisterns to be connected with the outlet of the worm or condenser by suitable pipes or other apparatus or which require certain clear spaces about the cisterns and other vessels of the distillery, or which require the distillers to have or furnish a plan of the distillery, as he may deem proper."

SECT. 3264. — Amended by 20 St. 334, ch. 125, § 5, by striking out all as far as "to make" in the fourth line, and substituting in place thereof, the first paragraph here quoted, and by adding the second paragraph here quoted at the end of the section:—

"On receipt of notice that any person, firm, or corporation wishes to commence the business of distilling, the collector, or a deputy collector, to be designated by him, shall proceed in person, at the expense of the United States, with the aid of an assistant designated by the Commissioner of Internal Revenue for the purpose of making surveys of distilleries in that district."

"Provided, That the survey of any distillery estimated and stated by the distiller, in his notice of intention to distil, as capable of distilling not more than 150 proof-gallons of distilled spirits every 24 hours may be made by the collector or by a deputy collector without the aid of an assistant; And that all surveys made for the purpose of correcting clerical errors or errors of computation existing in the report of a previous survey, and all surveys made for the purpose of changing the true spirit-producing capacity of any distillery for a day of 24 hours as estimated and determined by a previous survey, but which surveys do not require the remeasuring of the fermenting-tubs in a grain or molasses distillery, or the still or stills in a distillery of apples, peaches, or grapes exclusively, may be made without taking the measurements of the fermenting tubs or stills, as the case may be, and without revisiting the distillery: And provided further, That the Commissioner of Internal Revenue may, whenever he shall deem it proper, designate an officer, agent, or person other than the collector or deputy collector, to make, with or without the aid of a designated assistant, the surveys and resurveys hereinabove provided for."

Until a copy of the survey in which the tax is assessed has been delivered to him, the distiller is not liable under the 80 per cent clause of § 3309. *Peabody v. Stark*, 16 Wall. 240. But see *United States v. Black*, 11 Blatch. 538. But a delivery of a copy of the survey may be waived by the parties. *Wright v. United States*, 108 U. S. 281. So long as the survey and estimate remain unchanged, they conclusively determine the producing capacity of the distillery and fix the minimum tax due from the distiller. *United States v. Ferrary*, 93 U. S. 625; *Collector v. Beggs*, 17 Wall. 182; *Pahlman v. The Collector*, 20 Wall. 189; *Stoll v. Pepper*, 97 U. S. 438. On this section see further *Herndon v. United States*, 15 Ct. Cl. 446, 453; *Landram v. United States*, 16 Ct. Cl. 74; *United States v. King*, 4 Ben. 476; *United States v. Reed*, 13 Int. Rev. Rec. 148.



**SECT. 3266.**—In an indictment drawn under that portion of the section which prohibits the use of a still, boiler, or other vessel for the purpose of distilling in any building or on premises where vinegar is manufactured or produced, it is sufficient to charge the offence in the words of the statute. *United States v. Simmons*, 96 U. S. 360. But an indictment charging the defendant with causing or procuring some other person to use a still, boiler, or other vessel for the purpose of distilling must state the name of the other person or aver that the same is unknown. *Id.* As to the allegations necessary in an indictment hereunder, see *United States v. Reed*, 1 Lowell, 232. Other cases on this section are: *United States v. Flecke*, 2 Ben. 456; *United States v. Malone*, 9 F. R. 897; *United States v. Kee Ho*, 33 F. R. 333.

**SECT. 3267.**—See note, § 3263.

The gauger mentioned in this section is an officer of the United States, and he comes within the prohibition of Rev. Stats. § 1765. *Hedrick v. United States*, 16 Ct. Cl. 88; *Finch v. United States*, 12 Ct. Cl. 365. It is not contrary to this section, as it stood in the act of 1868, for a distiller to convey the product of his distillation from the outlet of the worm to a still or doubler through which such product has not passed before reaching the worm. 12 A. G. Op. 523. Neither is an arrangement by which a tank is interposed as a receptacle for the product of distillation so far as the same has not reached the condition of proof spirits but still continues to be low wines with a view to carry it back for further distillation. *Id.*

**SECT. 3269.**—The case stated from 12 A. G. Op. 523, in note, § 3267, is held to be applicable hereto.

**SECT. 3271.**—See note, § 3255. St. Jan. 8, 1874, ch. 7 (18 St. 2), provides:—

“That when from death or from any other cause there shall be a change in the person, firm or company engaged in the business of distilling at any distillery, and the person, firm or company that by reason of such change ceases to carry on said business at such distillery has at the time of such change spirits in the distillery warehouse, it shall be lawful for the Commissioner of Internal Revenue, upon the written consent of the surviving principals and sureties interested, and under such rules and regulations, and upon such other conditions, as he may prescribe, to permit the succeeding person, firm or company to use the distillery warehouse on the premises in the same manner as if it did not contain distilled spirits belonging to the original person, firm or company after setting apart and separating, by a secure and unbroken partition such portion of it as may be necessary for the storage and safekeeping of the spirits distilled by the original person, firm or company, during the period allowed by law for the removal of distilled spirits from distillery warehouses, or until said spirits are removed, and the tax paid thereon within that time: *Provided*, That nothing herein contained shall impair or in any way affect the lien existing at the time of such change under § 1 of the internal revenue act of July 20, 1868, as amended, or other liabilities under any internal revenue law, but the existence of such lien shall be no ground for refusing to approve the bond of the succeeding person, firm or company, anything in § 8 of the said act of July 20, 1868, as amended, to the contrary notwithstanding.”

The warehouse mentioned in this section is within the meaning of the joint resolution of Congress of March 29, 1869, which declares that proprietors of “internal revenue bonded warehouses” shall reimburse to the United States the expenses and salary of all storekeepers put by it in charge of them. *United States v. Powell*, 14 Wall. 493. The joint resolution contemplates however only the reimbursement of expenses and salary paid after its passage. *United States v. Singer*, 15 Wall. 111, 122; *United States v. 36 Barrels of High Wines*, 7 Blatch. 459, see note, § 3253; *United States v. Wright*, 3 Am. L. T. (U. S. Cts.) 17, see note, § 3242; *United States v. South Branch Distilling Co.* 8 Biss. 162, see note, § 3293. Other cases on this section are: *McCullough v. Large*, 20 F. R. 309; *United States v. Reed*, 13 Int. Rev. Rec. 148; *Finch v. United States*, 12 Ct. Cl. 364; *Woolner's Case*, 13 Ct. Cl. 355, 363; *Van Schoonhoven v. Curley*, 86 N. Y. 187; *Sherley v. McCormick*, 135 Mass. 126; *Bliss v. Carroll*, 9 Pac. Rep. 88.

**SECT. 3272.**—See note, § 3330. St. March 3, 1877, ch. 114, § 7 (19 St. 394), provides:—



"That whenever, in the opinion of the Commissioner of Internal Revenue, any special bonded warehouse is unsafe or unfit for use, or the merchandise therein is liable to loss or great wastage, he may discontinue such warehouse, and require the merchandise therein to be transferred to such other warehouse as he may designate, and within such time as he may prescribe; and all the provisions of Rev. Stat. § 3272, relating to transfers of spirits from warehouses, including those imposing penalties, are hereby made applicable to transfers from special bonded warehouses."

SECT. 3273. — *Woolner v. United States*, 13 Ct. Cl. 355, 363.

SECT. 3274. — *Van Schoonhoven v. Curley*, 86 N. Y. 187; *Sherley v. McCormick*, 135 Mass. 126.

SECTS. 3276, 3286. — See note, § 3282. Amended by 20 St. 335, ch. 125, § 5, by inserting "not exceeding" before "\$1000," wherever the latter occurs in these sections.

SECTS. 3277, 3278. — See notes, §§ 3152, 3282.

SECT. 3279. — Working in a distillery on which no sign is placed, is an offence under this section. *United States v. Flynn*, 15 Blatch. 302. But work done in erecting a shanty in which an illicit still is placed is not such work as is forbidden hereby. *United States v. Burgess*, 33 F. R. 833.

SECT. 3281. — See notes, §§ 1014, 3242. This statute is not unconstitutional by reason of providing for a forfeiture of real estate. Congress has power to determine what measures are requisite to enforce the collection of a tax (*United States v. A Distillery*, 2 Abb. U. S. 192; *United States v. McKinley*, 4 Brewst. (Penn.) 246); or to require a bond of one who engages in the business of distilling. *Mason v. Rollins*, 2 Biss. 99. It is not necessary in an indictment under this section to allege the particular means by which the United States are defrauded of the tax. *United States v. Simmons*, 96 U. S. 360. As to what is sufficient, see *United States v. Simmons*, *supra*; *Coffey v. United States*, 116 U. S. 427, 434; *United States v. Staton*, 25 Int. Rev. Rec. 10. A proceeding against a distillery for forfeiture under the revenue laws is not a criminal proceeding within the meaning of the Constitution, but a proceeding strictly *in rem*. *United States v. Three Tons of Coal*, 6 Biss. 379. Upon an information to obtain the forfeiture of a distillery and the things connected therewith, it is not sufficient to say "all the boilers, stills and other vessels used in the distillation of spirits, and all the distilled spirits, being about twelve barrels now in the distillery, owned by, and until seized in the possession of," &c. *United States v. Distillery*, 4 Biss. 26. Only such spirits as are owned by the illicit distiller, and not such as are in the possession of *bona fide* purchasers on which the tax has been paid, and in relation to which all requirements of law have been fulfilled, are liable to forfeiture hereunder. *United States v. 100 Barrels*, 23 Int. Rev. Rec. 10. The words "owned by such person wherever found" should be construed to mean "wherever found of which he is the owner." "Owner" is here used in a popular and not a technical sense. The intention of Congress was to condemn the property of the delinquent to the extent to which it, in fact, existed in him at the time of seizure without reference to the technical legal title. *United States v. 372 Pipes*, 5 Sawyer, 421. This section is construed in *United States v. One Copper Still*, 8 Biss. 270, where it was held that personal property situated upon distillery premises and used in the business of illicit distilling is subject to forfeiture by the government irrespective of its ownership. Under this section it seems that only the *right* and *interest* of the owner of inculpatated distillery premises can be condemned and forfeited. *Heidritter v. Elizabeth Oil Cloth Co.* 6 F. R. 138; 11 Repr. 595. As to what land is not subject to forfeiture, see *United States v. Spreckels*, 1 Sawyer, 84, in note, § 3242. In providing for the forfeiture of the interest in the land on which a distillery is situated of every person who knowingly has suffered or permitted the business of a distiller to be there carried on or who has connived at the same, it is not requisite that he should have knowingly suffered or permitted it to be *fraudulently* carried on or that he should have connived at such fraud. *United States v. The Distillery at*



Spring Valley, 11 Blatch. 255. In order to forfeit the personal property of a person who has permitted or suffered his premises to be used for purposes of ingress or egress to or from an illicit distillery, it is necessary to show that such person knew that the ingress or egress over his premises was to or from an illicit distillery. *Gregory v. United States*, 17 Blatch. 325. The forfeiture operates at the time of the seizure and not at the time when the statute is violated. *United States v. Feigelstock*, 14 Blatch. 321. Prior to St. Feb. 8, 1875, this section was held not to apply to a wholesale liquor dealer who had not paid the special tax. 2000 Bottles of Liquors, 5 Ben. 265. Under this section any number of acts, no matter how numerous, which go to show that the government has been defrauded of a tax are admissible. *United States v. Staton*, *supra*. But a single transaction does not constitute a person a dealer. *Rahter v. Bank of Lancaster*, 92 Penn. St. 393. And a sale of whiskey cannot be avoided by the vendee, because it is made in violation of law. The United States do not prohibit the sale of whiskey, but only impose a penalty for the violation of the laws relating thereto. *Id.* As to limitation of proceedings hereunder, see *United States v. Wright*, 3 Am. L. T. (U. S. Cts.) 17; 3 Pitts. 192; and *United States v. Mathoit*, 1 Sawyer, 142, see note, § 3242. See also *United States v. 100 Barrels of Spirits*, 1 Dillon, 64; *United States v. Harbison*, 13 Int. Rev. Rec. 118.

SECT. 3282. — See note, § 3263. Amended by 20 St. 335, ch. 125, § 5, by striking out the words “or any vapor of alcoholic spirits” immediately following the word “alcohol” in the eighth line of said section, and also by inserting in place of the words at the close of said section, namely: “But nothing herein contained shall be construed to authorize the distillation of such fermented liquids, except in an authorized distillery,” the following:—

“But no worm, goose-neck, pipe, conductor, or contrivance of any description whatsoever whereby vapor might in any manner be conveyed away and converted into distilled spirits, shall be used or employed or be fastened to or connected with any vaporizing apparatus used for the manufacture of vinegar; nor shall any worm be permitted on or near the premises where any vaporizing process is carried on. Nor shall any vinegar factory, for the manufacture of vinegar as aforesaid, be permitted within 600 feet of any distillery or rectifying house. But it shall be lawful for manufacturers of vinegar to separate, by a vaporizing process, the alcoholic property from the mash produced by them, and condense the same by introducing it into the water or other liquid used in making vinegar. No person, however, shall remove, or cause to be removed, from any vinegar factory or place where vinegar is made, any vinegar or other fluid or material containing a greater proportion than two per centum of proof spirits. Any violation of this provision shall incur a forfeiture of the vinegar, fluid, or material containing such proof spirits, and shall subject the person or persons guilty of removing the same to the punishment provided for any violation of this section. And all the provisions of Rev. Stats. §§ 3276, 3277, 3278, are hereby extended and made applicable to all premises whereon vinegar is manufactured, to all manufacturers of vinegar and their workmen or other persons employed by them.” [See note, § 3263, *supra*.]

St. June 14, 1879, ch. 23 (21 St. 20), provides —

“that any vinegar factory for the manufacture of vinegar, established and operated as a vinegar factory prior to March 1, 1879, may be operated for the manufacture of vinegar by the use of alcoholic vapor within such distance less than 600 feet of any distillery or rectifying-house under such regulations as the Commissioner of Internal Revenue may prescribe with the approval of the Secretary of the Treasury.”

This section construed and the intention of Congress in enacting it explained in *United States v. Prussing*, 2 Biss. 334. See also *United States v. Distillery*, 23 Int. Rev. Rec. 147.

SECT. 3285. — Amended by 21 St. 145, ch. 108, § 3, by inserting “or before” after “at” in the first line, and inserting the following in place of the words after “period”:—

“No fermenting-tub in a sweet-mash distillery shall be filled oftener than once in 72 hours nor in a sour-mash distillery oftener than once in 96 hours, nor in a rum distillery oftener than once in 144 hours.”

SECT. 3286. — See notes, §§ 3152, 3276.



SECT. 3287.—Amended (together with the amendment in 20 St. 336, ch. 123, § 5), by 21 St. 145, ch. 108, § 6, by inserting "or packages" after "casks," and "or package" after "cask," wherever either occur in this section; by changing "twenty" in the second line to "ten;" by changing "or cutting" in the fourth line to "who shall cut;" and by inserting the following in place of the two words after "cask" in the seventh line:—

"Or packages, and the particular name of such distilled spirits as known to the trade, that is to say, high-wines, alcohol, or spirits, as the case may be, shall be marked or branded on the head of such cask or package in letters of not less one inch in length; and the spirits shall" [as in the text].

This section and §§ 3293, 3294, Rev. Stats., when taken together, show that the warehousing bond is taken solely for the purpose of securing the payment of the tax at the convenience of the distiller within one year. *United States v. Farrell*, 8 Biss. 259. See *Finch v. United States*, 12 Ct. Cl. 364; *Woolner v. United States*, 13 Id. 355, 363; *Van Schoonhoven v. Curley*, 86 N. Y. 187; *Sherley v. McCormick*, 135 Mass. 126.

SECT. 3289.—This section was formerly held to apply only to such distilled spirits as were on hand when the act of 1868 was passed, spirits on hand after that act was passed, from which the proper mark and stamp were omitted, being within the provisions of Rev. Stats. § 3456. *United States v. 37 Barrels of Brandy*, 11 Int. Rev. Rec. 125; *United States v. One Rectifying Establishment*, Id. 45; *United States v. 133 Casks Distilled Spirits*, Id. 191; 1 Sawyer, 188. But the Supreme Court of the United States has declared the forfeiture here provided applicable to such distilled spirits as are on hand both at the time and after the act was passed. *United States v. 200 Barrels of Whiskey*, 2 Woods, 54; 95 U. S. 571; *United States v. 95 Barrels of Spirits*, 14 Int. Rev. Rec. 6, changing a previous ruling; 12 Id. 123; *United States v. 34 Barrels Spirits*, 13 Id. 188, *accord*. See note, § 3320. The term "distilled spirits," as used in this section and in § 3299, includes all spirits which have been distilled, whether subsequently rectified or not. *Boyd v. United States*, 14 Blatch. 317. The fact that claimants have made *bona fide* advances as purchasers upon spirits forfeited hereunder and under § 3299 does not defeat the forfeiture, which is absolute and cannot be dispensed with by the court. Id. Stand casks containing more than five gallons used by a retail dealer and permanently affixed to his store are not required to be marked or stamped, nor liable to forfeiture under this section. *United States v. Cask of Gin*, 3 F. R. 20; *United States v. Four Casks*, 5 F. R. 438; 11 Rep. 454; *United States v. Mooney*, 26 Int. Rev. Rec. 267. Where a cask or package of distilled spirits, having been properly marked and stamped, has stood for a period of time so that by evaporation the quantity therein has been decreased, a wholesale liquor dealer has a right, so long as no new spirits are added thereto, to add water without rendering himself liable under this section or § 3456. *United States v. 32 Barrels of Distilled Spirits*, 5 F. R. 188; *Three Packages of Distilled Spirits*, 14 F. R. 569. On this section, see also *Woolner v. United States*, 13 Ct. Cl. 355, 366; *Van Schoonhoven v. Curley*, 86 N. Y. 187.

SECT. 3290.—Section 50 of 15 St. 145, ch. 186, which abolished the office of inspector and transferred some of his duties to store-keepers and others to gaugers, did not expressly repeal § 38 of St. 1866, ch. 184, although the definite terms in which an inspector was described as a person in charge in a distillery precluded the application of its penal provisions to a gauger who is also an inspector; and, it being deemed necessary to prevent misuse of inspection-brands by either officer, gaugers being required to inspect spirits filled for removal by rectifiers and wholesale liquor-dealers, these persons were added as agents whom it is unlawful for gaugers to employ. 2 Com. D. 1598.

This section does not authorize a gauger to delegate his authority or have his duties performed for him, nor do the statutes or regulations anywhere give such a delegation or substitution, or authorize the charging of fees for work done by others in the discharge



of a duty which the law requires to be performed by the gauger in person. *United States v. Bittinger*, 21 Int. Rev. Rec. 342.

SECT. 3293. — See notes, §§ 2971, 3255, 3271, 3330. 21 St. 145, ch. 108, § 4 (repealing 20 St. 249, Res. 16, and the amendment in 20 St. 336), amends this section, by substituting “proof-gallons, and taxable gallons,” in place of “and proof-gallons” in the fifteenth line; by inserting “at the time of making said entry” after “shall” in the eighteenth line; by changing “one year” to “three years,” and “bond” to “entry,” in the twenty-second line; and by adding the following at the end of the section: —

“A new bond shall be required in case of the death, insolvency, or removal of either of the sureties, and may be required in any other contingency affecting its validity or impairing its efficiency, at the discretion of the Commissioner of Internal Revenue. And in case the distiller or owner fails or refuses to give the bond hereinbefore required, or to renew the same, or neglects to immediately withdraw the spirits and pay the tax thereon, or if he neglects to withdraw any bonded spirits and pay the tax thereon before the expiration of the time limited in the bond, the collector shall proceed to collect the tax by distraint, issuing his warrant of distraint for the amount of tax found to be due, as ascertained by him from the report of the gauger if no bond was given, or from the terms of the bond if a bond was given. But this provision shall not exclude any other remedy or proceeding provided by law. If it shall appear at any time that there has been a loss of distilled spirits from any cask or other package hereafter deposited in a distillery warehouse, other than the loss provided for in Rev. Stats. § 3221, as amended, which, in the opinion of the Commissioner of Internal Revenue, is excessive, he may instruct the collector of the district in which the loss has occurred to require the withdrawal from warehouse of such distilled spirits, and to collect the tax accrued upon the original quantity of distilled spirits entered into the warehouse in such cask or package, notwithstanding that the time specified in any bond given for the withdrawal of the spirits entered into warehouse in such cask or package has not expired. If the said tax is not paid on demand, the collector shall report the amount due upon his next monthly list, and it shall be assessed and collected as other taxes are assessed and collected. That the tax on all distilled spirits hereafter entered for deposit in distillery warehouses shall be due and payable before and at the time the same are withdrawn therefrom and within three years from the date of the entry for deposit therein; And warehousing bonds hereafter taken under the provisions of Rev. Stats. § 3293 shall be conditioned for the payment of the tax on the spirits as specified in the entry before removal from the distillery warehouse, and within three years from the date of said bonds.”

St. March 3, 1877, ch. 114, §§ 2, 3, 4 (19 St. 393), provide, —

“SEC. 2. That every distiller of brandy from grapes, upon rendering his monthly return of materials used and spirits produced by him, shall immediately pay the tax upon such spirits, or may, after they have been properly gauged, marked, and branded, under regulations to be prescribed by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury, and also stamped as hereinafter provided, cause them to be removed in bond from the place of manufacture to a special bonded warehouse, under such regulations, and after making such entries, and executing and filing with the collector of the district in which such spirits were manufactured such bonds and bills of lading, and giving such other additional security as may be prescribed by the Commissioner of Internal Revenue and approved by the [by the] Secretary of the Treasury.

“SEC. 3. That all brandy intended for deposit in a special bonded warehouse, before being removed from the distillery, shall have affixed to each package an engraved stamp indicative of such intention, to be provided and furnished to the several collectors as in the case of other stamps, and to be charged to them and accounted for in the same manner; and for the expense attending, providing, and affixing such stamps, ten cents for each stamp shall be paid the collector on making the entry for such transportation.

“SEC. 4. That any brandy made from grapes removed in bond according to law may, upon its arrival at a special bonded warehouse, be deposited therein upon making such entries, filing such bonds and other securities, and under such regulations as shall be prescribed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury. It shall be one of the conditions of the warehousing-bond covering such spirits that the principal named in said bond shall pay the tax on the spirits as specified in the entry, or cause the same to be paid within three years from the date of the original gauging of the same, and before withdrawal, except as hereinafter provided.”

The fact that distilled spirits, while bonded, have been seized, condemned, and sold for violation of the Internal Revenue law and the tax paid by the purchaser thereof, pursuant



to § 3334, Rev. Stats., does not release the obligors on the warehouse bond. *United States v. South Branch Distilling Co.*, 8 Biss. 162. Depositing distilled spirits in a government warehouse does not make them the property of the government or cause them to be held at its risk. The property remains in the distiller and the risk of loss by fire or other casualty is his, and the sureties on his bond will not be discharged by the destruction of spirits in the warehouse. *Farrell v. United States*, 99 U. S. 221. The stockholders of a corporation engaged in the business of distilling cannot properly be accepted as sureties upon the bond required of the corporation by this section. 16 A. G. Op. 10. But a bond executed by a married woman engaged in the business of distilling is valid. *United States v. Garlinghouse*, 4 Ben. 194. See notes, § 3287, 3260. Other cases on this section are: *Woolner v. United States*, 13 Ct. Cl. 355, 363; *Van Schoonhoven v. Curley*, 86 N. Y. 187; *United States v. Grotenkemper*, 2 Bond, 140.

SECT. 3294. — Amended by 20 St. 337, ch. 125, § 5, and 21 St. 145, ch. 108, § 5, by striking out all after "form" in the fourth line and substituting therefor the following:—

"*Entry for Withdrawal of Distilled Spirits from Warehouse.* — Tax paid. Entry of distilled spirits to be withdrawn, on payment of the tax, from warehouse of distillery number —, situated in the — district of —, by —, deposited on the — day of —, anno Domini —, by —, in said warehouse.

"And the entry shall specify the whole number of casks, or packages, with the marks and serial numbers thereon, the number of gauge or wine gallons, and of proof gallons and taxable gallons, and the amount of the tax on the distilled spirits contained in them at the time they were deposited in the distillery warehouse; and said entry shall also specify the number of gauge or wine gallons, and of proof-gallons and taxable gallons contained in said casks or packages at the time application shall be made for the withdrawal thereof; and on payment of the tax the collector shall issue his order to the storekeeper in charge of the warehouse for the delivery. One of said entries shall be filed in the office of the collector, and the other transmitted by him to the Commissioner of Internal Revenue." [*United States v. Farrell*, Biss. 259. See note, § 3287; *McCullough v. Large*, 20 F. R. 309.]

SECT. 3295. — *United States v. Bayaud*, 21 Blatch. 287; 16 F. R. 376, in note, § 3324.

SECT. 3296. — As to the necessary averments in an indictment under this section, see *United States v. Anthony*, 14 Blatch. 92; *United States v. Nunnemacher*, 7 Biss. 129. A removal of brandy made from fruit from the distillery without having cut or burned on the barrels the name of the distiller, the name of the district or serial numbers, is not illegal if all other requirements of the statute have been complied with. *United States v. 37 Barrels*, 11 Int. Rev. Rec. 125. If the principal on a bond effects a full and complete compromise with the government of prosecutions based upon this section, the sureties on the bond cannot thereafter be subjected to the penalties therein prescribed. *United States v. Chouteau*, 20 Ct. Cl. 250; 102 U. S. 603. The penalty herein prescribed is in no sense a substitute for the tax required, or an abatement of it when recovered. *Id.* As to what constitutes a justifiable removal of spirits, see *United States v. Smith*, 27 F. R. 854. If the defendant is a party in interest in the business of distilling, or a party participating in the profits of the business, and for himself or with others, directed, prescribed, ordered, or set on foot the alleged removal, he may be convicted though he may not have been personally present at the time. *United States v. Nunnemacher*, 7 Biss. 111. See also, *The Distilled Spirits*, 11 Wall. 356, in note, § 3299; *United States v. 50 Barrels of Whiskey*, 11 Int. Rev. Rec. 94.

SECT. 3297. — St. May 3, 1878, ch. 88, (20 St. 48), authorizes the Secretary of the Treasury to grant permits, as here provided,—

"to any scientific university, or college of learning created and constituted such by any State or Territory under its laws, though not incorporated or chartered, upon the same terms and subject to the same restrictions and penalties, already provided, by said § 3297: *Provided further*, That the bond required



thereby may be executed by any officer of such university or college, or by any other person for it, and on its behalf, with two good and sufficient sureties, upon like conditions, and to be approved as by said section is provided."

SECT. 3299. — Amended by 18 St. 319, ch. 80, by changing "distilling" to "distillery" in the second line. A removal procured by a false and fraudulent bond, though accepted by the collector, is not a removal according to law, and the spirits thus withdrawn are not exempt from the operation of this section. The Distilled Spirits, 11 Wall. 356. An innocent purchaser for value, without notice that spirits had been fraudulently removed from the bonded warehouse, or that the tax thereon imposed had not been paid, takes only the title of his vendor, and therefore if the goods were absolutely forfeited to the United States before the sale, he acquires nothing by his purchase. *United States v. 64 Barrels of Spirits*, 3 Cliff. 308; *Garnharts v. United States*, 16 Wall. 162; *United States v. 800 Caddies of Tobacco*, 2 Bond, 305. As to the construction of St. July 13, 1866, § 45, of which this section is substantially a re-enactment, see *United States v. Blaisdell*, 9 Int. Rev. Rec. 82. See also *Boyd v. United States*, 14 Blatch. 317, in note, § 3289.

SECT. 3301. — Amended by 20 St. 337, ch. 125, § 5, by striking out the five words following "wine" in the eighth and thirteenth lines, and, in both lines, inserting "gallons, of proof gallons, and of taxable gallons" in place thereof.

SECT. 3303. — It seems to be the intention of Congress in this section and §§ 3304, 3305 to forfeit the thing when proved to have been an offender without regard to the owner's culpability, or to the interest of outside parties. *Heidritter v. Elizabeth Oil Cloth Co.*, 6 F. R. 138; 11 Rep. 595; *United States v. The Distillery at Spring Valley*, 11 Blatch. 255. In an action upon a distiller's bond for breach of condition thereof, in omitting to make certain entries pursuant to this section, an answer denying the allegations and averring that if fraud was committed it was effected through other means than those charged, is a bar to the action. *United States v. Chouteau*, 102 U. S. 603. The distiller must provide books and make the entries, though the Commissioner has prescribed no particular form for keeping them. It is not sufficient cause for forfeiture that the defendant merely failed to provide books and make the proper entries therein. The failure must be coupled with an intent to defraud the government. *United States v. 35 Barrels*, 2 Biss. 88; *A Quantity of Distilled Spirits*, 3 Ben. 70. The books of a distiller are public books and quasi records. They are kept for the purposes of evidence, and are intended for use as well by the government as by the distiller. *United States v. Myers*, 1 Hughes, 533. Other cases on this section are *Henderson's Distilled Spirits*, 14 Wall. 44; reversing *United States v. 100 Barrels of Spirits*, 2 Abb. U. S. 305; 1 Dillon, 49; *United States v. Singer*, 15 Wall. 111; *Dobbins's Distillery v. United States*, 96 U. S. 395; *United States v. One Water Cask*, 10 Int. Rev. Rec. 93.

SECT. 3304. — The government has the right to examine all books kept by a distiller or rectifier pertaining to his business, — private books as well as those required by law. And this requirement is not unconstitutional. *United States v. Mason*, 6 Biss. 350. See also note, § 3303; *United States v. Myers*, 1 Hughes, 533.

SECT. 3305. — Distilled spirits found on the premises on which the business of distilling is carried on, being the product of such business, are not "personal property used in the business" within the meaning of this section. *United States v. 4800 Gallons Spirits*, 4 Ben. 471. The forfeiture provided for by the act of 1866 applied only to the apparatus, spirits, &c., in the possession of the offender at the time the act or neglect which gave the right of action occurred. *United States v. One Water Cask*, 10 Int. Rev. Rec. 93. See also note, § 3303.

SECT. 3307. — *Collector v. Beggs*, 17 Wall. 182; *Hartman v. Bean*, 99 U. S. 393; *Stoll v. Pepper*, 97 Id. 438; *Finch v. United States*, 12 Ct. Cl. 364; *United States v. Reed*, 13 Int. Rev. Rec. 148.



SECT. 3309. — See note, § 3251. Amended by 18 St. 419, ch. 131, § 12, by changing "seventy" to "ninety" wherever it occurs in this section. 20 St. 340, ch. 125, § 6, as amended by 21 St. 145, ch. 108, § 8, provides —

"SEC. 6. That whenever, under the provisions of Rev. Stats. § 3309, an assessment shall have been made against a distiller for a deficiency in not producing 80 per centum of the producing capacity of his distillery as established by law, or for the tax upon the spirits that should have been produced from the grain, or fruit, or molasses found to have been used in excess of the capacity of his distillery for any month, as estimated according to law, such excessive use of grain, or fruit, or molasses having arisen from a failure on the part of the distiller to maintain the capacity required by law to enable him to use such grain, or fruit, or molasses without incurring liability to such assessment, and it shall be made to appear to the satisfaction of the Commissioner of Internal Revenue that said deficiency, or that said failure, whereby such excessive use of grain, molasses, or fruit arose, was not occasioned by any want of diligence or by any fraudulent purpose, on the part of the distiller, but from misunderstanding as to the requirements of the law and regulations in that respect or by reason of unavoidable accidents, then, and in such case, the Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury is authorized, on appeal made to him, to remit or refund such tax, or such part thereof as shall appear to him to be equitable and just in the premises: and the Commissioner of Internal Revenue upon the production to him of satisfactory proof of the actual destruction, by accidental fire or other casualty, and without any fraud, collusion, or negligence of the distiller of any spirits in process of manufacture or distillation, or before removal to the distillery warehouse, shall not assess the distiller for a deficiency in not producing 80 per centum of the producing capacity of his distillery as established by law when the deficiency is occasioned by such destruction, nor shall he, in such case, assess the tax on the spirits so destroyed: *Provided*, That no tax shall be remitted or refunded under the provisions of this section upon any assessment made prior to January 1, 1874: *Provided further*, That no assessments shall be charged against any distiller of fruit for any failure to maintain the required capacity, unless the Commissioner shall, within six months after his receipt of each monthly report notify such distiller of such failure so to maintain the required capacity."

A distiller is bound to pay taxes on 80 per cent of the producing capacity of the distillery, though that be on more than the amount of spirits actually produced. *United States v. Nissley*, 1 Dillon, 586; *United States v. Halloran*, 14 Blatch. 1; *United States v. Ferrary*, 93 U. S. 625; *Weitzel v. Rabe*, 103 Id. 340; *Stoll v. Pepper*, 97 Id. 438; *Daley v. United States*, 16 Int. Rev. Rec. 147; *United States v. Bicket*, Id. 85; *United States v. Reed*, 13 Id. 148. The meaning of this section is that in no case shall the distiller be assessed for a less amount of spirits than 80 per cent of the producing capacity of his distillery, and if the spirits actually produced by him exceed this 80 per cent he shall also be assessed upon the excess. *United States v. Singer*, 15 Wall. 111. The distiller is not liable under the 80 per cent clause until a copy of the survey on which the tax has been assessed is delivered to him. *Peabody v. Stark*, 16 Wall. 240; *United States v. Black*, 11 Blatch. 538, *contra*. But an assessment by an officer is not a condition precedent to the collection of taxes, when the statute prescribes the amount to be paid, and this amount can be recovered in an action of debt. *United States v. Halloran*, *supra*. As to necessity of a demand before suit, see *United States v. Black*, *supra*. It is not necessary that the assessment should be made month by month so as to indicate the deficiency for each month, and so as to coincide in time with the monthly returns of the distiller. *Dandele v. Smith*, 18 Wall. 642. The survey and estimate of producing capacity, made under Rev. Stats. § 3264, are conclusive until and unless revised under the direction of the Commissioner, and an assessment as for a deficiency based thereon is lawful, though the distiller has in good faith reported and paid taxes upon his whole production, and though such production has exceeded 80 per cent of the *actual* producing capacity. *Collector v. Beggs*, 17 Wall. 182; *United States v. Ferrary*, *supra*.

As to the manner of determining whether the distiller has accounted for all the grain used by him in a month, see *Weitzel v. Rabe*, 103 U. S. 340. By this section a tax is imposed upon the production of the excess of material at what it should have been accord-



ing to the statutory estimate of the capacity of the material, and not upon what the excess actually was. *Stoll v. Pepper*, 97 U. S. 438; *Runkle v. Citizens' Ins. Co.* 6 F. R. 143. Where distilled spirits in a bonded warehouse are sold, the purchaser takes them subject to the lien in favor of the United States. *Hartman v. Bean*, 99 U. S. 393. The producing capacity of a distillery having been determined by a survey, the assessor subsequently without a new survey determined that the producing capacity was greater and assessed the distillery accordingly. The assessment was held to be void and the excess of assessment not recoverable. *United States v. King*, 4 Ben. 476. A distiller was prevented from operating his distillery for four days of one month through the fault of the government and for four other days by an accident. A judgment charging him with the capacity tax during those eight days was erroneous. *Clinkenbeard v. United States*, 21 Wall. 65; *United States v. Miller*, 5 Biss. 128. A judgment rendered by a Federal court founded on an assessment of a deficiency tax under this section cannot be opened and a new trial granted on the ground that certain facts existing when the case was tried were not then put in evidence. *United States v. Millinger*, 7 F. R. 187. The right to bring suit for taxes under this section is given by Rev. Stats. § 3213. *United States v. Bristow*, 20 F. R. 378. The powers of the Commissioner are the same under 20 St. 327, § 6, as under § 3220. *Barnett v. United States*, 16 Ct. Cl. 515. See note, § 3450.

SECT. 3310. — Amended by 19 St. 248, ch. 69 by changing "unavoidable" to "unavoidable" in the twenty-fifth line. 21 St. 145, ch. 108, § 7, substitutes, in place of the words in the first and second lines "every distiller at the hour of twelve meridian on the third day after that on which his bond is approved," the following: —

"The first fermenting period of every distiller shall be taken to begin on the day the distiller's bond is approved; and every distiller at the hour of twelve meridian on the last day of such first fermenting period, or at the same hour on any previous day of such fermenting period on which spirits are distilled."

A regular suspension relieves the distiller from assessment for taxation during the suspension whether the resumption is regular or not. If the resumption is irregular, the distiller is liable to forfeiture and punishment. A non-compliance with the statute in regard to one interval of suspension cannot affect the question of the regularity of another suspension. Having mash or wort on the premises during an interval of suspension, does not subject the distiller to assessment for taxation during that period. Nor does the fact that it was impossible to lock the door of the furnace of the still, when it was at the same time impossible to make a fire in the furnace, and an officer attended meanwhile and saw that no distilling was done. Nor does the fact that notice of the suspension was not communicated by the collector to the Commissioner. *Daniels v. Tarbox*, 9 Blatch. 176. There is nothing herein which conflicts with the regulation of the Commissioner which requires the distiller to "fix his time so that he will have time to run off the mash on hand before the notice takes effect." *Stowell v. Williams*, 17 Int. Rev. Rec. 38. "Shall incur" means that he shall thereby cause or bring on the forfeitures, &c., and they are the same as under § 3281, Rev. Stats. The Distillery at Spring Valley, 11 Blatch. 255; *Clinkenbeard v. United States*, 21 Wall. 65, in notes to § 3309; *United States v. Reed*, 13 Int. Rev. Rec. 148.

SECT. 3311. — The distiller is entitled to have the capacity estimated while the reduction is going on in such a way as not to charge him with material in mash when the change was applied for as material used in excess of capacity. *Weitzel v. Rabe*, 103 U. S. 340.

SECT. 3312. — These provisions are general, and relate to every sort of stamp for distilled spirits, rectified or not, unless in some particular provision some repugnancy appears from attributing this sense to the words. *Boyd v. United States*, 14 Blatch. 317. Restamping Distilled Spirits, 13 A. G. Op. 574, in note, § 3220; *United States v. Bayaud*,



21 Blatch. 287; 16 F. R. 376, see note, § 3324; *Chadwick v. United States*, 3 F. R. 750. *United States v. Hermance*, 15 Blatch. 6.

SECT. 3313. — *United States v. Ulrici*, 111 U. S. 38; *United States v. Hermance*, 15 Blatch. 6; 13 A. G. Op. 574, see note, § 3220.

SECT. 3314. — 21 St. 145, ch. 108, § 16, amends this section (and the amendment thereof in 20 St. 338), by striking out the first ten words in the eighteenth line of the section, and all the clauses beginning with "and from" in the twenty-first line to and including "month" in the twenty-fifth line; and by adding the following at the end of the section : —

"*Provided*, That all export stamps issued to collectors shall be charged to them as representing the value of ten cents for each stamp, and they shall collect the amount due for such stamps at the rate of ten cents for each stamp issued in such manner and at such time as the Commissioner of Internal Revenue may prescribe, and the Commissioner may, in his discretion, make assessment therefor."

The so-called amendment made to this section by St. March 1, 1879, ch. 125, § 5, simply re-enacts it without any change whatever. *United States v. Landram*, 21 Ct. Cl. 128; 118 U. S. 81; *United States v. Ulrici*, 111 U. S. 38.

SECT. 3315. — *Woolner v. United States*, 13 Ct. Cl. 355, 366. Amended by 20 St. 338, ch. 125, § 5, by striking out the clause beginning with "issue" in the third line and ending with "paid" in the fifth line, and substituting the following in place thereof : —

"issue stamps for restamping packages of distilled spirits, tobacco, cigars, snuff, cigarettes, and fermented liquors which have been duly stamped."

SECT. 3316. — *Boyd v. United States*, 14 Blatch. 317. See note, § 3312.

SECT. 3317. — Amended by the same act (20 St. 339), to read as follows : —

"That on or before the tenth day of each month every person engaged in rectifying or compounding distilled spirits shall make, in such form as may be prescribed by the Commissioner of Internal Revenue, a return to the collector of the district, showing the quantity of spirits received for rectification, and from whom received, the quantity dumped for rectification, the quantity rectified, the quantity removed after rectification during the preceding month, and giving such other information as may be required by the Commissioner of Internal Revenue, such return to be made in duplicate and sworn to by the rectifier; and the collector shall forward one of such returns to the Commissioner of Internal Revenue. Every person who engages in, or carries on, the business of a rectifier with intent to defraud the United States of the tax on the spirits rectified by him, or any part thereof, or with intent to aid, abet, or assist any person or persons in defrauding the United States of the tax on any distilled spirits, or who shall purchase or receive or rectify any distilled spirits which have been removed from a distillery to a place other than the distillery-warehouse provided by law, knowing or having reasonable grounds to believe that the tax on said spirits, required by law, has not been paid, shall, for every such offence, be fined not less than \$1000 nor more than \$5000, and imprisoned not less than six months nor more than two years."

Having in his possession a rectifying appliance to which illicit spirits had been conveyed in ale barrels, and on several occasions under suspicious circumstances poured into the receiving tub of such appliance, is sufficient to justify a jury in finding that the defendant was carrying on the business of a rectifier. The statute is intended to cover the receipt of distilled spirits from a legal or illicit distillery. *United States v. Byrne*, 7 F. R. 455; 19 Blatch. 259; 12 Rep. 163.

SECT. 3318. — See note, § 3152. Amended by 19 St. 248, ch. 69, by changing, in the twenty-ninth line, "therin" to "therein," and by inserting after "shall," in the thirty-fourth line, the words "on conviction." 20 St. 339 adds the following to this section : —

"That every person required to keep the books prescribed by this section shall, on or before the tenth day of each month, make a full and complete transcript of all entries made in such book during the



month preceding, and, after verifying the same by oath, shall forward the same to the collector of the district in which he resides. Any failure by reason of refusal or neglect to make said transcripts shall subject the person so offending to a fine of \$100 for each neglect or refusal."

Only wholesale dealers in domestic spirits are here referred to, and not those who buy at wholesale ale, wine, and foreign spirits, nor those who deal by retail in domestic spirits. *United States v. Reagan*, 15 Int. Rev. Rec. 8; *United States v. McCullough*, 22 Id. 202, *contra*. The principal himself is required to make the entries pursuant to this section. No provision is made for any one else making them, and the refusal or neglect to make them is to be punished without regard to the question of intent, knowledge, or wilfulness. A Quantity of Distilled Spirits, 3 Ben. 552. Rev. Stats. § 3456, does not impose a forfeiture of spirits for a violation of this section since a specific penalty is herein provided. *United States v. 1412 Gallons of Spirits*, 10 Blatch. 428; *United States v. 133 Casks of Spirits*, 1 Sawyer, 188. But if there is a wilful and knowing violation, then it is held to come within § 3456. A Quantity of Distilled Spirits, *supra*. Where the defendants, who were both wholesale and retail dealers, received fifteen barrels of spirits, of six of which they made due entries in their books, but of the remaining nine made none, but proceeded to use them in their retail department, they were held liable to the penalty of \$100. *United States v. Malone*, 8 Ben. 574. Goods passing from their possession as wholesale liquor dealers into their possession as retail liquor dealers are to be regarded as being sent out of their stock and possession as wholesale dealers, and should be entered as having been sent to themselves as retail dealers. *Id*. The bonded warehouse in which a liquor dealer stores his goods is to be regarded as his premises for the purpose of suit. *United States v. McCullough*, *supra*. As to what is considered to be a removal from the stock and possession of the defendant, see *United States v. Miller*, 14 Blatch. 93. The three punishments, penalty, fine, and imprisonment, are, in contemplation of law, only one punishment for the same offence, although the penalty of \$100 may be recovered in a civil action and the fine and imprisonment be inflicted by a criminal prosecution. And a judgment for the penalty is no bar to a criminal prosecution leading to fine and imprisonment. *Re Leszynsky*, 16 Blatch. 9. See *United States v. One Water Cask*, 10 Int. Rev. Rec. 93.

SECT. 3319. — See note, § 3244. If a rectifier purchases from an authorized distiller, who is not an authorized rectifier or an authorized wholesale dealer, distilled spirits in quantities greater than twenty gallons, which were not produced by such authorized distiller, such purchaser is liable to the penalty here imposed. *N. Y. Rectifying Co. v. United States*, 14 Blatch. 549.

SECT. 3320. — Where there is a neglect to cause casks or packages to be stamped as herein required, such casks or packages, and such only, are liable to forfeiture pursuant to Rev. Stats. § 3289. *United States v. 200 Barrels of Whiskey*, 2 Woods, 54; 95 U. S. 571; *United States v. Cask of Gin*, 3 F. R. 20; *United States v. 95 Barrels*, 14 Int. Rev. Rec. 6. For cases holding that Rev. Stats. § 3456, applied to this class of omissions, see note, § 3289. As to the responsibility of the distiller for the neglect or failure of the gauger to stamp the casks, &c., see *United States v. 37 Barrels of Brandy*, 11 Int. Rev. Rec. 125; *United States v. 200 Barrels of Whiskey*, *supra*. And see note, § 3323.

SECTS. 3321, 3323. — Sect. 3321 and a part of § 3323 are repealed. See note, § 3153. Wholesale dealers are bound to cause their casks to be stamped and branded in cases coming under Rev. Stats. § 3320 and 3321. *United States v. Rectifying Establishment*, 11 Int. Rev. Rec. 45; *United States v. 133 Casks*, 1 Sawyer, 188; *United States v. 95 Barrels*, 12 Int. Rev. Rec. 123. Rev. Stats. § 3323 provides its own penalty for the violation of its provisions, and therefore Rev. Stats. § 3456, does not apply. *United States v. 95 Barrels*, *supra*; *Boyd v. United States*, 14 Blatch. 317, in note, § 3312; *United States v. 32 Barrels*, 5 F. R. 188, in note, § 3289; *United States v. Cask of Gin*, 3 F. R. 20.



SECT. 3324. — St. March 1, 1879, ch. 125, §§ 12, 13 (20 St. 342), as amended by St. May 28, 1880, ch. 108, §§ 12, 13 (21 St. 145), provides: —

“SEC. 12. That every person who empties or draws off, or causes to be emptied or drawn off, the contents of any package of imported liquors stamped as above required, shall, at the time of such emptying, efface, obliterate, and destroy the stamp thereon, and also all other marks or brands which shall have been placed thereon in accordance with the law or regulations concerning imported liquors. Every cask or other package from which the stamp for imported liquors required by this act to be placed thereon shall not be effaced, obliterated, or destroyed, on emptying such package, shall be forfeited, and the same may be seized by any officer of internal revenue wherever found; and all the provisions and penalties of Rev. Stats. § 3324, relating to empty casks or packages from which the marks, brands, or stamps have not been effaced or obliterated, and relating to the removal of stamps from packages, and to having in possession any stamps so removed, shall apply to the stamps for imported spirits herein provided for, and to the casks or other packages on which such stamps shall have been used.

“SEC. 13. That if any person shall purchase or sell, with the imported-liquor stamp herein required remaining thereon, or any of the marks or brands which shall have been placed thereon in accordance with the laws or regulations concerning imported liquors remaining thereon, any cask or other package, after the same has been once used to contain imported liquors and has been emptied; or if any person shall use or have in possession such cask or package, with any imitation of such marks or brands, for the purpose of placing domestic distilled spirits therein for sale; every such cask or package, with its contents, if any, shall be forfeited to the United States. And every such person who shall violate any of the provisions of this section shall be liable to a penalty of \$200 for every such cask or package so purchased, sold, used, or had in possession.”

Upon an indictment under the clauses beginning “Every person who empties or draws off” in the first line and “or who has in his possession” in the twenty-fifth line, proof of intent is unnecessary. Under the clause beginning “And every railroad company” it is *United States v. Ulrici*, 3 Dillon, 532. The omission or neglect, however, must be knowing and wilful; the obliteration must be made at the time the contents of the barrel are emptied out, and the offender must be both fined and imprisoned. A Quantity of Distilled Spirits, 3 Ben. 552; 3 Am. L. T. (U. S. Cts.) 10. See also note, § 3456. The provisions of this section are applicable to both foreign and domestic spirits, and an indictment need not specify which they are. The offence is complete whether the spirits be the product of a licensed or an illicit distillery, and whether the stamp was lawfully affixed or not. The indictment need not set out the stamp *verbatim*, or state its contents, if it describes it by its statutory designation, nor need it charge an intent to use the stamp again, or an intent to defraud the United States, or knowledge on the part of the accused that the cask contained distilled spirits. An indictment under this section will lie against two persons jointly. *United States v. Bayaud*, 21 Blatch. 287; 16 F. R. 376; 15 Rep. 520. As to evidence insufficient to sustain an indictment under this section, see *United States v. Buchanan*, 4 Hughes, 487; 9 F. R. 689. A principal who causes a package of spirits to be emptied by an employé is bound to see that the marks, stamps, or brands thereon are obliterated at the time the package is emptied. If he entrusts this duty to the employé, he does so at his peril; and if the employé fails to do his duty, such failure is equally the failure of the principal. *United States v. Adler*, 21 Int. Rev. Rec. 316; 1 N. Y. Weekly Dig. 182. A carrier is bound to know that there were unobliterated stamps upon the barrels which it transports, and it is no defence that by the exercise of reasonable care and ordinary observation it did not discover them. *United States v. Goodrich Transportation Co.*, 8 Biss. 224. St. March 1, 1879, ch. 125, § 12, does not define the offence of removing stamps from packages of imported liquors, or of having in possession stamps so removed, except by adopting the provisions of § 3324, Rev. Stats., defining such offences in relation to stamps upon packages of domestic spirits and applying them in the case of imported liquors. In doing this its language is that of reference merely and not of definition. Having in possession a stamp once in use which has accidentally fallen off the package, is an offence under § 3324, Rev. Stats., but not under this



act. Having in possession stamps that have been removed without, at the time of removal, being defaced and destroyed, is an offence under both laws,—one in the case of domestic, the other in the case of imported, liquors. *United States v. Spiegel*, 116 U. S. 270. Said act prohibits filling any package in which foreign spirits have been imported with domestic spirits, even though the required stamps, marks, and brands have been obliterated. *United States v. 23 Gallons of Spirits*, 5 Sawyer, 594; *United States v. Half Barrel*, 6 Sawyer, 63. Barrels and kegs which have been emptied, and then carried to a room for the purpose of effacing the stamps and obliterating the marks, are not liable to seizure while the stamps and marks are being effaced. 11 Int. Rev. Rec. 5.

SECT. 3326. — St. Feb. 8, 1875, ch. 36, § 17 (18 St. 311), provides, —

“That if any person shall affix, or cause to be affixed, to or upon any cask or package containing, or intended to contain, distilled spirits, any imitation stamp or other engraved, printed, stamped, or photographed label, device, or token, whether the same be designed as a trade mark, caution notice, caution, or otherwise, and which shall be in the similitude or likeness of, or shall have the resemblance or general appearance of, any internal revenue stamp required by law to be affixed to or upon any cask or package containing distilled spirits, he shall, for each offence, be liable to a penalty of \$100, and, on conviction, shall be fined not more than \$1000, and imprisoned not more than three years, and the cask or package with its contents shall be forfeited to the United States.”

The addition of spirits on which no duty had been paid to a cask partly empty would be an undoubted act of fraud, punishable hereunder. *Three Packages Spirits*, 14 F. R. 569.

SECT. 3327. — This includes every kind of spirits which have once been distilled, no matter what other operation they may have been subjected to. *Boyd v. United States*, 14 Blatch. 317; *United States v. The Distillery at Spring Valley*, 11 Id. 255, 273.

SECT. 3328. — An article made from grapes grown in the United States, into which carbonic acid gas is injected by a separate process of manufacture, is free from taxation. *United States v. Case*, 6 Ben. 493.

SECTS. 3329, 3330. — See notes, §§ 2971, 3255, 3272, 3293, 3314. 21 St. 145, ch. 108, § 10, amends § 3329 by striking out the nine words following “exported” in the fifty-sixth line and inserting “ninety” in lieu thereof; by striking out “in quantities of not less than 1000 gallons” in the third line; and by inserting “packages” after “casks” in the fifth line. By § 11 it amends § 3330 by striking out “in quantities of not less than 1000 gallons” in the third line, and inserting “or packages” in lieu thereof. St. June 9, 1874, ch. 259 (18 St. 64), as amended by St. March 1, 1879, ch. 125, § 10 (20 St. 342), provides, —

“SEC. 1. That whenever the owner or owners of distilled spirits shall desire to withdraw the same from any distillery bonded warehouse for exportation under existing law, such owner or owners may at their option, in lieu of executing an export bond as now provided by law, give a transportation bond with sureties satisfactory to the collector of internal revenue, and under such rules and regulations as the Secretary of the Treasury may prescribe, conditioned for the due delivery thereof on board ship at a port of exportation to be named therein; and for the due performance on the part of the exporter or owner at the port of export of all the requirements in regard to notice of export, entry, and the giving of bond hereinafter specified. And in such case, on arrival of the spirits at the port of export, the exporter or owner at that port shall immediately notify the collector of the port of the fact, setting forth his intention to export the same, and the name of the vessel upon which the same are to be laden, and the port to which they are intended to be exported. He shall, after the quantity of spirits has been determined by the gauger and inspector, file with the collector of the port an export-entry verified by his oath or affirmation. He shall also give bond to the United States, with at least two sureties, satisfactory to the collector of customs, conditioned that the principal named in said bond will export the spirits as specified in said entry to the port designated in said entry, or to some other port without the jurisdiction of the United States. And upon the lading of such spirits, the collector of the port, after proper bonds for the exportation of the same have been completed by the exporter or owner at the port of shipment thereof, shall transmit to the collector of internal revenue of the district from which the said spirits were



withdrawn for exportation, a clearance certificate and a detailed report of the gauger, which report shall show the capacity of each cask in wine-gallons, and the contents thereof in wine-gallons, proof-gallons, and taxable gallons. Upon receipt of the certificate and report, and upon payment of tax on deficiency, if any, the collector of internal revenue shall cancel the transportation bond. The bond required to be given for the landing at a foreign port of distilled spirits shall be cancelled upon the presentation of satisfactory proof and certificates that said distilled spirits have been landed at the port of destination named in the bill of lading or any other port without the jurisdiction of the United States or upon satisfactory proof that after shipment the same were lost at sea without fault or neglect of the owner or shipper thereof. And whenever a distiller of spirits in bond shall desire to change the packages in which the same is contained, in order to export them, the Commissioner of Internal Revenue shall be authorized, under regulations to be prescribed by him, and upon the execution of proper bonds with sufficient sureties, to permit the withdrawal of so much spirits from bond and in new packages as the distiller shall desire to export as aforesaid.

"SEC. 2. That on and after July 1, 1874, for the expense of providing and affixing the stamps to each cask containing distilled spirits for exportation, there shall be charged ten cents for each stamp instead of twenty-five cents as now required by law."

St. March 3, 1877, ch. 114 (19 St. 393), in part, provides : —

"SEC. 6. That the provisions of existing law in regard to the exportation of distilled spirits are hereby extended so as to permit the exportation from special bonded warehouses of grape brandy free of tax in any original cask containing not less than 20 gallons, and for the exportation of grape brandy upon which all taxes have been paid, with the privilege of drawback in quantities of not less than 100 gallons, and in the distillers' original cask, containing not less than twenty-nine gallons each.

"SEC. 8. That the tax upon any brandy distilled from grapes, removed from the place where it was distilled, and in respect of which any requirement of this act is not complied with, shall at any time when knowledge of such fact is obtained by the Commissioner of Internal Revenue, be assessed by him upon the distiller of the same, and returned to the collector, who shall immediately demand payment of such tax, and, upon the neglect or refusal of payment by the distiller, shall proceed to collect the same by distraint. But this provision shall not exclude any other remedy or proceeding provided by law.

"SEC. 9. That nothing in this act shall be construed as extending the time in which the tax on brandy made from grapes shall be paid beyond three years from the day on which the taxable quantity is ascertained by the gauger; and all brandy made from grapes, found elsewhere than in a distillery or special bonded warehouse, not having been removed therefrom according to law, and all brandy on which the tax has not been paid within three years of the date of the original gauging shall be forfeited to the United States.

"SEC. 10. That the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may make all needful rules and regulations for carrying into effect the provisions of this act, and such regulations when made shall have all the force and effect of law.

"SEC. 11. That in case any grape brandy removed from the distillery for deposit in a special warehouse, shall fail to be deposited in such warehouse within ten days thereafter, or within the time specified in any bond given on such removal, or if any grape-brandy deposited in any special warehouse shall be taken therefrom for deposit in another warehouse, or for export, or otherwise, without full compliance with the provisions of this act, and with the requirements of any regulations made thereunder, and with the terms of any bond given on such removal, then any person who shall be guilty of such failure, and any person who shall in any manner violate any provisions of this act, or of the regulations made in pursuance thereof, shall be subject, on conviction, to a fine of not less than \$100 nor more than \$4000, and to imprisonment for not less than three months nor more than three years, for every such failure or violation; and the spirits as to which such failure or violation shall take place shall be forfeited to the United States."

St. Dec. 20, 1879, ch. 1 (21 St. 59), provides : —

"SEC. 1. That where spirits are withdrawn from distillery warehouses for exportation according to law, it shall be lawful, under such rules and regulations and limitations as shall be prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, for an allowance to be made for leakage or loss by any unavoidable accident, and without any fraud or negligence of the distiller, owner, exporter, carrier, or their agents or employees, occurring during transportation from a distillery warehouse to the port of export; nor shall any assessment be collected for such loss or leakage where the same has not been paid on distilled spirits, exported since May 1, 1878.



"SEC. 2. That where the spirits provided for in the preceding section are covered by a valid claim of insurance in excess of the market value thereof, exclusive of the tax, the tax upon such spirits shall not be remitted to the extent of such excessive insurance."

Whiskey was bonded and gauged for export purposes in April. Later in the same year its designation was changed; it was again gauged and bonded, and sent out of the country. The difference between the two gauges was 1065 gallons, which was shown to have been caused by the intermediate leakage and evaporation. Suit was brought for the recovery of the tax on such difference. It was held that the government could recover, and that the law taxing exported whiskey was constitutional. *United States v. Thompson*, 32 Int. Rev. Rec. 166.

SECT. 3330. — See note, § 3329. The "tax on deficiency" in the quantity of distilled spirits exported, when compared with the quantity withdrawn for exportation, may be collected by distraint upon the property of the withdrawer of spirits, as well as by suit upon the exportation bond. 16 A. G. Op. 634 (1879); but see 21 St. 59, ch. 1, *supra*. The forfeiture of boats, vehicles, horses, &c., is declared irrespective of the question of ownership. *United States v. The Distillery at Spring Valley*, 11 Blatch. 255.

SECT. 3331. — If proceedings for the forfeiture of a distillery have been abandoned after the property has been released on bond, under this section, a lien for unpaid taxes is not thereby affected, and a subsequent purchaser in good faith and without notice is liable for such taxes. *Alkan v. Bean*, 8 Biss. 83. The release of property on bond after its seizure does not divest the court of jurisdiction over the condemnation proceedings. The effect of the release is to give the owner the right to sell the property. If liens or rights are acquired thereafter, they will be protected; but the court may reseize the property and order its sale. *United States v. Mackoy*, 2 Dillon, 299.

SECT. 3332. — Amended by St. March 1, 1879, ch. 125, § 5 (20 St. 339), by adding the following: —

"And in case of seizure of a still, doubler, worm, worm-tub, mash-tub, fermenting-tub, or other distilling apparatus, having a less producing capacity than one hundred and fifty gallons per day, for any offence involving forfeiture of the same, where said apparatus shall be of less than \$500 value, and where it shall be impracticable to remove the same to a place of safe storage from the place where seized, the seizing officer is authorized to destroy the same only so far as to prevent the use thereof, or any part thereof, for the purpose of distilling: *Provided*, That such destruction shall be in the presence of at least one credible witness, and that such witness shall unite with the said officer in a duly sworn report of said seizure and destruction, to be made to the Commissioner of Internal Revenue, in which report they shall set forth the grounds of the claim of forfeiture, the reasons for such seizure and destruction, their estimate of the fair cash value of the apparatus destroyed, and also of the materials remaining after such destruction, and a statement that, from facts within their own knowledge, they have no doubt whatever that said distilling apparatus was set up for use and not registered, or had been used in the unlawful distillation of spirits, and that it was impracticable to remove the same to a place of safe storage. Within one year after such destruction the owner of the apparatus so destroyed may make application to the Secretary of the Treasury, through the Commissioner of Internal Revenue, for reimbursement of the value of the same; and unless it shall be made to appear to the satisfaction of the Secretary and the Commissioner that said apparatus had been used in the unlawful distillation of spirits, the Secretary shall make an allowance to said owner, not exceeding the value of said apparatus, less the value of said materials as estimated in said report; and if the claimant shall thereupon satisfy said Secretary and Commissioner that said unlawful use of the apparatus had been without his consent or knowledge, he shall still be entitled to such compensation, but not otherwise. And in case of a wrongful seizure and destruction of property under the foregoing provisions, the owner thereof shall have right of action on the official bond of the officer who occasioned the destruction for all damages caused thereby."

SECT. 3333. — *United States v. 508 Barrels of Spirits*, 5 Blatch. 407; *United States v. 6 Barrels of Spirits*, Id. 542; *Boyd v. United States*, 14 Id. 317.

SECT. 3334. — See notes, p. 245. Amended by 20 St. 340, ch. 125, § 5, by adding, —

"*Provided*, That in all cases wherein it shall appear that any distilled spirits offered for sale on distraint for taxes, where the taxes on such spirits have not been paid, or offered for sale for the benefit



of the United States as forfeited spirits under order of court or under proceeding pursuant to Rev. Stats. § 3460, will not, by reason of such spirits being below proof, bring a price equal to the tax due and payable thereon, but will bring a price equal to, or greater than, the tax on said spirits, computed only upon the proof-gallons contained in the packages, without regard to the greater number of wine-gallons contained therein, then, and in such case, upon sale being so made, tax-paid stamps to the amount required to stamp such spirits as if the tax thereon were only on the proof-gallons thereof, may, under such rules and regulations as the Commissioner of Internal Revenue shall prescribe, be used by the collector making such sale, or furnished by a collector to a United States marshal, or to any other government officer making such sale for the benefit of the United States, without making payment for said stamps so used or delivered. Any collector using or furnishing stamps in manner aforesaid, on presenting vouchers satisfactory to the Commissioner of Internal Revenue, shall be allowed credit for the same in settling his stamp account with the department. In such cases, the officer selling the distilled spirits shall affix, or cause to be affixed, to the same the tax paid stamps so provided, and shall write across the face of such stamps the true number of proof and wine gallons contained in the package, the amount of tax actually paid thereon, and also the words 'Affixed under provisions of act of ——— 1879' (inserting the date of the approval of this act)."

District attorneys are entitled under Rev. Stats. § 825 to a commission upon the "tax" required to be paid by the purchasers of forfeited property sold in pursuance of this section. 15 A. G. Op. 566. See *United States v. South Branch Distilling Co.*, 8 Biss. 162, in note, § 3293.

## CHAPTER V.

### FERMENTED LIQUORS.

**SECT. 3336.** — Amended by St. April 29, 1886, ch. 64 (24 St. 15), by striking out, in the second and third lines, the clause beginning with "and" and ending with "thereafter;" by changing "twice" in the fifth line to "three times;" and by adding at the end of the section —

"And he shall execute a new bond once in four years and whenever required so to do by said collector, in the amount above named and conditioned as above provided, which bond shall be in lieu of any former bond or bonds of such brewer in respect to all liabilities accruing after its approval by said collector."

See *Underhill v. Pleasanton*, 8 Blatch. 260; *United States v. Dooley*, 21 Int. Rev. Rec. 115.

**SECT. 3337.** — St. May 13, 1876, ch. 95 (19 St. 53), provides that nothing in § 3337 —

"shall be so construed as to authorize an assessment upon the quantity of materials used in producing or purchased for the purpose of producing, fermented or malt liquors, nor shall the quantity of materials so used or purchased be evidence, for the purpose of taxation, of the quantity of liquor produced: but the tax on all beer, lager-beer, ale, porter, or other similar fermented liquor, brewed or manufactured, and sold or removed for consumption or sale, shall be paid as provided in § 3339 of said statutes, and not otherwise: *Provided*, That this act shall not apply to cases of fraud. *And provided further*, That nothing in this act shall have the effect to change the present rules of law respecting evidence in any prosecution or suit."

Where a brewer keeps a book which purports to be an account such as is required to be kept, he shall not, under § 3340, Rev. Stats., forfeit \$300 for an accidental omission of an item or an unintentional error in the account. *United States v. Obermeyer*, 5 Ben. 541. But it is no defence that the neglect to keep the books was through ignorance or carelessness, and that there was no wrongful or criminal intent. *United States v. Foster*, 2 Biss. 453. A book of general accounts kept by a brewer in conducting his business cannot be deemed a book of entries of materials furnished or such a book as the statute requires. *United States v. Bellingsstein*, 16 Int. Rev. Rec. 92. The terms "malt liquors" and "fer-



mented liquor" are used synonymously, and the brewer is required to enter all malt liquors in his book, whether sold to other brewers or to the public. *United States v. Dooley*, 21 Int. Rev. Rec. 115. See *United States v. Miller*, 16 Id. 25; *Bergdoll v. Pollock*, 95 U. S. 337.

SECT. 3338. — *Bergdoll v. Pollock*, 95 U. S. 337.

SECT. 3339. — See note, § 3337.

"Gallons." 20 St. 327, ch. 125, § 21, provides —

"That the word 'gallon,' wherever used in the internal-revenue law, relating to beer, lager-beer, ale, porter, and other similar fermented liquors, shall be held and taken to mean a wine-gallon, the liquid measure containing 231 cubic inches."

This provision was intended, not to establish an exception, but to introduce into the excise conformity to the standard of the wine gallon long before existing in the customs service and recognized by the mercantile community. 16 A. G. Op. 361. It is sufficient to show a failure or neglect to affix the stamps as required by law, and it is unnecessary to show a wrongful or criminal intent. *United States v. Foster*, 2 Biss. 453. See *Underhill v. Pleasanton*, 8 Blatch. 260.

SECT. 3340. — Amended by 20 St. 342, by striking out "as aforesaid" in the sixth line. In a civil action to recover the penalty for neglect to keep the books provided by law, the question of intent is immaterial. *United States v. Miller*, 16 Int. Rev. Rec. 25; *United States v. Bellingstein*, Id. 92; *United States v. Obermeyer*, 5 Ben. 541, see note, § 3337. The penalties herein imposed are to be recovered in civil actions and not by indictment. *Fein v. United States*, 1 Wyoming, 246.

SECT. 3342. — Amended by 18 St. 484, ch. 154, by substituting "in the head" in place of the nine words after "spigot-hole" in the fourth line; and by striking out the clause beginning in the ninth and tenth lines with "in such a way," and ending with "purpose" in the twelfth line, and substituting therefor the following:—

"Which stamp shall be destroyed by driving through the same the faucet through which the liquor is to be withdrawn, or an air-faucet of equal size, at the time the vessel is tapped, in case the vessel is tapped through the other spigot-hole (of which there shall be but two, one in the head and one in the side)."

The penalty imposed may be recovered in an action of debt. Whether, after action brought, an indictment can be maintained, *quære*. *United States v. Foster*, 2 Biss. 453. Beer is not to be removed from the place of manufacture until it is stamped, and it is unnecessary for the indictment to negative all cases where the law authorizes a removal without the affixing and cancellation of a stamp. *United States v. Schimer*, 5 Biss. 195.

SECT. 3346. — Amended by 20 St. 340, ch. 125, § 5, by striking out all after "done" in the fifth line and substituting therefor the following:—

"And every person who shall remove, or cause to be removed, from any cask or package of fermented liquors, any stamp denoting the tax thereon, with intent to re-use such stamp, or who, with intent to defraud the revenue, knowingly uses, or permits to be used, any stamp removed from another cask or package, or receives, buys, sells, gives away, or has in his possession, any stamp so removed, or makes any fraudulent use of any stamp for fermented liquors, shall be fined not less than \$100 nor more than \$1000, and imprisoned not less than six months nor more than three years."

SECT. 3349. — See note, § 3244, par. 3.

SECT. 3351. — This does not say that tun liquor is known as malt liquor, but that, on the contrary, it is known as unfermented worts. *United States v. Dooley*, 21 Int. Rev. Rec. 115.

SECT. 3352. — Under this section fermented liquors seized and sold by State officers in execution of its police laws, may again be seized in the hands of the purchaser therefrom by the United States authorities where they have been removed from the brewery or warehouse, and the tax required by the internal revenue laws has not been paid. 14 A. G. Op. 370.



## CHAPTER VI.

## TOBACCO AND SNUFF.

**SECT. 3355.**—19 St. 248, ch. 69, changed "conspicuous" to "conspicuous" in the forty-first and forty-second lines. 20 St. 344, ch. 125, § 14, amends this section by striking out the clause beginning with "but" in the thirty-fourth line and ending with "Revenue" in the thirty-seventh line, and the words "for which the bond has been given" in the fortieth and forty-first lines; and by substituting in place of the clause beginning with "two" in the fourteenth line and ending with "tobacco" in the twentieth line, the following:—

"Not less than \$2000 nor more than \$20,000 to be fixed by the collector of the district, according to the quantum of business proposed to be done by the manufacturer, with right of appeal by the manufacturer to the Commissioner of Internal Revenue in respect to the amount of said bond."

St. March 3, 1883, ch. 121 (22 St. 488), provides,—

"That the taxes herein specified imposed by the laws now in force be, and the same are hereby, repealed, as hereinafter provided, namely: On capital and deposits of banks, bankers, and national banking associations, except such taxes as are now due and payable; and on and after July 1, 1883, the stamp tax on bank checks, drafts, orders, and vouchers, and the tax on matches, perfumery, medicinal preparations, and other articles imposed by Schedule A following Rev. Stats. § 3437: *Provided*, That no drawback shall be allowed upon articles embraced in said schedule that shall be exported on and after July 1, 1883: *Provided further*, That on and after May 15, 1883, matches may be removed by manufacturers thereof from the place of manufacture to warehouses within the United States without attaching thereto the stamps required by law, under such regulations as may be prescribed by the Commissioner of Internal Revenue.

"**SEC. 2.** That on and after May 1, 1883, dealers in leaf tobacco shall annually pay \$12; dealers in manufactured tobacco shall pay \$2.40; all manufacturers of tobacco shall pay \$6; manufacturers of cigars shall pay \$6; pedlers of tobacco, snuff, and cigars shall pay special taxes, as follows: Pedlers of the first class, as now defined by law, shall pay \$30; pedlers of the second class shall pay \$15; pedlers of the third class shall pay \$7.20; and pedlers of the fourth class shall pay \$3.60. Retail dealers in leaf-tobacco shall pay \$250.30 for each dollar on the amount of their monthly sales in excess of the rate of \$500 per annum: *Provided*, That farmers and producers of tobacco may sell at the place of production tobacco of their own growth and raising at retail directly to consumers, to an amount not exceeding one hundred dollars annually.

"**SEC. 3.** That hereafter the special tax of a dealer in manufactured tobacco shall not be required from any farmer, planter, or lumberman who furnishes such tobacco only as rations or supplies to his laborers or employees in the same manner as other supplies are furnished by him to them: *Provided*, That the aggregate of the supplies of tobacco so by him furnished shall not exceed in quantity 100 pounds in any one special tax year; that is, from May 1 in any year until April 30 in the next year: *And provided further*, That such farmer, planter, or lumberman shall not be, at the time he is furnishing such supplies, engaged in the general business of selling dry goods, groceries, or other similar supplies in the manner of a merchant or storekeeper to others than his own employees or laborers.

"**SEC. 4.** That on and after May 1, 1883, the internal taxes on snuff, smoking, and manufactured tobacco, shall be eight cents per pound; and on cigars which shall be manufactured and sold or removed for consumption or sale on and after May 1, 1883, there shall be assessed and collected the following taxes, to be paid by the manufacturer thereof: On cigars of all descriptions, made of tobacco or any substitute therefor, \$3 per thousand; on cigarettes weighing not more than three pounds per thousand, 50 cents per thousand; on cigarettes weighing more than three pounds per thousand, \$3 per thousand; *Provided*, That on all original and unbroken factory packages of smoking and manufactured tobacco and snuff, cigars, cheroots, and cigarettes held by manufacturers or dealers at the time such reduction shall go into effect, upon which the tax has been paid, there shall be allowed a drawback or rebate of the full amount of the reduction, but the same shall not apply in any case where the claim has not been presented within 60 days following the date of the reduction; and such rebate to manufacturers may be paid in stamps at the reduced rate; and no claim shall be allowed or drawback paid for a less amount than ten dollars.



It shall be the duty of the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, to adopt such rules and regulations and to prescribe and furnish such blanks and forms as may be necessary to carry this section into effect. [See 23 St. 2, ch. 6.]

“SEC. 5. That from and after the passage of this act every manufacturer of tobacco or snuff shall, in addition to all other requirements of law, print on each package, or securely affix by pasting on each package containing tobacco or snuff manufactured by or for him, a label on which shall be printed the number of the manufactory, the district and State in which it is situated, and these words: ‘NOTICE. The manufacturer of this tobacco has complied with all requirements of law. Every person is cautioned, under penalties of law, not to use this package for tobacco again.’”

SECT. 3357. — Amended by St. June 9, 1880, ch. 161, § 2 (21 St. 167), by adding at the end of the section: —

“Except for reasons satisfactory to himself and approved by the Commissioner of Internal Revenue.”

SECT. 3358. — An account must be kept of goods manufactured as well as goods sold. This section is not complied with by entering goods in an account at the time of their transfer from the manufacturing to the retailing department, no account being kept of the sales made in the latter. *United States v. A Quantity of Tobacco*, 5 Ben. 112.

SECT. 3360. — Amended by St. March 1, 1879, ch. 125, § 14 (20 St. 345), to read as follows: —

“Every dealer in leaf-tobacco shall make daily entries in two books kept for that purpose, one book to be furnished by the government, under such regulations as the Commissioner of Internal Revenue shall prescribe, of the number of hogsheads, cases, and pounds of leaf-tobacco purchased or received by him on assignment, consignment, transfer, or otherwise, and of whom purchased or received, and the number of hogsheads, cases, or pounds sold by him, with the name and residence, in each instance, of the person to whom sold, and, if shipped, to whom shipped, and to what district; one of these books shall be kept at his place of business, and shall be open at all hours to the inspection of any internal-revenue officer or agent, and the other shall, at the end of each and every year, and upon the discontinuance of business of any leaf-dealer during any year, be handed over to the collector of his district for the use of the government. And every dealer in leaf-tobacco who wilfully neglects or refuses to keep the books herein provided for, and in the manner which shall be prescribed by the Commissioner of Internal Revenue, or to transfer to the collector of his district, as herein provided, the duplicate copy containing his daily transactions, as aforesaid, shall be fined not less than \$100 nor more than \$5000, and imprisoned not more than one year.”

Where the statute prescribes a penalty by civil suit and a punishment on a criminal conviction, the two being connected by the copulative “and,” the whole is one punishment and cannot be satisfied by part. *Re Leszynsky*, 16 Blatch. 9. A single sale is sufficient to constitute a dealer in leaf tobacco. The penalty can be neither more nor less than \$500. *United States v. Damiani*, 11 Int. Rev. Rec. 5.

SECT. 3362. — Amended by 19 St. 248, ch. 69, by changing, in the fourth line of the fourth paragraph, “sweeping” to “sweepings;” and by 20 St. 345, by inserting “three” after “two,” wherever the latter occurs in this section, and by inserting “one-half” before “one” in the fourth line. St. Jan. 9, 1883, ch. 16 (22 St. 401), inserts the following after “export” in the twenty-eighth line: —

“And perique tobacco may be sold by the manufacturer or producer thereof, in the form of carrottes, directly to the legally qualified manufacturer, to be cut or granulated and used as material in the manufacture of cigarettes or smoking-tobacco, without payment of tax.”

The proviso does not dispense with the requirement of § 3297 that certain numbers and names be burned on cigar boxes. 15 A. G. Op. 516. Tobacco scraps may be transferred from a customs bonded warehouse to an internal revenue bonded cigar manufactory for the purpose of manufacturing cigars, without payment of internal revenue tax, and without being put up and prepared in the manner prescribed by this section. 23 Int. Rev. Rec. 55. See also *United States v. Imsand*, 1 Woods, 581; 16 A. G. Op. 89.



SECT. 3363. — A retail dealer who in the course of his business sells at retail tobacco taken by him from a wooden package duly put up and stamped, whether taken at or before the sale, does not violate this section. *United States v. Veazie*, 6 F. R. 867; 11 Rep. 830. Nor does one who sells part of the package to another retail dealer who proposes to sell it again. *United States v. Jenkinson*, 15 F. R. 903. The last clause of this section contains no such exception as must be negatived in an indictment founded thereon. *United States v. Imsand*, 1 Woods, 581; 16 A. G. Op. 89, in note, § 3236. Congress has power to say that the tax on tobacco shall be paid by stamps. *United States v. Keyes*, 10 F. R. 876.

SECT. 3366. — *United States v. Keyes*, 10 F. R. 876, see note, § 3374.

SECT. 3368. — Amended by 18 St. 339, ch. 127, § 2, by changing "20 cents a pound," at the end of the section, to "24 cents a pound." The rate of taxation was again changed by 20 St. 343, ch. 125, § 14, which provides: —

"That on and after May 1, 1879, there shall be levied and collected upon all snuff manufactured of tobacco, or any substitute for tobacco, ground, dry, damp, pickled, scented, or otherwise, of all descriptions, when prepared for use; and upon all chewing and smoking tobacco, fine-cut, cavendish, plug or twist, cut or granulated, of every description; on tobacco twisted by hand or reduced into a condition to be consumed, or in any manner other than the ordinary mode of drying and curing, prepared for sale or consumption, even if prepared without the use of any machine or instrument and without being pressed or sweetened, and on all fine cut shorts and refuse scraps, clippings, cuttings, and sweepings of tobacco, a tax of 16 cents per pound. And the sum of \$15,000 or so much thereof as may be necessary, be, and the same hereby is, appropriated, out of any money in the Treasury not otherwise appropriated, for the alteration of dies and stamps, and such other expenses as are incident in preparing for the collection of the taxes on tobacco and snuff at the reduced rates provided in this act."

The tax on snuff is thirty-two cents per pound. Granulated tobacco is not snuff within the meaning of the statute. *Venable v. Richards*, 1 Hughes, 326; 105 U. S. 636. As 18 St. 339 did not take effect until the afternoon of March 3, 1875, the increase of tax thereunder did not apply to tobacco stamped, sold, and removed on the forenoon of that day. *Burgess v. Salmon*, 1 Hughes, 356; 97 U. S. 381. A completed sale or a completed removal of manufactured tobacco is a necessary preliminary to the accruing assessment and payment of the tax upon it. *United States v. A Quantity of Tobacco*, 6 Ben. 68. Tobacco which was shipped from the manufactory to an export bonded warehouse between June 6 and July 15, 1872, was subject to a tax of thirty-two cents per pound as prescribed by St. July 20, 1868. *Jones v. Blackwell*, 100 U. S. 599; 14 A. G. Op. 110.

SECT. 3371. — *Frayser v. Russell*, 3 Hughes, 227. Amended by St. March 1, 1879, ch. 125, § 14 (20 St. 346), by changing the words in the sixth line, "upon such information as he can obtain," to "upon satisfactory proof," and by adding at the end of the section: —

"Provided, however, that no such assessment shall be made until and after notice to the manufacturer of the alleged sale and removal to show cause against said assessment; and the Commissioner of Internal Revenue shall, upon a full hearing of all the evidence, determine what assessment, if any, should be made."

SECT. 3372. — The time for commencing proceedings to enforce a forfeiture hereunder is limited to twenty days by St. March 2, 1867, § 25, and this proviso is not repealed by St. July 20, 1868. *Henderson's Tobacco*, 11 Wall. 652; *Snyder v. United States*, 112 U. S. 216.

SECTS. 3373, 3374. — There is no exception of refuse or worthless tobacco, or of tobacco to be re-manufactured, or of tobacco on which the tax has been paid, or any other kind. The statute includes every kind of manufactured tobacco, no matter what its value or condition, or what the person who has it in his possession is about to do with it; if it be out of the manufactory, and not in a bonded warehouse, it must be stamped and the stamps cancelled. *United States v. Keyes*, 10 F. R. 876; *Henderson's Tobacco*, 11 Wall. 652.



see note, § 3372; A Quantity of Tobacco and Cigars, 5 Ben. 407; United States v. 95 Barrels, 14 Int. Rev. Rec. 6.

SECT. 3375. — A Quantity of Tobacco and Cigars, 5 Ben. 407.

SECT. 3376. — The possession of parts of internal revenue stamps which had previously been used upon snuff jars does not constitute an offence within this section, although the facts indicate a fraudulent intent upon the part of the defendant. United States v. Loup, 1 F. R. 696; 1 McCrary, 168. But see a Quantity of Tobacco and Cigars, 5 Ben. 407, *semble, contra*.

SECT. 3377. — Amended by 20 St. 346, ch. 125, § 14, by adding the following : —

“ *Provided*, That scraps, cuttings, and clippings of tobacco imported from any foreign country may, after the proper customs duty has been paid thereon, be withdrawn in bulk without the payment of the internal-revenue tax, and transferred as material directly to the factory of a manufacturer of tobacco or snuff, or of a cigar-manufacturer, under such restrictions and regulations as shall be prescribed by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury.”

SECT. 3379. — Nov. 23, 1868, was fixed by order of the Secretary of the Treasury as the date after which stamps must be affixed, the taxes having been previously paid according to St. July 20, 1868, although the stamps thereby required could not be immediately prepared. 2 Com. D. 1644.

SECT. 3383. — Amended by the above act (20 St. 346), by inserting “and his special-tax stamp” after “certificate” in the sixth line; by changing “his special stamp” in the eighth and ninth lines to “his special-tax stamp and certificate, or either of them;” and by adding at the end of the section —

“Any internal-revenue agent may demand production of, and inspect the pedler’s special-tax stamp and the collector’s certificate for pedlers; and refusal or failure to produce the same, or either of them, when so demanded, shall subject the party guilty thereof to a fine of not less than \$50 nor more than \$500 dollars, and to imprisonment for not less than 30 days nor more than 12 months.”

SECT. 3384. — Amended by the same act (20 St. 346), by adding the following : —

“And any collector or deputy collector finding such pedler in the act of offending as to either of the offences mentioned in this section, may seize the horse or horses, mule or mules, wagon and contents, or pack, bundle, or basket, of any such person; and the collector shall thereupon proceed upon such seizure as provided in § 3383,” as amended in the previous section.

SECT. 3385. — Amended and re-enacted by St. Aug. 8, 1882, ch. 468 (22 St. 372), (which amends 21 St. 167, ch. 161, § 1), as amended by St. Jan. 13, 1883, ch. 24 (22 St. 402), by striking out the clause beginning with the first “and” in the fifteenth line and ending with “transportation” in the eighteenth line; by striking out “the amount of tax” in the twenty-third line; by inserting “and” after “exported” in the twenty-fifth line; and by striking out all after “shipment,” in the twenty-seventh line, and substituting the following, therefor : —

“Upon the presentation to the collector of internal revenue of a detailed report from the inspectors of customs, and a certificate of the collector of customs at the port from which the goods are to be exported that the goods removed from the manufactory under bond and described in the permit of the collector of internal revenue have been received by the said collector of customs, and that the said goods were duly laden on board of a foreign-bound vessel, naming the vessel, and that the said merchandise was entered on the outward manifest of said vessel, and that the said vessel and cargo were duly cleared from said port, and on the payment of the tax or deficiency, if any, the bonds, which have been given or shall hereafter be required to be given under the provisions of this section shall be cancelled. But when the goods are exported to an adjacent foreign territory, by vessel or otherwise, said bonds shall be cancelled upon such proofs of exportation as may be prescribed by the commissioner of Internal Revenue, with the approval of the Secretary of the Treasury. Every person who, with the intent to defraud the revenue laws of the United States, relands or causes to be relanded within the jurisdiction of the United States, any manufactured tobacco, snuff, or cigars which have been shipped for exportation under the provisions



of this act, without properly entering such tobacco, snuff, or cigars at the custom-house, and paying the proper customs and internal revenue tax thereon, or who receives such relanded tobacco, snuff, or cigars, and every person who aids or abets in such relanding or receiving such tobacco, snuff, or cigars, shall, on conviction, be fined not exceeding \$5000, or imprisoned not more than three years, and all tobacco, snuff, or cigars so relanded shall be forfeited to the United States."

St. Feb. 8, 1875, ch. 36, §§ 24, 25, (18 St. 307), provides, —

"SEC. 24. That whenever any manufacturer of tobacco shall desire to withdraw the same from his factory for exportation under existing laws, such manufacturer may, at his option, in lieu of executing an export bond, as now provided by law, give a transportation bond, with sureties satisfactory to the collector of internal revenue, and under such rules and regulations as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may prescribe, conditioned for the due delivery thereof on board ship at a port of exportation to be named therein; and in such case, on arrival of the tobacco at the port of export, the exporter or owner at that port shall immediately notify the collector of the port of the fact, setting forth his intention to export the same, the name of the vessel upon which the same is to be laden, and the port to which it is intended to be exported. He shall, after the quantity and description of tobacco have been verified by the inspector, file with the collector of the port an export entry verified by affidavit. He shall also give bond to the United States, with at least two sureties, satisfactory to the collector of customs, conditioned that the principal named in said bond will export the tobacco as specified in said entry, to the port designated in said entry, or to some other port without the jurisdiction of the United States. And upon the lading of such tobacco, the collector of the port, after proper bonds for the exportation of the same have been completed by the exporter or owner at the port of shipment thereof, shall transmit to the collector of internal revenue of the district from which the said tobacco was withdrawn for exportation, a clearance certificate and a detailed report of the inspector; which report shall show the quantity and description of manufactured tobacco, and the marks thereof. Upon the receipt of the certificate and report, and upon payment of tax on deficiency, if any, the collector of internal revenue shall cancel the transportation bond. The bonds required to be given for the landing at a foreign port of such manufactured tobacco shall be cancelled upon the presentation of satisfactory proof and certificates that said tobacco has been landed at the port of destination named in the bill of lading, or any other port without the jurisdiction of the United States, or upon satisfactory proof that after shipment the same was lost at sea without fault or neglect of the owner or exporter thereof.

"SEC. 25. That if any person or persons shall fraudulently claim or seek to obtain an allowance or drawback of duties on any manufactured tobacco, or shall fraudulently claim any greater allowance or drawback thereon than the duty actually paid, such person or persons shall forfeit triple the amount wrongfully or fraudulently claimed or sought to be obtained, or the sum of \$500 at the election of the Secretary of the Treasury, to be recovered as in other cases of forfeiture provided for in the internal revenue laws."

The stamps required by this section are not a tax or duty within the meaning of that clause of the Constitution which declares that "no tax or duty shall be laid on articles exported from any State." *Pace v. Burgess*, 92 U. S. 372; *Turpin v. Burgess*, 117 Id. 504. An excise laid on tobacco before its removal from the factory is not a duty on "exports," or on "articles exported," within the prohibition of the Constitution, though the tobacco be intended for exportation. *Id.* When manufactured tobacco is removed and transported from the factory in one district to an export bonded warehouse in another district, but withdrawn for consumption or sale, the tax collected is to be divided and credited equally among the collectors of the two districts. *Wilcox's Case*, 12 Ct. Cl. 495. As to this and the following section, see *United States v. Edwards*, 17 Int. Rev. Rec. 126. See *United States v. Thompson*, 32 Int. Rev. Rec. 166.

SECT. 3386. — See preceding note. Amended by 20 St. 347, ch. 125, § 16, by changing the proviso at the end of the section to read as follows:—

"*Provided*, That no claim for an allowance of drawback shall be entertained or allowed until a certificate from the collector of customs at the port from which the goods have been exported, or other evidence satisfactory to the Commissioner of Internal Revenue, has been furnished, that the stamps affixed to the tobacco, snuff, or cigars entered and cleared for export to a foreign country were totally destroyed before such clearance; nor until the claimant has filed a bond, with good and sufficient sureties, to be approved by the collector of the district from which the goods are shipped, in a penal sum double the



amount of the tax for which said claim is made, that he will procure, within a reasonable time, evidence satisfactory to the Commissioner of Internal Revenue that said tobacco, snuff, or cigars have been landed at any port without the jurisdiction of the United States, or that after shipment the same were lost at sea, and have not been relanded within the limits of the United States." [See *United States v. Edwards*, 17 Int. Rev. Rec. 126.]

## CHAPTER VII.

### CIGARS.

SECT. 3387. — Amended by 20 St. 347, § 16, by striking out the nineteen words after "conditioned that" in the second sentence. A pledge of unstamped cigars does not fall within the provisions of this and § 3406, and it seems that a sale of unstamped cigars will not be invalid if, as a part of the transaction, it was contemplated that they should be stamped before removal. *Combs v. Tuchelt*, 24 Minn. 423; 16 A. G. Op. 89; see note, § 3236. As to this and following sections, see *Ludloff v. United States*, 108 U. S. 176; *Crisp v. Proud*, 4 Hughes, 57. The last sentence relating to cigarettes and cheroots applies as well to those portions of this chapter which impose penalties for a violation thereof as to those portions which relate to directions for manufacturing, packing, and stamping. *United States v. Mena*, 29 Int. Rev. Rec. 190.

SECT. 3389. — Amended by 20 St. 347, § 16, by inserting "and" after "on" in the fourth line, and by striking out, in the fifth and sixth lines, the clause beginning with "and" and ending with "district."

SECT. 3390. — 16 A. G. Op. 89; see note, § 3236.

SECT. 3392. — Amended by 20 St. 347, § 16, by inserting "two hundred" at the beginning of the third line, and by adding the following at the end of the section:—

*"And provided further, That every manufacturer of cigarettes shall put up all the cigarettes that he either manufactures or has made for him, and sells or removes for consumption or use, in packages or parcels containing ten, twenty, fifty, or one hundred cigarettes each, and shall securely affix to each of said packages or parcels a suitable stamp denoting the tax thereon, and shall properly cancel the same prior to such sale or removal for consumption or use, under such regulations as the Commissioner of Internal Revenue shall prescribe; and all cigarettes imported from a foreign country shall be packed, stamped, and the stamps cancelled in like manner, in addition to the import stamp indicating inspection of the custom-house, before they are withdrawn therefrom."*

The proviso shows that, unless expressly excepted, Congress considered that retail dealers were within the general language of that section, and therefore the punishment for selling or offering to sell cigars not properly boxed and stamped, is intended as well for them as for manufacturers or importers whose duty it is to pack the cigars and affix the stamps. *United States v. Edwards*, 17 Int. Rev. Rec. 126. See *Ludloff v. United States*, 108 U. S. 176, 183.

SECT. 3393. — See note, § 3397. Amended by 20 St. 348, § 14, by changing the words, in the third and fourth lines, "together with the proprietor's or manufacturer's name" to "besides;" and by substituting the following in place of the second sentence of the notice:—

*"Every person is cautioned not to use either this box for cigars again, or the stamp thereon again, nor to remove the contents of this box without destroying said stamp, under the penalties provided by law in such cases."*

SECT. 3394. — See note, § 3392. Amended by St. March 3, 1875, ch. 127, § 2 (18 St. 339), by changing "five" to "six" wherever it occurs in this section, and by changing "fifty" to "seventy-five," adding the following:—



"*Provided*, That the increase of tax herein provided for shall not apply to tobacco on which the tax under existing law shall have been paid when this act takes effect. *And provided further*, That whenever it shall be shown to the satisfaction of the Secretary of the Treasury by testimony under oath that any person liable to pay the increased tax by this section imposed had prior to Feb. 19, 1875, made a contract for the future delivery of such tobacco, cigars, and cigarettes at a fixed price, which contract was in writing prior to that date, such tobacco may be delivered to the contracting party entitled thereto under special permit from the Commissioner of Internal Revenue provided therefor, without previous payment of such additional tax; but the said additional tax shall be a lien thereon, and shall be paid by and collected from the purchaser under such contract before the sale or removal thereof by him, and when demanded by the collector of internal revenue for the district to which the same shall be removed for delivery to the purchaser; and any sale or removal by such purchaser, prior to the payment of such tax, shall subject him and such tobacco so sold or removed to all the penalties and processes of law provided in the case of manufacturers of tobacco so selling or removing tobacco to avoid the payment of tax."

SECT. 3396. — Rules and regulations, see *Ludloff v. United States*, 108 U. S. 176.

SECT. 3397. — Amended by 20 St. 348, § 16, by striking out the clause beginning with "or" in the fourth line and ending with "manufacturer" in the sixth line, and substituting therefor the following (and also by adding the proviso here quoted at the end of the section): —

"Or without stamping, indenting, burning, or impressing into each box, in a legible and durable manner, the number of the cigars contained therein, the number of the manufactory,

"*Provided*, That cigars packed expressly for export, and which shall be exported to a foreign country under the restrictions and regulations prescribed by the Commissioner of Internal Revenue, and approved by the Secretary of the Treasury, shall be exempt from the provisions of this section, and also from the provisions of Rev. Stats. § 3393, requiring a label to be affixed to each box."

The following acts have been held to be violations of the provisions of this section: Impressung upon boxes of cigars the number of a factory other than that where the cigars were made (*United States v. 76,125 Cigars*, 18 F. R. 147; *sub nom. Jackson v. United States*, 22 Blatch. 353); affixing to a box containing domestic cigars, on which the tax has been paid, a stamp in the likeness of that required by Rev. Stats., § 2804, on a box of imported cigars (*United States v. Jacoby*, 12 Blatch. 491); removing cigars from the back part of a room where they are manufactured to the front part where they are sold, without first branding and stamping them. *United States v. Neid*, 8 Phila. 169; 13 Int. Rev. Rec. 28. In order to enforce a forfeiture, an information based upon this section must, since 20 St. 348, § 16, also state the factory number. *United States v. 76,125 Cigars*, *supra*. An indictment under this section need not aver an intent to defraud (*United States v. Jacoby*, *supra*); nor, if laid in the words of the statute, aver that a stamp was required to be affixed. *United States v. Edwards*, 17 Int. Rev. Rec. 126. An averment that the defendant did buy, receive, *and* have in his possession is sufficient on proof of possession alone. *United States v. Millard*, 13 Blatch. 534. Different offences under this section, if arising out of the same transaction, may be charged in separate counts of one indictment, though some of them are felonies and others not. *United States v. Jacoby*, *supra*. The penalties for selling or offering to sell cigars not properly packed and stamped are not limited in their application to manufacturers but apply to every one. *United States v. Mena*, 29 Int. Rev. Rec. 190; *United States v. Edwards*, *supra*. The Commissioner cannot authorize a dealer to cut the stamps upon boxes of cigars, and permit them to be taken out, repacked, and put in the same boxes again, with a view of disposing of them without adding new stamps. *United States v. 4000 Cigars*, 25 Int. Rev. Rec. 132. As to 15 A. G. Op. 516, see note, § 3362. Other cases on this section are: *Crisp v. Proud*, 4 Hughes, 57; *Hamilton Brooks Cigar Stamp*, 16 A. G. Op. 443.

SECT. 3398. — *United States v. 95 Barrels of Spirits*, 14 Int. Rev. Rec. 6; *United States v. Edwards*, 17 Id. 126.



SECT. 3400. — For such a state of facts as were held to constitute a violation of the provisions of this section, see *Ludloff v. United States*, 108 U. S. 176. See also *United States v. Mena*, 29 Int. Rev. Rec. 190.

SECT. 3402. — By this section importers of foreign cigars, besides paying the import duties upon them, are to affix to the boxes the like stamps as are required to be affixed to domestic cigars by the manufacturers; and importers are made subject to the penalties applied to the manufacturers. *United States v. Edwards*, 17 Int. Rev. Rec. 126.

SECT. 3406. — *Combs v. Tuchelt*, 24 Minn. 423, see note, § 3387. As to *Hamilton Brooks Cigar Stamp*, see 16 A. G. Op. 443.

## CHAPTER VIII.

### BANKS AND BANKERS.

SECT. 3407. — See note, § 3355. St. March 1, 1879, ch. 125, § 22 (20 St. 351), provides: —

“SEC. 22. That whenever and after any bank has ceased to do business by reason of insolvency or bankruptcy, no tax shall be assessed, or collected or paid into the Treasury of the United States, on account of such bank, which shall diminish the assets thereof necessary for the full payment of all its depositors; and such tax shall be abated from such national banks as are found by the Comptroller of the Currency to be insolvent; and the Commissioner of Internal Revenue, when the facts shall so appear to him, is authorized to remit so much of said tax against insolvent State and savings banks as shall be found to affect the claims of their depositors. That in making further collections of internal-revenue taxes on bank deposits, no savings-bank, recognized as such by the laws of its State, and having no capital stock, shall, on account of mercantile or business deposits heretofore received, upon which no interest has been allowed to the parties making such deposits, be denied the exemptions allowed to savings-banks having no capital stock, and doing no other business than receiving deposits to be loaned or invested for the sole benefit of the parties making such deposits, without profit or compensation to the banks, if such bank has paid the lawful tax upon the entire average amount of such business or mercantile deposits; but nothing in this section shall be construed to extend said exemptions to deposits hereafter made, or in any way to affect the liability of such deposits to taxation.”

A corporation whose business is to invest its capital in bonds secured by mortgage on real estate, and to negotiate the sale and guaranty of them, is not a banker within the meaning of this section (*Selden v. Equitable Trust Co.*, 94 U. S. 419); but a bank in Canada having a place of business in this country where credits are opened by the deposit of money is. *United States v. Bank of Montreal*, 21 F. R. 236. Upon an action brought to recover a tax levied under § 3408, the defendant may show that it is not doing business as a bank within this section. *United States v. Bank of America*, 15 F. R. 730; 15 Rep. 262. A tax assessed but not paid at the time of the passage of 20 St. 351, ch. 125, § 22, was held to be abated thereby. *Johnston v. United States*, 17 Ct. Cl. 157. Said act relieves the customers of an insolvent national bank from the relations of tax-payers, but does not affect the liabilities of the owners thereof. *Jackson v. United States*, 20 Ct. Cl. 298. See further, *Northrup v. Shook*, 10 Blatch. 243; *Clark v. Bailey*, 12 Id. 156; *District Savings Assn. v. Marks*, 23 Int. Rev. Rec. 241; *Deposit Savings Assn. v. Mayer*, Id.

SECT. 3408. — See note, § 3355, and preceding note. Amended by 20 St. 352, ch. 125, § 22, by striking out all after the thirtieth line and inserting the following: —

“Associations or companies known as provident institutions, savings-banks, savings-funds, or savings institutions doing no other business than receiving and loaning or investing savings deposits shall be exempt from tax on so much of such deposits as they have invested in securities of the United States, and on \$2000 of savings deposits and nothing in excess thereof, made in the name of and belonging to any one person. That all laws and parts of laws inconsistent with the provisions of this section, be, and the same are hereby repealed.”



St. June 18, 1874, ch. 304 (18 St. 80), provides —

"That all deposits made in institutions now existing which do business only as savings-banks, and are recognized as such by the laws of their respective States, or by Congress, are hereby declared to be exempt from taxation the same as deposits in savings institutions having no capital although they have a capital stock or bond for the additional security of their depositors, and pay dividends thereon; and no tax shall be assessed upon the deposits made in such institutions, or collected of them on said deposits, otherwise than as herein provided: *Provided*, That all the profits of such savings banks, less the aforementioned dividends on stock not exceeding at the rate of 8 per cent per annum are divided among the depositors, and that the capital stock is invested only in the same class of securities as is used for investing the deposits, and that the interest at the rate of not less than 4½ per cent be paid in all cases to their depositors, to be made good if necessary from the capital stock."

St. June 22, 1874, ch. 399 (18 St. 194), provides —

"That no further collection of internal revenue taxes shall be made on the earnings of savings banks or institutions for savings, having no capital stock and doing no other business than receiving deposits to be loaned or invested for the sole benefit of the parties making such deposits, without profit or compensation to the association or company, whether the earnings of the same have been or may hereafter be divided annually, semi-annually, or at other periods." [See also note, § 3412, *post*.]

St. Feb. 8, 1875, ch. 36, §§ 19, 20, 21 (18 St. 311), provide —

"SEC. 19. That every person, firm, association other than national bank associations, and every corporation, State bank, or State banking association, shall pay a tax of 10 per centum on the amount of their own notes used for circulation and paid out by them.

"SEC. 20. That every such person, firm, association, corporation, State bank, or State banking association, and also every national banking association, shall pay a like tax of 10 per centum on the amount of notes of any person, firm, association other than a national banking association, or of any corporation, State bank, or State banking association, or of any town, city, or municipal corporation, used for circulation and paid out by them.

"SEC. 21. That the amount of such circulating notes, and of the tax due thereon, shall be returned, and the tax paid at the same time, and in the same manner, and with like penalties for failure to return and pay the same, as provided by law for the return and payment of taxes on deposits, capital, and circulation, imposed by the existing provisions of internal revenue law."

SECT. 3411. — This exemption relates not to the tax upon notes *paid out* which Rev. Stats. § 3412 imposes, but exclusively to the tax upon circulation imposed by § 3408, and it relieves, to the extent mentioned, from the latter tax only. 14 A. G. Op. 97.

An entry in a depositor's pass-book of a deposit or payment is a "check," "draft," or "certificate of deposit" within the meaning of the first clause. *Oulton v. Savings Institution*, 17 Wall. 109, reversing *German Savings and Loan Society v. Oulton*, 1 Sawyer. 695. The tax on deposits is collectible though interest at an agreed rate is paid thereon, but securities or money deposited at a bank as a pledge to secure the pledgee against loss on the purchase or sale of stock is not subject to tax. *Clark v. Bailey*, 12 Blatch 156. The word "capital" as here used does not include money borrowed in the ordinary course of business by a person or firm engaged in the business of banking (*Clark v. Bailey*, 12 Blatch 156; 21 Wall. 284); nor the surplus earnings of a bank with a fixed capital under Subd. 1, § 79, act June 30, 1864. *Mechanics & F. Bank of Albany v. Townsend*, 5 Blatch 315. But it does include a building purchased with a part of the authorized capital of a corporation or association or the personal funds of a private banker, and used for banking purposes. 15 A. G. Op. 218. And where a manufacturing company established a savings-bank in connection with its other business, the entire capital of the company was held liable to the tax. 15 A. G. Op. 371. See also *Id.* 452. So also was the capital of a State bank which was invested in foreign countries, it not appearing in what manner the investments were made. *Nevada Bank v. Sedgwick*, 104 U. S. 111. The capital of a branch bank is the amount which is allotted to it, or which it is permitted to use, and the branch for the purpose



of the tax is deemed a separate entity. *United States v. Bank of Montreal*, 21 F. R. 236. The "average amount invested in United States bonds" is to be determined by taking the price actually paid for the bonds, exclusive of accrued interest. 16 A. G. Op. 187. Certificates of indebtedness issued by a person or corporation are not taxable as "circulation" under this section unless they are intended to be used or circulate as money (*United States v. Wilson*, 106 U. S. 620); nor is a promise in this form, "Due the bearer, \$1 in goods at our store. Kennedy. N. Y. Oct. 14, 1878. Aldrich, Sweetland & Co.;" nor generally is an order for money payable in merchandise or obligations called "wages certificates" liable to taxation as notes used for circulation within 18 St. 311, §§ 19, 21. *Philadelphia & R. R. Co. v. Pollock*, 19 F. R. 401; *United States v. White*, 22 Blatch. 82; 19 F. R. 723. See 16 A. G. Op. 341, and Op. Atty. Gen. 25 Int. Rev. Rec. 167, *contra*. And the fact that notes or certificates issued by a company, but not intended by it for circulation, are so used by others does not affect the character imposed upon them by the company. *Philadelphia & R. R. Co. v. Pollock*, *supra*. "Issued" means not only the making of the notes, but includes also the idea of putting them out into circulation. *Deposit Savings Assn. v. Mayer*, 23 Int. Rev. Rec. 241.

18 St. 311, §§ 19, 20, 21, is an amendment to the internal revenue laws, and is to be construed in connection with them. Only such promissory notes as are in law negotiable, so as to carry title in their circulation from hand to hand, are the subjects of taxation under 18 St. 311. *Hollister v. Mercantile Institution*, 111 U. S. 62. This act extended the law so as to apply to individuals and to corporations engaged in banking business as well as to national bank associations, and made it applicable to new persons, but not to new subject-matter. *Re Aldrich*, 16 F. R. 369. St. March 1, 1879, ch. 125 (20 St. 327), does not change the effect of the last clause exempting savings-banks of the character there mentioned from taxation on so much of their deposits as they have invested in securities of the United States and on all sums not exceeding \$2000 which they have on deposit in the name of any one person. *Savings Bank v. Archbold*, 104 U. S. 708, reversing 15 Blatch. 398. Savings-banks are not exempt from taxation under the proviso if they have a capital stock or if they do any other business than receive deposits to be lent or invested for the sole benefit of the person making such deposits. *Oulton v. Savings Institution*, *supra*; *United States v. Bank of America*, 15 F. R. 730, see note, § 3407; *United States v. Warrick*, 25 F. R. 138; 20 Rep. 741, construing 18 St. 311, § 19; *Bank for Savings v. Collector*, 3 Wall. 495.

SECT. 3412. — See note, § 3408. St. March 3, 1875, ch. 167 (18 St. 507), provides:—

"That the Secretary of the Treasury be, and he is hereby, authorized and directed to settle and release any claims for tax on circulation of evidences of indebtedness made against any mining, manufacturing or other corporations other than against any national banking-association, State bank, or banking-association, by such corporations paying the tax, without penalty, that shall have accrued thereon since November 1, 1873. And that the provisions of Rev. Stats. § 3423, shall not be construed in pending cases, except as to national banking-associations, to apply to such evidences of indebtedness issued and reissued prior to the passage of this act, but said section shall be construed as applying to such evidences of indebtedness issued after the passage hereof."

This tax is constitutional, and is not a direct tax within that clause of the Constitution which declares that "direct taxes shall be apportioned among the several States according to their respective numbers." *Veazie Bank v. Fenno*, 8 Wall. 533. These provisions relate as well to the notes of a State bank or banking association which are *by itself paid out* as to any others. *District Savings Assn. v. Marks*, 3 Woods, 553; 23 Int. Rev. Rec. 241; *Deposit Savings Assn. v. Mayer*, 23 Id. 241; 14 A. G. Op. 97. 18 St. 311, ch. 36, § 19, extends this section not only to banks and banking associations, but to all persons, firms, associations, and corporations whose notes are used for circulation. *Hollister v. Mercantile Institution*, 111 U. S. 62.



*"State Banking Association."* This term comprehends not only associations organized under State banking laws, but associations or partnerships formed by private agreement for the purpose of carrying on the business of banking. It also includes a railroad company issuing scrip in the form of currency, where the issue by the company possesses the essential characteristics of a banking operation. 14 A. G. Op. 373.

SECTS. 3413, 3414, 3415. — See note, § 3408. Sect. 3413 is constitutional. The tax is not laid upon the obligation but upon its use as a circulating medium. *National Bank v. United States*, 101 U. S. 1; *Hollister v. Mercantile Institution*, 111 Id. 62.

Under Sect. 3415 only a single return covering deposits and capital is required to be made, and only one penalty of \$200 is imposed for all neglects or defaults prior to the commencement of the suit. The penalty is not imposed for each and every refusal or neglect, but for *any* refusal or neglect. *United States v. N. Y. Guaranty, &c. Co.*, 8 Ben. 269. As to §§ 3414 and 3415, see *Savings Bank v. Archbold*, 15 Blatch. 398.

SECT. 3417. — See note, § 3407. Amended by 18 St. 319, ch. 80, by inserting "3413" after "twelve" in the fourth line.

## CHAPTER IX.

### STAMP TAXES ON SPECIFIC OBJECTS.

SECT. 3418. — See note, § 3429. The internal-revenue taxes on bank checks, &c. were repealed by 22 St. 488 (stated in note, § 3355). 18 St. 310, ch. 36, § 15, changed "or order" in the second line to "order, or voucher." By 18 St. 339, ch. 127, § 6, stamps are not required on savings-bank receipt-books. *United States v. Mann*, 95 U. S. 580.

SECT. 3419. — *Ferguson v. Arthur*, 117 U. S. 482, 488.

SECT. 3420. — *United States v. Mann*, 95 U. S. 580.

SECT. 3421. — This section applies only to the United States courts. Congress has no authority to declare that a written instrument, unless stamped, shall not be received as evidence in a State Court. *Carpenter v. Snelling*, 97 Mass. 452; *Green v. Holway*, 101 Id. 243; *Griffin v. Ranney*, 35 Conn. 239; *Latham v. Smith*, 45 Ill. 29; *Bunker v. Green*, 48 Id. 243; *United States Express Co. v. Haines*, Id. 248; *Craig v. Dimock*, 47 Id. 308; *Pargoud v. Richardson*, 30 La. Ann. 1286; *Holt v. Board of Liquidators*, 33 Id. 673; *contra*, *Succession of Bernard*, 24 Id. 402; *Patterson v. Gile*, 1 Col. 200. In the last case it was said that inasmuch as Colorado was a Territory deriving its political rights and privileges from the general government, it was bound by its legislation. This section does not interfere with the record under State laws of an unstamped mortgage (*Moore v. Quirk*, 105 Mass. 49); nor does it prevent an instrument duly stamped from being read in evidence by reason of the stamp not being cancelled. *Patterson v. Gile*, *supra*.

SECT. 3422. — Amended by 19 St. 248, ch. 69, by striking out "or" after "document" in the ninth line, and by inserting "or" before "order" in the tenth line. St. Feb. 18, 1875, ch. 80 (18 St. 319), inserts after "issued" in the twenty-seventh line: —

*"And provided further, That where it shall appear to said collector, upon oath or otherwise, to his satisfaction, that any such instrument has not been duly stamped at the time of making or issuing the same, by reason of accident, mistake, inadvertence, or urgent necessity, and without any wifful design to defraud the United States of the stamps, or to evade or delay the payment thereof, then, and in such case, if such instrument, or, if the original be lost, a copy thereof, duly certified by the officer having charge of any records in which such original is required to be recorded, or otherwise duly proven to the satisfaction of the collector, shall, within 12 calendar months after the making or issuing thereof, be brought to the said collector of revenue to be stamped, and the stamp-tax chargeable thereon shall be paid, it shall be lawful for the said collector to remit the penalty aforesaid, and to cause such instrument to be duly stamped."*



18 St. 250, ch. 462, the provisions of which were, by 19 St. 5, ch. 13, extended to Jan. 1, 1877, provided that stamps might be affixed, prior to Jan. 1, 1876, to unstamped instruments or to a copy thereof where the original was lost.

A conveyance made contrary to the provisions of this section is void. But the mere omission to stamp a conveyance or cancel the stamps does not constitute a violation of this section. It must be alleged and proved that the omission was with intent to evade the law and defraud the government of the stamp duty. *Dowell v. Applegate*, 7 F. R. 881; 7 Sawyer, 232; *United States v. Griswold*, 8 F. R. 556, 571; 7 Sawyer, 311, 331. But in *Green v. Holway*, 101 Mass. 243, it was held that an instrument was voidable only on proof that the stamp was omitted with intent to defraud the revenue made before it has been duly stamped on application to the collector, or if the instrument is one which passes title, before that title has been conveyed away by the grantee by an instrument duly stamped. And the following cases are cited: *Tobey v. Chipman*, 13 Allen, 123; *Govern v. Littlefield*, Id. 127, note; *McGovern v. Hoesback*, 53 Penn. St. 176; *Dudley v. Wells*, 55 Me. 145; *Whitehill v. Shickle*, 43 Mo. 537; *Hallock v. Jaudin*, 34 Cal. 167; *Harper v. Clark*, 17 Ohio St. 190; *Hitchcock v. Sawyer*, 39 Vt. 412. See also *Wiley v. Robinson*, 13 Allen, 128, note; *Lynch v. Morse*, 97 Mass. 458, note. In the following cases the instrument was held void, irrespective of the question of intent: *Hugus v. Strickler*, 19 Iowa, 413; *Miller v. Morrow*, 3 Coldw. 587; *Maynard v. Johnson*, 2 Nev. 16; *Wayman v. Torreyson*, 4 Id. 124. As to the constitutionality of the provision, see also *Green v. Holway*, *supra*, and cases cited. In the absence of a fraudulent intent, the want of a stamp does not affect the validity of a mortgage. *Moore v. Quirk*, 105 Mass. 49.

The intent with which a deed is accepted by the grantee or the use he puts it to or makes of it is immaterial under this section. But whoever accepts a draft or order thereby becomes an active party thereto. In effect and to that extent he makes or emits it, gives it a new life and circulation, and the intention with which he does so, so far as the stamp duty is concerned, is placed by the stamp act in the same category as that of the maker. *Dowell v. Applegate*, 8 F. R. 698; 7 Sawyer, 232, 240. A fraudulent omission to affix the proper stamp to any of the instruments mentioned in this section cannot be taken advantage of on demurrer. The defence can be set up only by special plea or urged on the trial. *Campbell v. Wilcox*, 10 Wall. 421. 16 St. 257, § 5, applied to notes issued prior as well as subsequent to its passage. *Pugh v. McCormick*, 14 Wall. 361. See this case also for a general discussion of this section. Other cases on this section are: *United States v. Mann*, 95 U. S. 580; *James v. Blauvelt*, 16 L. Rep. N. S. 485; *Craig v. Dimock*, 47 Ill. 308; *Lambert v. Whitelock*, 29 Ind. 26; *Patterson v. Gile*, 1 Col. 200.

SECT. 3423. — The second sentence of this section imposes a penalty without a prohibition at least in terms. But it does not follow, even though it did both, that an instrument bearing an uncanceled stamp is therefore void. *Dowell v. Applegate*, 7 F. R. 881; 7 Sawyer, 232.

SECT. 3425. — St. Aug. 15, 1876, ch. 287, § 1 (19 St. 143), provides that thereafter —

“the transmission of internal revenue stamps to the officers of the internal revenue service shall be made through the mails of the United States in registered packages.”

The bond to be given by manufacturers of friction matches, &c., may be payable to the United States directly, and need not be payable to the Treasurer of the United States. And it is unnecessary that a new bond should be furnished on every fresh supply of stamps on credit. *Jessup v. United States*, 106 U. S. 147. One to whom proprietary stamps are sold on credit is not, in default of payment therefor, accountable for public money, and does not forfeit the commissions to which he is, under this section, entitled. *United States v. Goldback*, 102 U. S. 623. Stamps sold to one need not be used by him individ-



ually, but may be used by a firm engaged in the manufacture of friction matches of which he is a member. *United States v. Weedon*, 4 Hughes, 450; 3 F. R. 623; 10 Rep. 515. Commissions to purchasers of internal revenue stamps are to be paid in cash. The Commissioner has no power to pay them in stamps at their face value calculated on the amount of money paid by the purchaser, instead of on the whole amount of stamps furnished him. And commissions are to be paid whether the purchaser pays cash or secures a credit of sixty days and gives bond. *United States v. Fielding*, 3 McCrary, 479; 17 F. R. 572; *Swift Co. v. United States*, 105 U. S. 691; 111 Id. 22, reversing 14 Ct. Cl. 481. *Bechtel v. United States*, 101 U. S. 597; *Diamond Match Co. v. United States*, 31 F. R. 271; 24 Blatch. 442; *Folger v. United States*, 103 U. S. 30.

SECT. 3426. — Amended by 20 St. 349, § 17, to read as follows: —

“The Commissioner of Internal Revenue may, upon receipt of satisfactory evidence of the facts, make allowance for or redeem such of the stamps issued under the provisions of this title, or of any internal-revenue act, as may have been spoiled, destroyed, or rendered useless or unfit for the purpose intended, or for which the owner may have no use, or which, through mistake, may have been improperly or unnecessarily used, or where the rates or duties represented thereby have been excessive in amount, paid in error, or in any manner wrongfully collected; and such allowance or redemption shall be made either by giving other stamps in lieu of the stamps so allowed for or redeemed, or by refunding the amount or value to the owner thereof, deducting therefrom, in case of repayment, the percentage, if any, allowed to the purchaser thereof; but no allowance or redemption shall be made in any case until the stamps so spoiled or rendered useless shall have been returned to the Commissioner of Internal Revenue, or until satisfactory proof has been made showing the reason why the same cannot be so returned: *Provided*, That nothing herein shall be held as authorizing redemption of, or allowance for, any of the stamps allowance for which is prohibited by the provisions of ‘An act relative to the redemption of unused stamps,’ approved July 12, 1876. That claims for allowance on account of stamps arising under Rev. Stat. § 3426, as restricted by ‘an act relative to the redemption of unused stamps,’ approved July 12, 1876, may be allowed, if presented within three years after the purchase of said stamps from the government, or a government agent for the sale of stamps, and not otherwise: *Provided*, That no existing claim for the redemption of or allowance for any internal-revenue stamps other than the two-cent documentary stamps shall be allowed, unless presented within one year from the date of the passage of this act: *Provided, further*, That from and after June 13, 1879, no allowance shall be made, in any manner, for documentary stamps other than those of the denomination of two cents.”

St. July 12, 1876, ch. 181 (19 St. 88), repeals § 14 of 18 St. 307, ch. 36, and provides: —

“That all unused stamps shall be redeemed when properly presented, as was done prior to the passage of the aforesaid act: *Provided*, That from and after the passage of this act no allowance shall be made for documentary stamps, except those of the denomination of two cents, which when presented to the Commissioner of Internal Revenue are not found to be in the same condition as when issued by the Internal Revenue Department, or, if so required by the said Commissioner, when the person presenting the same cannot satisfactorily trace the history thereof from their issue to their presentation as aforesaid.”

By reason of the prohibition contained in St. July 12, 1876, ch. 181, it is now necessary, in order that allowances for documentary stamps above the denomination of two cents may be made under this section, that they shall, when presented to the Commissioner, be in the same condition as when issued by the Internal Revenue Department, or that the person presenting them, on being so required by the Commissioner, shall trace the history thereof to the satisfaction of the latter, from their issue to their presentation. 15 A. G. Op. 426; see also note, § 3223. *Kaufman's Case*, 11 Ct. Cl. 659; 96 U. S. 567; see note, § 3244. It is immaterial whether a brewer's certificate be in form under §§ 3320 or 3426, so long as it represents a case where the Commissioner is authorized to refund and the amount which the party is entitled to have refunded. *Id.* See 14 A. G. Op. 513; *Woolner v. United States*, 13 Ct. Cl. 355; *Diamond Match Co. v. United States*, 24 Blatch. 442; 31 F. R. 271.



SECT. 3427. — An assistant treasurer of the United States who receives and sells internal-revenue stamps by direction of the Secretary of the Treasury under the provisions of this section is not entitled to the allowance of a commission or extra compensation for such service. *Folger v. United States*, 13 Ct. Cl. 86; 103 U. S. 30. *United States v. Butterfield*, 7 Ben. 412, *contra*, was not followed. See *United States v. Cheeseman*, 21 Int. Rev. Rec. 340.

SECT. 3429. — Amended by 19 St. 248, ch. 69, by inserting a comma after “die” in the sixteenth and seventeenth lines respectively. 20 St. 349, ch. 125, § 17, inserts “article” before “paper” in the forty-fifth line, and in the forty-ninth line, after “counterfeit,” inserts “washed, restored, or altered.” 20 St. 327, ch. 125, § 1, provides, —

“That any collector of internal revenue, or any deputy collector or other employee of, or person acting for, such collector, who shall issue any stamp or stamps indicating the payment of any internal-revenue tax, before payment in full therefor has been made to the officer or person issuing the same, shall be deemed guilty of a misdemeanor, and shall be fined for each stamp thus issued an amount equal to the face value thereof, in addition to the liability of the collector on his official bond on account of such stamp; and such collector, deputy collector, or employee shall be dismissed from office.”

SECT. 3430. — 14 A. G. Op. 459. See note, § 3355. Amended by 20 St. 351, ch. 125, § 19, by inserting the following after “wax tapers” in the proviso:—

“And all articles upon which a tax is imposed by law, as enumerated and mentioned in Schedule A, following Rev. Stats. § 3437.”

A package in the sense of § 3437 means a bundle put up suitable for transportation or handling as an article of sale. Therefore a matchbox, holding less than 100 matches, which contains two sliding drawers which are open on the top when drawn out, is but one package or parcel, each drawer not being a separate parcel or package requiring a separate stamp. *United States v. Goldback*, 1 Hughes, 529. And it seems that the penalty may be recovered by indictment. *United States v. Abbott*, 9 Int. Rev. Rec. 186.

SECT. 3432. — 14 A. G. Op. 459. Cosmetics were seized by the government on the wharf where they had been sent for export, and an information was filed to forfeit them on the ground of their not being stamped. The goods were not manufactured in the warehouses prescribed by § 3433, and it was therefore held that, under § 3432, they should have been stamped although intended for exportation, and not having been so stamped were liable to forfeiture. *United States v. 236 Dozen Boxes of Cosmetics*, 6 Ben. 543.

SECT. 3433. — See note, § 3432; S. T. D. No. 6671. Amended by 19 St. 248, ch. 69, by inserting “except distilled spirits” after “materials” in the twenty-sixth line. St. May 28, 1880, ch. 108, §§ 14, 17 (21 St. 145, repealing 20 St. 351, ch. 125, § 20), provides:—

“SEC. 14. That under such regulations and requirements as to stamps, bonds, and other security as shall be prescribed by the Commissioner of Internal Revenue, any manufacturer of medicines, preparations, compositions, perfumeries, cosmetics, cordials, and other liquors, for export, manufacturing the same in a duly constituted manufacturing warehouse, shall be authorized to withdraw, in original packages, from any distillery warehouse, so much distilled spirits as he may require for the said purpose, without the payment of the internal-revenue tax thereon.

“SEC. 17. Whenever the owner of any distilled spirits shall desire to withdraw the same from the distillery warehouse, or from a special bonded warehouse, he may file with the collector a notice giving a description of the packages to be withdrawn, and request that the distilled spirits be regauged; and thereupon the collector shall direct the gauger to regauge the same, and mark upon each package so regauged the number of gauge or wine gallons and proof-gallons therein contained. If upon such regauging it shall appear that there has been a loss of distilled spirits from any cask or package, without the fault or negligence of the distiller or owner thereof, taxes shall be collected only on the quantity of distilled spirits contained in such cask or package at the time of the withdrawal thereof from the distillery warehouse, or special bonded warehouse: *Provided, however*, That the allowance which shall be made for such loss of spirits as aforesaid shall not exceed 1 proof-gallon for 2 months, or part thereof, 1½ gallons for 3 and 4 months, 2 gallons for 5 and 6 months, 2½ gallons for 7 and 8 months, 3 gallons for 9 and 10 months, 3½



gallons for 11 and 12 months, 4 gallons for 13, 14, and 15 months,  $4\frac{1}{2}$  gallons for 16, 17, and 18 months, 5 gallons for 19, 20, and 21 months,  $5\frac{1}{2}$  gallons for 22, 23, and 24 months, 6 gallons for 25, 26, and 27 months,  $6\frac{1}{2}$  gallons for 28, 29, and 30 months, 7 gallons for 31, 32, and 33 months, and  $7\frac{1}{2}$  gallons for 34, 35, and 36 months: *Provided, also*, That the foregoing allowance of loss shall apply only to casks or packages of a capacity of 40 or more wine-gallons, and that the allowance for loss on casks or packages of less capacity than 40 gallons shall not exceed one-half the amount allowed on said 40-gallon cask or package: But no allowance shall be made on casks or packages of less capacity than 20 gallons: *And provided further*, That the proof of such distilled spirits shall not in any case be computed at the time of withdrawal at less than 100 per cent."

SECT. 3436. — St. Feb. 8, 1875, ch. 36, §§ 22, 23 (18 St. 307), provides: —

"That hereafter nothing contained in the internal revenue laws shall be construed so as to authorize the imposition of any stamp tax upon any medicinal articles prepared by any manufacturing chemist, pharmacist, or druggist, in accordance with a formula published in any standard dispensatory or pharmacopœia in common use by physicians and apothecaries, or in any pharmaceutical journal issued by any incorporated college of pharmacy, when such formula and where found shall be distinctly referred to on the printed label attached to such article, and no proprietary interest therein is claimed. Neither shall any stamp be required when the formula of any medicinal preparation shall be printed on the label attached to such article where no proprietorship in such preparation shall be claimed."

SECT. 3437. — Schedule A. 14 A. G. Op. 459. See notes, §§ 3430, 3441, and 22 St. 488, ch. 121 (stated in note, § 3355), repealing the taxes on matches, perfumery, medicinal preparations, and other articles imposed by this Schedule. *United States v. Goldback*, 1 Hughes, 529, see note, § 3430.

## CHAPTER X.

### LEGACIES AND SUCCESSIONS.

By St. July 14, 1870, ch. 255, §§ 3 and 27 (16 St. 256), the tax on legacies and successions is repealed. On the repealed law, see

SECT. 3438. — *United States v. New York Life Ins. & Trust Co.*, 9 Ben. 413; *Hellman v. United States*, 15 Blatch. 13; *United States v. Watts*, 1 Bond, 580; *United States v. Hazard*, 14 Phila. 486; 8 F. R. 380; *United States v. Townsend*, 14 Phila. 493, 8 F. R. 306; *United States v. Brice*, 14 Phila. 487; 8 F. R. 381; *May v. Slack*, 16 Int. Rev. Rec. 134; *United States v. Leverich*, 9 F. R. 586; *United States v. Hunnewell*, 13 Id. 617; *Mason v. Sargent*, 104 U. S. 689, reversing 23 Int. Rev. Rec. 155; *Sturges v. United States*, 117 U. S. 363; *United States v. Rankin*, 8 F. R. 872; *United States v. Morris*, 27 Id. 341; *United States v. Kelly*, 28 Id. 845; *United States v. Truck*, Id. 846

SECT. 3439. — *Clapp v. Mason*, 94 U. S. 589; *United States v. Hart*, 4 F. R. 292

## CHAPTER XI.

### PROVISIONS COMMON TO SEVERAL OBJECTS OF TAXATION.

SECT. 3441. — Amended by 20 St. 350, ch. 125, § 17, by striking out, in the eighth and ninth lines, the words "any amount, claimed or due, less than \$10, nor for."

SECT. 3444. — See note, § 2514.

SECT. 3445. — 15 A. G. Op. 191, see note, § 3456.

SECT. 3446. — Amended by 20 St. 351, ch. 125, § 18, to read as follows: —

"The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may establish and, from time to time, alter or change the form, style, character, material, and device of any



stamp, mark, or label used under any provision of the laws relating to internal revenue. Such stamps shall be attached, protected, removed, cancelled, obliterated, and destroyed, in such manner and by such instruments or other means as he, with the approval of the Secretary of the Treasury, may prescribe; and he is hereby authorized and empowered to make, with the approval of the Secretary of the Treasury, all needful regulations relating thereto; and all pains, penalties, fines and forfeitures now provided by law relating to internal-revenue stamps shall apply to and have full force and effect in relation to any and all stamps which may or shall be so established by the Commissioner of Internal Revenue: *Provided*, Such stamps or device or instrument or means of removal or obliteration, shall entail no additional expense upon the persons required to affix or use the same." [15 A. G. Op. 191; see note, § 3456; 16 Id. 443.]

SECT. 3447. — In *Pahlman v. Collector*, 20 Wall. at page 200 it is said that there is no rule by which the producing capacity of a distillery is to be determined, except that the Commissioner of Internal Revenue is, by §§ 2 and 103 of the act of 1868, empowered to make necessary regulations.

SECT. 3448. — This is in force in the Indian Territory embraced within the Western District of Arkansas and occupied by the Cherokee Indians, notwithstanding the 10th Article of the prior treaty of 1868 between said Indians and the United States. *United States v. Tobacco Factory*, 1 Dillon, 264; *sub nom.* *The Cherokee Tobacco*, 11 Wall. 616.

SECT. 3449. — This section constitutes the last provision of § 29 of the cited St. 1866, the other provisions of that section having been expressly repealed or superseded by later acts. 2 Com. D. 1677.

SECT. 3450. — Where a forfeiture is by statute declared absolute, it takes effect at the time of the commission of the offence, and not from the decree of condemnation. Accordingly where a removal of distilled spirits from the place where distilled, with intent to defraud the United States of the tax thereon, was alleged as a ground for the forfeiture of the spirits, it was held that neither the subsequent payment of the taxes, nor the fact that the claimant was an innocent purchaser without notice of the wrongful acts of the antecedent owner, constituted a defence to the charge. A removal of distilled spirits from the place where distilled to a bonded warehouse of the United States, if made with intent to defraud the United States of the tax, is illegal, and the spirits removed are subject to forfeiture. *Henderson's Distilled Spirits*, 14 Wall. 44, reversing *United States v. 100 Barrels Spirits*, 1 Dillon, 49; 2 Abb. U. S. 305.

The animals and conveyances referred to in this section are subject to forfeiture when employed in the removal of goods, &c., contrary to its provisions, though they are so employed by a person who has hired them from their owner representing that they were to be used for another purpose. *United States v. Two Bay Mules*, 36 F. R. 84; *United States v. Two Horses*, 9 Ben. 529.

But a decree of condemnation entered against the spirits by default is not conclusive evidence against the owner of a truck and horses that the spirits were being removed with intent to defraud the revenue. *United States v. 2 Horses*, *supra*. See also on this section, *Coffey v. United States*, 116 U. S. 436.

SECT. 3451. — For seizure and forfeiture under this section, see *Thacher v. United States*, 15 Blatch. 15; *sub nom.* *Thacher's Distilled Spirits*, 103 U. S. 679.

SECT. 3452. — The words "in fraud of the internal-revenue laws, or" are here added to § 48 of the cited St. 1864, in order that the same offence might be stated for which the previous clauses of the section had provided a forfeiture. 2 Com. D. 1678.

Where a suit is prosecuted for the penalty herein imposed, a verdict cannot be rendered for the alternative penalty of \$500. To constitute fraud an intent to evade the payment of the tax must appear to the satisfaction of the jury, and such intent can be inferred only from the facts in proof. *United States v. Grotenkemper*, 2 Bond, 140. As to the burden of proof in actions for penalties, see *Chaffee v. United States*, 18 Wall. 516.



SECT. 3453.—The indictment or information must aver that the goods, &c., or raw material were in the custody of the defendant with fraudulent intent (*United States v. Fears*, 3 Woods, 510); that tools, implements, &c., if any, were found within the enclosure where they were to be fraudulently used. The latter averment may be supplied by amendment if omitted. *United States v. 16 Hogsheads Tobacco*, 2 Bond, 137. It need not allege that the taxes on the goods were unpaid (*United States v. Adler*, 3 Dillon, 285), nor need it set forth the facts from which the fraudulent intent is inferred. *United States v. 16 Hogsheads Tobacco*, *supra*. To sustain a seizure and forfeiture of goods, &c., and raw material, there must be proof of fraudulent intent. *United States v. A Quantity of Tobacco*, 6 Ben. 68; *United States v. One Still*, 5 Blatch. 403. Otherwise of the personal property found in the place or building. *United States v. One Still*, *supra*. Proof of a completed sale or removal of goods is unnecessary. *Id.* All the beer found in the possession or custody of the claimants, whether fraudulently sold or intended for sale or not, and the raw materials, fixtures, &c., are infected with fraud. *United States v. 256 Barrels Beer*, 2 Bond, 395. The burden of proof of fraudulent intent is on the government. *A Quantity of Distilled Spirits*, 3 Ben. 70. And evidence that, through each of the seven months preceding the seizure, the claimants made false returns of spirits made and materials used by them is competent. *United States v. 36 Barrels Wines*, 7 Blatch. 469. But in *Lilienthal's Tobacco v. United States*, 97 U. S. 237, affirming *United States v. A Quantity of Tobacco*, 5 Ben. 112, it was held that where there has been a violation of the internal revenue laws in connection with the sale and removal of tobacco subject to tax, but unconnected with the property under seizure, the burden of proof is upon the claimant to show that such violation was not committed by him with intent to defraud the revenue, and unless he does so the jury may infer that such intent existed. *United States v. One Still*, 5 Blatch. 403; *United States v. 508 Barrels Spirits*, *Id.* 407, *accord*. Tobacco is such merchandise as may be forfeited under this section (*United States v. 800 Caddies Tobacco*, 2 Bond, 305); and so is beer (*United States v. 256 Barrels Beer*, 2 Bond, 395); and so are distilled spirits, though their forfeiture is also provided for elsewhere. *The Distilled Spirits*, 11 Wall. 356; affirming 3 Cliff. 261; *United States v. One Still*, 5 Blatch. 403. Raw materials may be seized wherever found, if the information alleges that they were intended to be fraudulently used or disposed of. *United States v. 16 Hogsheads Tobacco*, 2 Bond, 137; *United States v. 16 Barrels Spirits*, 10 Ben. 484. To warrant a forfeiture of tools, instruments, implements, or other personal property upon the ground that they are found upon the premises where an illicit manufacture is carried on, it should appear that such property was used or intended to be used in such manufacture or was in some way connected with it. *United States v. 33 Barrels Spirits*, 1 Lowell, 239; 1 Abb. U. S. 311; 7 Am. Law Reg. n. s. 365. This decision was disapproved in *United States v. 16 Barrels Spirits*, 10 Ben. 484. and in *United States v. A Quantity of Rags*, 7 Am. Law Reg. n. s. 369, it was held immaterial whether the personal property be of a nature to be used in the distillation of spirits or not. Personal property is not limited to the property of the person having the fraudulent intent, or to property constituting part of the manufacturing apparatus used in the business, nor can it be saved or withdrawn by calling it part of the real estate. *United States v. The Distillery at Spring Valley*, 11 Blatch. 255. If found in a place with articles or raw materials referred to in this section, proof of fraudulent intent is not necessary to warrant its forfeiture. *United States v. One Still*, 5 Blatch. 403. The word "place" in the thirteenth line seems to refer to a place less than a building, or to a part of a building. *United States v. 16 Barrels Spirits*, 10 Ben. 484. "Such articles" in the fourteenth line refer to "all goods, merchandise, articles, and objects" in the first line, and not to articles which might in the future be manufactured out of the raw materials found in the place. *Id.* Where the state of facts described in this section exists, an officer may seize illicit



distilled spirits without process. *United States v. Fears*, 3 Woods, 510. But in order to warrant a condemnation there must be a seizure, and it must continue until the decree, unless the officer has authority to take a bond for the value of the property seized. And a mere reseizure after the information is filed is insufficient to preclude the claimant from objecting to the jurisdiction. *United States v. 92 Barrels Rectified Spirits*, 8 Blatch. 480. Distilled spirits, though in a distillery warehouse (see *Rev. Stats. § 3271*), are still in the possession of the owner, so as to bring him within the provisions of this section. *United States v. 36 Barrels High Wines*, 7 Blatch. 459. The lien of the government attaches from the time of the commission of the offence, and it follows them into the hands of a purchaser for value without notice. *United States v. 800 Caddies Tobacco*, 2 Bond, 305; see also *United States v. 64 Barrels Distilled Spirits*, 3 Cliff. 308; note, § 3299. As between individuals, however, a sale of brandy before payment of the tax is not void unless made with intent to avoid payment thereof. *Ross v. Crow*, 9 Baxter (Tenn.), 420. The expression "in fraud of the internal revenue laws" means in "violation" of them, and the provisions of this section include violations of §§ 3373, 3374, 3376, *Rev. Stats.* A Quantity of Tobacco, &c., 5 Ben. 407. A claimant contesting the forfeiture is subject to costs. *United States v. 7 Barrels Oil*, 8 Int. Rev. Rec. 162. As to the effect of a seizure under this section, and the duty of a purchaser seeking to avail himself of a title under a sale pursuant to § 3459 in making proof of the necessary steps required to give jurisdiction to the collector to sell, see *Tracy v. Corse*, 45 How. Pr. 316; 58 N. Y. 143; *Coffey v. United States*, 116 U. S. 436.

SECT. 3456. — Amended by 19 St. 248, ch. 69, by inserting "liquor" before "dealer" in the ninth line.

This section must be held to mean that when no punishment has elsewhere been attached to the doing or omitting of acts required or forbidden, the offence, if knowingly or wilfully committed, shall be punished by the infliction of the penalty and forfeiture provided hereby. It does not increase or cumulate punishments. *United States v. 4800 Gallons Spirits*, 4 Ben. 471; *United States v. One Rectifying Establishment*, 11 Int. Rev. Rec. 45; *United States v. 1412 Gallons Spirits*, 10 Blatch. 428. A distiller who in good faith obtains utensils and machinery, in which defects not open to discovery by observation exist, does not render himself liable hereunder. *Felton v. United States*, 96 U. S. 699. In proceedings hereunder it is unnecessary to allege or prove a criminal or fraudulent intent. *United States v. McKim*, 2 Am. L. T. (U. S. Cts.) 153; 10 Int. Rev. Rec. 74; 3 Pittsb. 155. Only such spirits as are owned by the distiller, rectifier, or wholesale liquor dealer, or in which he has an interest as owner at the time of the discovery of the offence, are subject to forfeiture for the offences herein mentioned. *United States v. 200 Barrels Whiskey*, 2 Woods, 54; 95 U. S. 571. If a rectifier knew that stamps upon empty barrels were not cancelled, and it was his will freely exercised that they should not be cancelled when the barrels were emptied, then he had "knowingly and wilfully" neglected to comply with § 3324, and under this section all distilled spirits or liquors owned by him were forfeited. A Quantity of Distilled Spirits, 3 Ben. 552; 3 Am. L. T. (U. S. Cts.) 10. Violations of §§ 3318 and 3324 are punishable under this section. *Id.* But see *United States v. 1412 Gallons Spirits*, 10 Blatch. 428, and *United States v. 133 Casks Spirits*, 1 Sawyer, 188; note, § 3318, *contra*. Regulations promulgated under and in conformity with §§ 3445, 3446, have the force of law, and a failure on the part of a vender of cigars to comply with them would render him liable under this section, even if he did not become amenable to more specific provisions. 15 A. G. Op. 191. As to the punishment applicable to violations of § 3320, see note, § 3289; *United States v. 32 Barrels Distilled Spirits*, 5 F. R. 188, see note, § 3289. "Liquors" in the tenth line, includes whatever the more special term "distilled spirits" does not embrace, and the word "or" before "liquor" does not



create an alternative forfeiture of one exclusive of the other. *United States v. 133 Casks Spirits*, 1 Sawyer, 188.

SECT. 3458. — Affixing stamps to packages sold pursuant to this section is a payment of the tax thereon, and discharges a bond given to secure the payment thereof. *United States v. Ulrici*, 111 U. S. 41.

SECT. 3459. — This section prescribes the rule as to notice in proceedings under it, and a notice pursuant to it will not therefore be quashed because not given as required by a rule of court. *United States v. Adler*, 3 Dillon, 285. See also *Tracy v. Corse*, 45 How. Pr. Rep. 316; 58 N. Y. 143, note, § 3453; 92 Barrels Spirits, 5 Ben. 323.

SECT. 3460. — *North Carolina v. Vanderford*, 35 F. R. 282. See note, § 3334. The bond of a claimant prescribed in the third clause is not compulsory, and the omission to furnish it does not prevent the owner of goods which have been unlawfully seized from maintaining an action against the seizing officer for the damages occasioned by the trespass. *Cardinel v. Smith*, Deady, 197.

SECT. 3463. — By 20 St. 178, ch. 329, § 1, par. 5, the Commissioner of Internal Revenue is to make a detailed statement to Congress once in each year as to how he has expended the sum thereby appropriated for detecting, and bringing to trial and punishment, persons guilty of violating the internal revenue laws, or accessory to the same, including payments for information and detection. By 22 St. 312, 23 St. 204, 24 St. 234, 25 St. 518, similar provision is made, and the Commissioner is also required to make a detailed statement of all miscellaneous expenditures in the Bureau of Internal Revenue for which appropriation is thereby made.

An offer of reward for information leading to the forfeiture of illicit distilleries, and the conviction of the persons operating them, is within the authority vested in the Commissioner and Secretary by this section. And the fact that informers may share in the proceeds of forfeited distilleries under another statute does not provide for the expenses as contemplated by this act. *Williams v. United States*, 12 Ct. Cl. 192.

The offer of a reward for taxes recovered by reason of information furnished by the claimant, contained in Treasury circulars No. 99, No. 99 revised, and No. 99 second revision, was authorized by law. *Sanborn's Contract*, 15 A. G. Op. 133.

The independent action of both the officers named in this section is necessary to authorize the payment of sums within the amount appropriated. Neither of them can delegate his powers to the other. *Sanborn's Case*, 15 A. G. Op. 88.



## TITLE XXXVI.

## DEBTS DUE BY OR TO THE UNITED STATES.

"THE right of priority of payment of debts due to the government is a prerogative of the crown well known to the common law. It is founded not so much upon any personal advantage to the sovereign, as upon motives of public policy, in order to secure an adequate revenue to sustain the public burdens and discharge the public debts. The claim of the United States, however, does not stand upon any sovereign prerogative, but is exclusively founded upon the actual provisions of their own statutes. The same policy which governed in the case of the royal prerogative, may be clearly traced in these statutes; and as that policy has mainly a reference to the public good, there is no reason for giving to them a strict and narrow interpretation. Like all other statutes of this nature, they ought to receive a fair and reasonable interpretation, according to the just import of their terms." Story J., in *United States v. State Bank*, 6 Pet. 29, 34. "The administrator of a creditor of the government, duly appointed in the State where he was domiciled at his death, has full authority to receive payment, and give a full discharge of the debt due to his intestate, in any place where the government may choose to pay it; whether it be at the seat of government, or at any other place where the public funds are deposited." Vaughn *v.* Northup, 15 Pet. 1. Debts against the United States are enforced in the Court of Claims; see pages 352, 358, *ante*; note § 1065.

SECT. 3466. — See page 351 *et seq. ante*. The expression "any person" includes corporations. *Beaston v. Delaware Bank*, 12 Pet. 102, 134. This priority was by act of Aug. 4, 1790, ch. 62, § 45, first applied to bonds for the payment of duties. *United States v. State Bank, supra*. Under this and § 3467, the government's priority "extends to all classes of debts, whether liquidated or unliquidated, joint or several, legal or equitable, and when the insolvent debtor has made a voluntary general assignment, or committed an act of bankruptcy, such priority extends to all his estate which comes to the hands of his assignee. The assignee becomes a trustee for the United States, and is bound to pay their debt first out of the proceeds of the debtor's property." *Per* Wallace, J., in *United States v. Barnes*, 24 Blatch. 466, 469; 31 F. R. 705; citing *Field v. United States*, 9 Pet. 182. See 3 A. G. Op. 625; 2 Id. 718. Debts payable in future are included, and all debtors, whether principals or sureties. *United States v. State Bank, supra*; *United States v. Fisher*, 2 Cranch, 358; 1 Wash. C. C. 4; *Re Vetterlein*, 20 F. R. 109; *United States v. Barnes, supra*. One obtaining from a disbursing officer public moneys, without right, and knowing they are such, is indebted. *Bayne v. United States*, 93 U. S. 642. Those who claim exemption from the operation of the statute must show that they are not within its provisions. *Beaston v. Delaware Bank, supra*, page 134. No lien is created by the statute. *Id.* page 132. The preference is an appropriation of the debtor's estate, so that if, before it has attached, the debtor has conveyed or mortgaged his property, or it has been transferred in the ordinary course of business, neither is overreached by the statutes. *Conrad v. Atlantic Ins. Co.*, 1 Pet. 386, 440; 1 A. G. Op. 616; *Conrad v. Nicoll*, 4 Pet. 291; *Thelasson v. Smith*, 2 Wheat. 396; *Brent v. Washington Bank*, 10 Pet. 596, 610; *United States v. Hooe*, 3 Cranch, 73; *Cottrell v. Pierson*, 2 McCrary, 390; *Bush v. United States*, 8 Sawyer, 322; 13 F. R. 625; *United States v. Griswold*, 7 Sawyer, 296, 303; 8 F. R. 496, 556. This "priority does not attach to property legally transferred to a



creditor on *respondentia*, though he may hold it subject to an account, equity, or trust for the borrower;" "but if the goods were of greater value than the debt due, equity would compel an account for the surplus." *Brent v. Washington Bank*, 10 Pet. 596, 611; *Conrad v. Atlantic Ins. Co.*, 1 Id. 386; *Conrad v. Nicoll*, 4 Id. 291. The appointment of receivers by a United States Circuit Court, with power to take possession of all the property of a debtor to the United States, is not such a transfer and possession within this section as to give the United States a right to priority of payment out of the funds in their hands. *Beaston v. Delaware Bank*, *supra*. The United States brought an action of debt to recover a statutory penalty, and obtained a judgment for the amount and costs against the defendant, after he had filed a petition in bankruptcy. Proofs of debt were then filed by the United States in the bankruptcy proceedings, and priority claimed. It was held that the debt arose at the time the penalty was incurred, which was before the petition in bankruptcy was filed, and that the United States were entitled to priority of payment for the amount less costs. *Re Rosey*, 6 Ben. 507. The claim of the United States against a partner has priority only on his share of the partnership assets remaining after the liquidation of all partnership debts. *United States v. Hack*, 8 Pet. 271. But where the claim is against a firm, the government is entitled to the payment of its debt out of the firm's separate property, in preference to all other debts due by the partners, or either of them, or by the firm. *Lewis v. United States*, 92 U. S. 618. The same right of priority, which belongs to the government, attaches to the claim of an individual who, as surety, has paid money to the government. *Hunter v. United States*, 5 Pet. 172, 182. Where the judgment precedes the debtor's assignment, the government has a priority on all his property, including debts depending on a future contingency. *Id.* 183. It has been held that this section does not apply to the demands of the United States against an insolvent national bank. *Cook County Bank v. United States*, 107 U. S. 145. The local laws of a State cannot create a priority in favor of other creditors, in cases of insolvency, which shall supersede that of the United States. *Field v. United States*, 9 Pet. 182. And the provisions of this section are not beyond the exercise of the powers conferred on Congress by the Constitution. *United States v. Fisher*, 2 Cranch, 358. The privilege is not confined to contracts made within the United States, or with American citizens. *Harrison v. Sterry*, 5 Cranch, 289, 298. And it was held that the United States did not waive their priority by proving their debt under the Bankrupt Act of 1800. *Id.* The priority named in this section can never attach while the debtor continues the owner, and in the possession of the property, although he may be unable to pay all his debts. *United States v. Hooe*, 3 Cranch, 73; *Prince v. Bartlett*, 8 Id. 431; *Conrad v. Nicoll*, 4 Pet. 291, 308; *Lewis v. United States*, *supra*; *United States v. King*, Wall. C. C. 12; *Beaston v. Delaware Bank*, *supra*. The assignment must be of all his property. *United States v. Howland*, 4 Wheat. 103; *Conrad v. Atlantic Insurance Co.*, 1 Pet. 386, 438. And unless the deed of assignment shows it to include the whole, the *onus* is thrown upon the United States to show that it does include all. *United States v. Howland*, 4 Wheat. 108, 116; see *Marshall v. Barclay*, 1 Paige (N. Y.), 159.

As to a bill by the government to remove a cloud from a title, not being a creditor's bill, see *United States v. Wilson*, 118 U. S. 86, 88. As to the meaning of attachments, spoken of in the statute, see *United States v. Wilkinson*, 5 Dillon, 275, 277. "Bankruptcy" refers to the bankrupt laws of this country, and not to those of England. *Conrad v. Nicoll*, 4 Pet. 291, 307. A bankrupt's certificate of discharge, under St. 1867, does not include his liability as a surety for the faithful performance of duty by a public officer. *United States v. Herron*, 20 Wall. 251, 263. And the fact that the claim was not proved in bankruptcy, does not affect the right to priority of payment. *Id.*; *Lewis v. United States*, 92 U. S. 618; *Harrison v. Sterry*, 5 Cranch, 289. In 13 A. G. Op. 528, it was held



that priority does not exist as to deposits made in national banks to the credit of United States officers, owing to language used in the act establishing such banks. For cases arising under treaties, see 3 A. G. Op. 163; 2 Id. 718.

SECT. 3467. — If the assignees have notice of a claim, they are not protected by an order of the State court to distribute to other creditors. They must satisfy existing liens out of the property subject to them, not out of the general fund, and they are liable only for funds actually received. *Field v. United States*, 9 Pet. 182; *United States v. Barnes*, 24 Blatch. 466; 31 F. R. 705. Executors cannot maintain a suit in behalf of the United States to defeat a lien which has attached on the property of the insolvents, before the claim of the United States, on the ground that under this statute they must first pay the debts due the United States. *Brent v. Washington Bank*, 10 Pet. 596.

SECT. 3468. — See notes, §§ 3466, 3467. St. Aug. 8, 1888, ch. 787 (25 St. 387), provides:—

“That hereafter, whenever any deficiency shall be discovered in the accounts of any official of the United States, or of any officer disbursing or chargeable with public money, it shall be the duty of the accounting officers making such discovery to at once notify the head of the Department having control over the affairs of said officer of the nature and amount of said deficiency, and it shall be the immediate duty of said head of Department to at once notify all obligors upon the bond or bonds of such official of the nature of such deficiency and the amount thereof. Said notification shall be deemed sufficient if mailed at the post-office in the city of Washington, District of Columbia, addressed to said sureties respectively, and directed to the respective post-offices where said obligors may reside, if known; but a failure to give or mail such notice shall not discharge the surety or sureties upon such bond.

“SEC. 2. That if, upon the statement of the account of any official of the United States, or of any officer disbursing or chargeable with public money, by the accounting officers to the Treasury, it shall thereby appear that he is indebted to the United States, and suit therefor shall not be instituted within five years after such statement of said account, the sureties on his bond shall not be liable for such indebtedness.”

This section does not apply to recognizances in criminal cases. *United States v. Ryder*, 110 U. S. 729. And sureties must sue in their own names and not in that of the United States. *Id.* 740; see *United States v. Preston*, 4 Wash. 446. For all purposes of the law the consignee of goods is considered as the owner, and unless he states himself not to be so, he is the principal in the bond for duties and his sureties cannot look beyond him for a right of priority of payment. *Childs v. Shoemaker*, 1 Wash. 494; see *United States v. Fisher*, 2 Cranch, 358, 394.

SECT. 3469. — See page 591, *ante*. This section confers no authority when the claim is solvent, but circumstances of hardship, &c., exist. 16 A. G. Op. 617. But otherwise when there is uncertainty of obtaining a judgment. *Id.* 259. It extends to claims of a personal character and not to assertions of title to real property in the possession of the United States, and to which it has a record title. *Id.* 384. It includes adjudged as well as asserted rights of the government. 13 *Id.* 479. It confers no authority to compromise criminal proceedings pending in court. *United States v. George*, 6 Blatch. 406, 412; *Re Webster*, 9 Int. Rev. Rec. 137; see 12 A. G. Op. 543. An action by a private prosecutor under §§ 3490–3494, to recover damages, &c., for a violation of § 5438, is under the control of the prosecutor, subject to the restriction on his rights to discontinue under § 3491, and his interest in any judgment is his absolute property, and the United States cannot compromise, &c., the same by pardon or otherwise. *United States v. Griswold*, 12 Sawyer, 398; 30 F. R. 604; 12 Sawyer, 352; 30 F. R. 762; 11 Sawyer, 65; 24 F. R. 361; 7 Sawyer, 296; 8 F. R. 496; 7 Sawyer, 311; 8 F. R. 556; 6 Sawyer, 255; 11 F. R. 807; 5 Sawyer, 25.

“*Agents having charge of.*” See 16 A. G. Op. 570.

SECT. 3471. — See notes, §§ 990, 991. The discharge of a debtor under this section does not discharge his co-obligors or his sureties from liability. *United States v.*



Sturges, 1 Paine, 525. A United States marshal being entitled to poundage fees for a *ca. sa.* against a debtor afterwards discharged by the United States may hold the government responsible for the poundage. *United States v. Ringgold*, 8 Pet. 150. Where a debtor was discharged under a special act of Congress providing that any estate the debtor "may subsequently acquire shall be liable to be taken in the same manner as if he had not been imprisoned and discharged," it was held that the judgment remained good in law without any special provision to that effect. *Hunter v. United States*, 5 Pet. 173. This statute is analogous to the poor debtor law of Massachusetts, and it is to be considered cumulative, as well as the act of 1800, in relation to private debtors. *United States v. Tetlow*, 2 Lowell, 159, 166.

SECT. 3472. — See note, § 3471; *United States v. Ringgold*, 8 Pet. 150, 163.

SECT. 3473. — See notes, §§ 3009, 3513. Amended by 19 St. 249, ch. 69, by striking out all after "banks" in the eighth line, and inserting "coin certificates" before "or" in the second line. The cited act of 1846 was deemed to supersede St. May 3, 1822, ch. 47 (3 St. 675). 2 Com. D. 1758.

It is held that, where the holder of Treasury notes issued under the act of July 17, 1861, accepts in payment, under protest, legal tender notes, and surrenders the Treasury notes, he cannot recover the difference in value between gold and the legal tender notes, the protest not being authorized by law and having no efficacy to qualify the voluntary surrender of the Treasury notes. *Savage v. United States*, 92 U. S. 382; 11 Ct. Cl. 215; 8 Id. 545; see *Detrick v. Balfour*, 7 Sawyer, 348; 8 F. R. 468.

SECT. 3474. — See note, § 3513.

SECT. 3477. — See note, § 3737. 18 St. 481 makes judgments and claims against the United States subject to offsets of debts from creditors. See page 352, *ante*, note, § 1065. This section "embraces every claim against the United States, however arising, of whatever nature it may be, and wherever and whenever presented." *United States v. Gillis*, 95 U. S. 407, 413; 12 Ct. Cl. 704; see *Ely v. United States*, 19 Ct. Cl. 658; *Morgan v. United States*, 14 Id. 319, 331; *Johnston v. United States*, 13 Id. 217, 224; *Stevens v. United States*, Feb. 26, 1883, in Rules, &c., of Court of Comm. of Ala. Claims, Washington, 1885. Yet it has usually been considered to refer to unliquidated claims. 15 A. G. Op. 271, 272. Claims against the United States cannot be assigned so as to enable the assignee to bring suit in his own name in the Court of Claims. *United States v. Gillis*, *supra*; see note, § 1072. Justices Bradley and Field concurred in the conclusion but dissented from so much of the opinion "as holds that an assignment of a claim against the United States could not transfer the legal title thereto without the aid of some statute;" page 417. This case overruled *Lawrence's Case* and *Cavender's Case*, 8 Ct. Cl. 252, 281, which had already overruled *Sine's Case*, 1 Id. 12; *Cooper's Case*, Id. 87, and the *Coté Case*, 3 Id. 64-71. This section "strikes at every derivative interest in whatever form acquired and incapacitates every claimant upon the government from creating an interest in the claim in any other than himself." *Spofford v. Kirk*, 97 U. S. 484, 488, holding that an accepted order in the hands of a holder for good faith and for value was void. See *McKnight v. United States*, 98 Id. 179; 13 Ct. Cl. 292. It has been held that the assignor may repudiate the assignment at any time before actual payment and sue in his own name. *Belt v. United States*, 15 Ct. Cl. 92, 110. This section "only refers to claims against the United States which can be presented by the claimant to some department or officer of the United States for payment, or may be prosecuted in the Court of Claims." *Hobbs v. McLean*, 117 U. S. 567, 575, holding that certain articles of copartnership did not constitute such an assignment as is forbidden by the statute. A motion in the United States Circuit Court to remand to the State Court will be denied if the suit involves the construction of this section. *Willard v. Mueller*, 23 F. R. 209. The only case where these claims are recognized is where a warrant is already issued. 16 A. G. Op. 261, 263;



see *Id.* 153; 5 *Id.* 85; 6 *Id.* 60. Payment to one authorized to receive it by power of attorney executed before the allowance of the claim is good as between the government and claimant where, at the time of payment the power is unrevoked, the statute being for the protection of the government. *Bailey v. United States*, 109 U. S. 432, 438. So this section does not embrace a lease of real estate to be used for public purposes, under which the lessor is not to perform service for the government, but is only to receive from time to time the rent agreed upon. *Freedman's Co. v. Shepherd*, 127 U. S. 494. A warrant of attorney to draw money from the Treasury upon a claim not transferred or assigned must be executed subsequent to the date of the warrant for the payment of the claim. 9 A. G. Op. 188. A transfer of an approved account or voucher of one of the government departments was held void. 16 A. G. Op. 191. So also an agreement with an attorney to pay out of a particular fund a percentage for his services. *Trist v. Child*, 21 Wall. 441, 447; 16 A. G. Op. 227, 232. A voluntary transfer, by way of mortgage, finally completed and made absolute by a judicial sale, is void. *St. Paul R. Co. v. United States*, 112 U. S. 733, 736; 18 Ct. Cl. 405; *Flint R. Co. v. United States*, 18 Ct. Cl. 420; 112 U. S. 737. A power of attorney given by a contractor to one to collect the amount due from the government is void. The provision "all powers of attorney, orders, or other authorities for receiving payment," relates not only to claims paid by Treasury warrant but to those otherwise payable. 16 A. G. Op. 261. It seems that a claim may be duly assigned within this section though the Treasury draft therefor never reached the claimant, and at the time of the assignment was in the hands of a third person. *Kinney v. United States*, 19 Ct. Cl. 671. This section does not affect the jurisdiction of the Court of Claims under the Bowman Act. On the contrary it constitutes a defence to a suit by the assignee. *Forehand v. United States*, 23 Ct. Cl. 477, 482. It has been held that "claim" in this section does not include claims for supplies furnished the Oregon expedition, &c.; at least after the act of Congress providing for their payment. *Dowell v. Cardwell*, 4 Sawyer, 217. A transfer of stock by a stockholder of a corporation holding a claim against the government is valid. *Kellogg Bridge Co. v. United States*, 15 Ct. Cl. 111, 115. A transfer of title by operation of law takes a case out of the statute. *Erwin v. United States*, 97 U. S. 392, 397; 13 Ct. Cl. 49; *Goreley v. Butler*, 147 Mass. 8, 11. This includes the voluntary assignment by an insolvent debtor for the benefit of creditors. *Goodman v. Niblack*, 102 U. S. 556, 560; see *Stanford v. Lockwood*, 24 Hun, 291. An assignment which takes place before the United States assumes the indebtedness is not within the statute. *United States v. Griswold*, 12 Sawyer, 398; 30 F. R. 604. It has been held that if a creditor voluntarily gives such an assignment or power as this section contemplates, and the Treasury officers treat it as valid and pay the debt to the person named, the courts must deal with the question as if no such statute existed. The creditor who gives an assignment or power must act promptly in notifying the debtor or he will be bound by payment made thereunder. *Buffalo R. Co. v. United States*, 16 Ct. Cl. 238. A judgment by the Court of Claims against the government is not within this section and may be assigned. 12 A. G. Op. 216. For a special act creating an exception to this statute, see 22 St. 4, ch. 15. As to regulations as to attorneys, &c., see S. T. D. 8473.

**SECT. 3480.**—This section was declared by 19 St. 362 not to apply to payments thereby authorized to mail-contractors for mail-service performed in the Confederate States before they respectively engaged in the Rebellion. See *Hart v. United States*, 118 U. S. 62; 16 Ct. Cl. 459; *Mordecai v. United States*, 19 Id. 11; *Wilmoth v. United States*, 20 Id. 113; note, § 4716. A claim arising under the sundry civil appropriation act is treated in *Hukill v. United States*, 16 Ct. Cl. 562. This section applies to claims for bounty land, as it was intended "to include in the prohibition all manner of claims and demands—not only pecuniary, but other claims as well." 15 A. G. Op. 450. In 14 A. G. Op. 526, the



Attorney-General refused to pass upon a question of fact under this section. It has been held that this section is an implied affirmation that the war began April 12, 1861, and that the payment of all claims originating after that date was prohibited by the rules of war. *Chesapeake v. United States*, 20 Ct. Cl. 49, 68; see *Wilmoth v. United States*, *supra*; *Mordecai v. United States*, *supra*.

SECT. 3482. — See note, § 3483. By St. June 22, 1874, ch. 395 (18 St. 193), claims are not to be denied because horses were purchased in States in insurrection; and payment is not to be refused for loss in military service, unless caused by the fault or negligence of the officers or enlisted men. See *Thomas v. United States*, 16 Ct. Cl. 522; *Valdez v. United States*, Id. 550; *Tapia v. United States*, Id. 561; *Irby v. United States*, 18 Id. 259; 15 A. G. Op. 39; 8 Id. 293; 9 Id. 151, 185, 334.

SECT. 3483. — See notes, § 3482. In 10 A. G. Op. 21, this statute is amply discussed and it is held that it is remedial and should be so construed as to advance the remedy. In 14 A. G. Op. 535, the question is considered as to what must be shown to bring a claim for the loss of a steamboat within this section. The authority conferred upon accounting officers to adjust claims is treated in 15 A. G. Op. 39. See notes, §§ 273, 277. It is not the duty of accounting officers of the Treasury to require of claimants under this act proof of loyalty. 15 A. G. Op. 652. In 16 Id. 242, it was held that a vessel was within the meaning of the section, and that the case did not fall within the terms of the exception contained therein. As to the meaning of "enemy" and "military service," see *Stuart v. United States*, 18 Wall. 84; 9 Ct. Cl. 60; 6 Id. 111. As to the rights of insurers who pay the owner the amount of certain policies on a vessel impressed into the military service and lost, see *Shaw v. United States*, 8 Ct. Cl. 488. See further on this section, 9 A. G. Op. 334; 13 Id. 381; 16 Id. 242.

SECT. 3489. — See 16 A. G. Op. 284.

SECTS. 3490-3494. — See notes, §§ 563, 771, 5438. The relator in a *qui tam* action, under §§ 3490, 3491, is concluded by a judgment in the Court of Claims against the United States. *United States v. Moore*, 3 MacArthur, 226. The person who sues represents the United States and is entitled to control the suits. *Bush v. United States*, 8 Sawyer, 322; 13 F. R. 625. An application for copies of papers in a department, to be used in a suit under § 3491, stands upon the same footing with a like application by a plaintiff in any other private suit. 15 A. G. Op. 562; see especially note, § 3469.



## TITLE XXXVII.

## COINAGE, WEIGHTS, AND MEASURES.

SECT. 3495. — By 18 St. 45, an assay-office is to be established at Helena, Montana, and a suitable building there constructed for the purpose. 21 St. 322 establishes an assay-office at St. Louis, Mo. Provision was made by 18 St. 97, for reopening the branch mint at New Orleans.

SECT. 3498. — Compare the cited provision of 1874 and 24 St. 185, 608.

SECT. 3513. — See notes, §§ 3527, 3586; 15 A. G. Op. 312. 20 St. 47 prohibits the coinage of twenty-cent pieces of silver authorized by 18 St. 478. By 18 St. 296 and 19 St. 33, silver coins are to be issued in redemption of fractional currency, which, when redeemed, is to be a part of the sinking fund.

St. Feb. 28, 1878, ch. 20 (20 St. 25), provides: —

“SEC. 1. That there shall be coined, at the several mints of the United States, silver dollars of the weight of  $412\frac{1}{2}$  grains Troy of standard silver, as provided in the act of Jan. 18, 1837, on which shall be the devices and superscriptions provided by said act; which coins together with all silver dollars heretofore coined by the United States, of like weight and fineness, shall be a legal tender, at their nominal value, for all debts and dues public and private, except where otherwise expressly stipulated in the contract. And the Secretary of the Treasury is authorized and directed to purchase, from time to time, silver bullion, at the market price thereof, not less than \$2,000,000 worth per month, nor more than \$4,000,000 worth per month, and cause the same to be coined monthly, as fast as so purchased, into such dollars; and a sum sufficient to carry out the foregoing provision of this act is hereby appropriated out of any money in the Treasury not otherwise appropriated. And any gain or seigniorage arising from this coinage shall be accounted for and paid into the Treasury, as provided under existing laws relative to the subsidiary coinage: *Provided*, That the amount of money at any one time invested in such silver bullion, exclusive of such resulting coin, shall not exceed \$5,000,000: *And provided further*, That nothing in this act shall be construed to authorize the payment in silver of certificates of deposit issued under the provisions of § 254 Rev. Stats.

“SEC. 2. That immediately after the passage of this act, the President shall invite the governments of the countries composing the Latin Union, so-called, and of such other European nations as he may deem advisable, to join the United States in a conference to adopt a common ratio between gold and silver, for the purpose of establishing, internationally, the use of bi-metallic money, and securing fixity of relative value between those metals; Such conference to be held at such place, in Europe or in the United States, at such time within six months, as may be mutually agreed upon by the executives of the governments joining in the same, whenever the governments so invited, or any three of them, shall have signified their willingness to unite in the same. The President shall, by and with the advice and consent of the Senate, appoint three commissioners, who shall attend such conference on behalf of the United States, and shall report the doings thereof to the President, who shall transmit the same to Congress. Said commissioners shall each receive the sum of \$2500 and their reasonable expenses, to be approved by the Secretary of State; and the amount necessary to pay such compensation and expenses is hereby appropriated out of any money in the Treasury not otherwise appropriated.

“SEC. 3. That any holder of the coin authorized by this act may deposit the same with the Treasurer or any assistant treasurer of the United States, in sums not less than \$10, and receive therefor certificates of not less than \$10 each, corresponding with the denominations of the United States notes. The coin deposited for or representing the certificates shall be retained in the Treasury for the payment of the same on demand. Said certificates shall be receivable for customs, taxes, and all public dues, and, when so received, may be reissued.

“SEC. 4. All acts and parts of acts inconsistent with the provisions of this act are hereby repealed.”



St. Aug. 4, 1886, ch. 902 (24 St. 227; see Id. 515), provides:—

"The Secretary of the Treasury is authorized and required to issue silver-certificates in denominations of \$1, \$2, and \$5, and the silver-certificates herein authorized shall be receivable, redeemable, and payable in like manner and for like purposes as is provided for silver-certificates by 20 St. 25, and denominations of \$1, \$2, and \$5 may be issued in lieu of silver-certificates of larger denominations in the Treasury or in exchange therefor upon presentation by the holders; and to that extent said certificates of larger denominations shall be cancelled and destroyed."

SECT. 3515. — "Minor coins" includes only those here designated. United States v. Bickster, 1 Mackey, 341. St. March 2, 1889, ch. 411 (25 St. 955), authorizes the Secretary of the Treasury to recoin any and all the uncurrent minor coins in the Treasury.

SECT. 3516. — 14 A. G. Op. 219. St. Jan. 29, 1874, ch. 19 (18 St. 6), provides:—

"That it shall be lawful for coinage to be executed at the mints of the United States for any foreign country applying for the same, according to the legally prescribed standards and devices of such country, under such regulations as the Secretary of the Treasury may prescribe; and the charge for the same shall be equal to the expenses thereof, including labor, materials, and use of machinery, to be fixed by the director of the mint, with the approval of the Secretary of the Treasury: *Provided*, That the manufacture of such coin shall not interfere with the required coinage of the United States."

SECT. 3519. — St. May 26, 1882, ch. 195 (22 St. 97), provides:—

"That the superintendents of the coinage mints, and of the United States assay office at New York, are hereby authorized to receive United States gold coin from any holder thereof in sums not less than \$5000, and to pay and deliver in exchange therefor gold bars in value equalling such coin so received."

SECT. 3520. — St. March 3, 1887, ch. 396 (24 St. 634), repealing all provisions authorizing the coinage and issuance of United States trade-dollars, provides—

"That for a period of six months after the passage of this act, United States trade-dollars, if not defaced, mutilated, or stamped, shall be received at the office of the Treasurer, or any assistant Treasurer of the United States in exchange for a like amount, dollar for dollar, of standard silver dollars, or of subsidiary coins of the United States.

"SEC. 2. That the trade-dollars received by, paid to, or deposited with the Treasurer or any assistant treasurer or national depositary of the United States shall not be paid out or in any other manner issued, but, at the expense of the United States, shall be transmitted to the coinage mints and recoinied into standard silver dollars or subsidiary coin, at the discretion of the Secretary of the Treasury: *Provided*, That the trade-dollars received under this act shall not be counted as part of the silver bullion required to be purchased and coined into standard dollars as required by the act of Feb. 28, 1878."

SECT. 3524. — 21 St. 374 substitutes "for melting or refining bullion" in place of the nine words following "trade-dollars" in the third line of this section. 18 St. 296 repeals so much of this section as provides for a charge of one fifth of one per centum for converting standard gold bullion into bullion, and provides that thereafter no charge shall be made for that service.

SECT. 3526. — See note, § 3586. By 18 St. 202, gold bars may be transferred from the bullion fund at New York, and applied to the redemption of coin certificates or in exchange for gold coins. By 20 St. 25, the amount of money at any one time invested in silver bullion purchased for coining standard silver dollars is not to exceed \$5,000,000.

SECT. 3527. — St. June 9, 1879, ch. 12 (21 St. 7), repealing all laws and parts of laws in conflict therewith, provides that the holder of any of the United States silver coins of smaller denominations than \$1, may, on presentation of the same in sums of \$20, or any multiple thereof, at the office of the United States Treasurer or any assistant treasurer, receive therefor lawful money of the United States; that the Treasurer or any assistant treasurer so receiving any coins shall exchange the same in sums of \$20, or any multiple thereof, for lawful United States money, on demand of any holder thereof; that the present United



States silver coins of smaller denominations than \$1 shall thereafter be a legal tender in all sums not exceeding \$10, in full payment of all dues, public and private.

SECT. 3529. — See note, § 3653. St. Oct. 2, 1888, ch. 1069 (25 St. 518, 521; see also 23 St. 493), authorizes and directs the Secretary of the Treasury, in expending the sum appropriated for transportation of silver coin by registered mail or otherwise, —

“to transport from the Treasury or subtreasuries, free of charge, silver coin when requested to do so: *Provided*, That an equal amount in coin or currency shall have been deposited in the Treasury or such subtreasuries by the applicant or applicants. And the Secretary of the Treasury shall report to Congress the cost arising under this appropriation. The Secretary of the Treasury is authorized to transfer to the United States Mint at Philadelphia, for cleaning and reissue, any minor coins now in or which may hereafter be received at the subtreasury offices in excess of the requirement for the current business of said offices; and the sum of \$4000 is hereby appropriated for the expense of transportation for such reissue. And the Secretary of the Treasury is also authorized to recoin any and all the uncurrent minor coins now in the Treasury; and the sum of \$4000, or so much thereof as may be necessary, is hereby appropriated to reimburse the Treasury for the loss on such recoinage.”

SECT. 3536. — “A” inserted after “weighing” in the fourth line by 19 St. 249.

SECT. 3545. — See notes, §§ 245, 254, 3526.

SECT. 3546. — By 20 St. 191, refining and parting of bullion is to be carried on at the mints and at the assay-office at New York.

SECT. 3548. — Res. 26 of March 3, 1881 (21 St. 521), provides: —

“That the Secretary of the Treasury be, and he is hereby, directed to cause a complete set of all the weights and measures adopted as standards to be delivered to the governor of each State in the Union, for the use of agricultural colleges in the States, respectively, which have received a grant of lands from the United States, and also one set of the same for the use of the Smithsonian Institution: *Provided*, That the cost of each set shall not exceed \$200, and a sum sufficient to carry out the provisions of this resolution is hereby appropriated out of any money in the Treasury not otherwise appropriated.”

St. July 11, 1888, ch. 615 (25 St. 270; see also Id. 720), provides:

“That such necessary repairs and adjustments shall be made to the standards furnished to the several States and Territories as may be requested by the governors thereof, and also to standard weights and measures that have been, or may hereafter be, supplied to United States custom-houses and other offices of the United States, under act of Congress, when requested by the Secretary of the Treasury.”

SECT. 3551. — 18 St. 76, authorizes medals commemorating the Centennial Anniversary of Independence to be prepared for the Centennial Board of Finance.

SECT. 3552. — By 20 St. 25, any gain or seigniorage arising from the coinage of the standard silver dollars thereby authorized, is to be accounted for and paid into the Treasury.

SECT. 3561. — 18 St. 319, substitutes “officers” for “offices” in the second line, and 19 St. 249 substitutes “applying” for “applicable” in the fourth line.

SECT. 3564. — The value of foreign coins, as ascertained by the estimate of the Director of the Mint and proclaimed by the Secretary of the Treasury, is conclusive upon the custom house officers and importers. *Hadden v. Merritt*, 115 U. S. 25; *Cramer v. Arthur*, 102 Id. 612; *Heinemann v. Arthur*, 120 Id. 82; *The Collector v. Richards*, 23 Wall. 246; *Detrick v. Balfour*, 7 Sawyer 348; 8 F. R. 468. An official estimate or appraisal, made and declared pursuant to such a statute as this, is equally obligatory with one stated in terms in the statute itself. *Auffm'ordt v. Rasin*, 102 U. S. 620; see 14 A. G. Op. 353. See Secretary Manning's Estimate of Values of Foreign Coins, in S. T. D., No. 7951 (Jan. 1, 1887). See also Id. Nos. 8604, 9226.

“*And be proclaimed on the first day of January.*” This clause is not directory merely, but requires the Secretary to make the proclamation at the time designated. 14 A. G. Op. 382.



SECT. 3565. — A note for £500 sterling is payable in money and negotiable; and in an action thereon, it is not necessary to aver or prove the value of the pound in United States money, but judgment will be given in United States money according to the ratio prescribed by the statute. *King v. Hamilton*, 8 Sawyer, 167; 12 F. R. 478. See *The Blohm*, 1 Ben. 228; S. T. D. 8164.

SECT. 3566. — By 22 St. 518, "coins, gold, silver and copper," when imported, are exempt from duty.

SECT. 3568. — See note, § 3640. 19 St. 249, substitutes "return" in place of "turn" in the fourth line.



## TITLE XXXVIII.

## THE CURRENCY.

SECT. 3571. — The appropriation act of Oct. 2, 1888, ch. 1069 (25 St. 511), contains the proviso : —

“That no portion of this sum shall be expended for printing United States notes of large denomination in lieu of notes of small denomination cancelled or retired.”

SECT. 3575. — See notes, §§ 3513, 3586–3588, 5171. Where the government under a mistake of fact redeems notes never issued by it pursuant to law, it can bring suit to recover the money paid therefor. *Cooke v. United States*, 12 Blatch. 43.

SECT. 3576. — This does not prohibit such portraits upon internal-revenue stamps. 14 A. G. Op. 528.

SECT. 3577. — See note, § 5171.

SECT. 3580. — By 24 St. 227, no portion of the sum thereby appropriated for engraving and printing is to be expended for printing United States notes of large denomination in lieu of notes of small denomination cancelled or retired.

SECT. 3581. — By 18 St. 204, National Bank and United States notes may be destroyed by maceration instead of by burning.

SECT. 3582. — See § 6 of St. 1874, stated in note, § 5191; and note, § 3588.

SECT. 3583. — *Hollister v. Mercantile Assn.*, 111 U. S. 64. The object of this section was to secure the field for the circulation of stamps, as provided in § 1 of the cited act, without competition from any quarter; it does not apply to an obligation for fifty cents, payable to bearer on demand in goods. *United States v. Van Auken*, 96 U. S. 366; *Barnett v. State*, 54 Ala. 579.



## TITLE XXXIX.

## LEGAL TENDER.

THE issue of United States notes (not legal tender), is "a proper exercise of the power to borrow money, which is granted to Congress without limitation. The extent to which the power may be exercised depends in all cases upon the judgment of that body as to the necessities of the government. The power to borrow includes the power to give evidences of indebtedness and obligations of repayment. Instruments of this character are among the securities of the United States mentioned in the Constitution. These securities are sometimes in the form of certificates of indebtedness, but they may be issued in any other form." Field, J., in *Legal Tender Cases*, 12 Wall. 635, 636, and note, *q. v.* for a list of the earlier acts of Congress upon this subject.

SECT. 3585. — See note, § 3586. St. June 28, 1834, ch. 95, § 3 (4 St. 700), was treated as obsolete by the Revisers. 2 Com. D. 1757.

SECT. 3586. — See notes, §§ 3513, 3527. It is not a criminal act to add base metal to a good coin, and "a hole punched through a coin with a sharp instrument, crowding the silver into a slightly different shape, but leaving it all in the coin, has no effect to render it less valuable or less lawful tender than before." *United States v. Lissner*, 12 F. R. 840, 842. The last provision of § 3585 does not apply to silver coins. *Id.* 841.

These coins are a legal tender only where the amount of the debt does not exceed five dollars, and the rule applies alike to the officers of the government in receiving its dues and in disbursing its funds. 16 A. G. Op. 138.

Joint Res. No. 17 of July 22, 1876 (19 St. 215), provides, —

"That the Secretary of the Treasury, under such limits and regulations as will best secure a just and fair distribution of the same through the country, may issue the silver coin at any time in the Treasury to an amount not exceeding \$10,000,000, in exchange for an equal amount of legal-tender notes; and the notes so received in exchange shall be kept as a special fund separate and apart from all other money in the Treasury, and be reissued only upon the retirement and destruction of a like sum of fractional currency received at the Treasury in payment of dues to the United States; and said fractional currency, when so substituted, shall be destroyed and held as part of the sinking fund, as provided in the act approved April 17, 1879. [See act June 21, 1876; 21 St. 30, § 3.]

"SEC. 2. That the trade dollar shall not hereafter be a legal tender, and the Secretary of the Treasury is hereby authorized to limit from time to time, the coinage thereof to such an amount as he may deem sufficient to meet the export demand for the same.

"SEC. 3. That in addition to the amount of subsidiary silver coin authorized by law to be issued in redemption of the fractional currency it shall be lawful to manufacture at the several mints, and issue through the Treasury and its several offices, such coin, to an amount, that, including the amount of subsidiary silver coin and of fractional currency outstanding, shall, in the aggregate, not exceed, at any time, \$50,000,000. [See 15 A. G. Op. 312.]

"SEC. 4. That the silver bullion required for the purposes of this resolution shall be purchased, from time to time, at market rate, by the Secretary of the Treasury, with any money in the Treasury not otherwise appropriated; but no purchase of bullion shall be made under this resolution when the market-rate for the same shall be such as will not admit of the coinage and issue, as herein provided, without loss to the Treasury; and any gain or seigniorage arising from this coinage shall be accounted for and paid into the Treasury as provided under existing laws relative to the subsidiary coinage: *Provided*, That the amount of money at any one time invested in such silver bullion, exclusive of such resulting coin, shall not exceed \$200,000."



SECT. 3587. — See last clause of preceding note.

SECT. 3588. — See note § 3473. By 18 St. 123, § 6, the amount of United States notes outstanding shall not exceed \$382,000,000. St. Jan. 14, 1875, ch. 15 (18 St. 296), as to the resumption of specie payments, provides (as amended by 24 St. 560, § 3, by adding the words here italicized), —

“And on and after January 1, 1879, the Secretary of the Treasury shall redeem, in coin, the United States legal tender notes then outstanding on their presentation for redemption, at the office of the assistant treasurer of the United States in the city of New York *and the city of San Francisco, California*, in sums of not less than \$50. And to enable the Secretary of the Treasury to prepare and provide for the redemption in this act authorized or required, he is authorized to use any surplus revenues, from time to time, in the Treasury not otherwise appropriated, and to issue, sell, and dispose of, at not less than par, in coin, either of the descriptions of bonds of the United States described in the act of Congress approved July 14, 1870, entitled, ‘An act to authorize the refunding of the national debt,’ with like qualities, privileges, and exemptions, to the extent necessary to carry this act into full effect, and to use the proceeds thereof for the purposes aforesaid.”

20 St. 87 prohibits further reduction of the amount of issue of such notes, and provides that notes redeemed or received into the Treasury, are to be reissued. Notes so reissued are a legal tender, and the act is constitutional. *Juillard v. Greenman*, 110 U. S. 421, 437, 450.

Congress “intended by the terms debts, ‘public and private,’ such obligations for the payment of money as are founded upon contract.” *Perry v. Washburn*, 20 Cal. 351. They do not refer to taxes imposed by State authority. *Lane County v. Oregon*, 7 Wall. 71; *Bank v. Supervisors*, Id. 26; *Hagar v. Reclamation District*, 111 U. S. 701, 706; 6 Sawyer 567; 4 F. R. 366. But see *Haas v. Misner*, 1 Idaho, 170; *Rhodes v. O’Farrell*, 2 Nev. 60. A bond for payment of a certain sum “in gold and silver coin, lawful money of the United States, with interest in coin, at a rate specified until repayment,” cannot be discharged by a tender of United States notes under this section. *Bronson v. Rodes*, 7 Wall. 229; 34 N. Y. 649; *Miller, J.*, dissenting on the ground that it was intended that the notes should be “a legal tender for all private debts then due, or which might become due on contracts then in existence without regard to the intent of the parties on that point.” Page 258. This case was reaffirmed in *Butler v. Horwitz*, 7 Wall. 258, *Miller, J.*, concurring in the judgment because the original contract was an agreement to pay in English guineas as a commodity, and hence their value was properly computed in legal tender notes; but dissenting from the opinion. The constitutionality of the acts was assumed in both cases. See also *Trebilcock v. Wilson*, 12 Wall. 687; 23 Iowa 331; *Dewing v. Sears*, 11 Wall. 379; 14 Allen 413; *Commonwealth Bank v. Van Vleck*, 49 Barb. 508; *Murray v. Gale*, 52 Id. 427; *Chisholm v. Arrington*, 43 Ala. 610; *McGoon v. Shirk*, 54 Ill. 408; *Rankin v. Demott*, 61 Pa. St. 263; *Frank v. Colhoun*, 59 Id. 381; *Dutton v. Pailaret*, 52 Id. 109; *Independent Ins. Co. v. Thomas*, 104 Mass. 192; *Villhac v. Biven*, 28 Cal. 409; *Luling v. Atlantic Ins. Co.*, 51 N. Y. 207; *Wright v. Jacobs*, 61 Mo. 19; *Linn v. Minor*, 4 Nev. 462; *Maryland v. Baltimore R. Co.*, 22 Wall. 105; *Cushing v. Wells*, 98 Mass. 550; *Scott v. Shropshire*, 2 Duv. 152. In *Hepburn v. Griswold*, 8 Wall. 603; 2 Duv. 20, the cases in 7 Wall. were approved, and it was held that in making mere promises to pay dollars a legal tender in payment of debts previously contracted, the act was unconstitutional; *Miller, J.*, (with whom concurred *Swayne* and *Davis, JJ.*), dissenting on the grounds that the acts were constitutional as within the implied powers of the government, and saying “The two houses of Congress, the President who signed the bill, and fifteen State courts, being all but one that have passed upon the question, have expressed their belief in the constitutionality of these laws,” (p. 638). So much of *Hepburn v. Griswold*, as applied to contracts before the legal tender acts, was overruled by the Legal Tender Cases, 12 Wall. 457; 11 Wall. 682; 14 Allen, 94; and the acts were held constitutional as applied to contracts made either before or after their



passage, the Chief-Justice and Justices Clifford, Field and Nelson dissenting. The Legal Tender Cases were affirmed in *Dooley v. Smith*, 13 Wall. 604; *Railroad Co. v. Johnson*, 15 Id. 195; 37 Conn. 433; *Maryland v. Railroad Co.*, 22 Wall. 105; 36 Md. 519. And it is now held, Mr. Justice Field dissenting, that Congress has the constitutional power to make the United States Treasury notes a legal tender in payment of private debts, in time of peace as well as in time of war. *Juillard v. Greenman*, 110 U. S. 421; see Bancroft's "Plea for the Constitution."

For various decisions of State tribunals declaring these acts constitutional, both as to debts contracted before and after their passage, see *Kimpton v. Bronson*, 45 Barb. 618; *Roosevelt v. Bull's Head Bank*, Id. 579; *Hague v. Powers*, 39 Id. 427; *Wilson v. Morgan*, 30 How. Pr. 386; *Henderson v. McPike*, 35 Mo. 255; *Riddlesbarger v. McDaniel*, 38 Id. 138; *Appel v. Woltman*, Id. 194; *Verges v. Giboney*, Id. 458; *Metropolitan Bank v. Van Dyck*, 27 N. Y. 400; *People v. Cook*, 44 Cal. 638; *Belloc v. Davis*, 38 Id. 242; *Spear v. Alexander*, 42 Ala. 572; *Carpenter v. Northfield Bank*, 39 Vt. 46; *Black v. Lusk*, 69 Ill. 70; *Legal Tender Cases*, 52 Pa. St. 9; *Thayer v. Hedges*, 23 Ind. 141, overruling 22 Ind. 282; *Reynolds v. State Bank*, 18 Ind. 467; *Hintrager v. Bates*, 18 Iowa 174; *Van Huse v. Kanouse*, 13 Mich. 303; *Warner v. Sauk County Bank*, 20 Wis. 492; *Johnson v. Ivey*, 4 Cold. (Tenn.) 608; *O'Neil v. McKewn*, 1 S. C. 147; *Bowen v. Clark*, 46 Ind. 405; *State v. Spicer*, 4 Houst. (Del.) 100; *Longworth v. Mitchell*, 26 Ohio St. 334; *Mervine v. Sailor*, 5 Phila. 422. See also *The Mary J. Vaughan*, 2 Ben. 47; *Latham v. United States* 1 Ct. Cl. 149; *Willard v. Tayloe*, 8 Wall. 557. *Contra*, *Meyer v. Roosevelt*, 25 How. Pr. 97. See 1 Kent Com. (13th ed.) 254, note; *Harris v. Jex*, 55 N. Y. 421. That a mortgage made before the act of Congress must be paid in gold or silver coin, see *Martin v. Martin*, 20 N. J. Eq. 421. As to the duty of the State courts in following the decisions of the United States Supreme Court, see *Barringer v. Fisher*, 45 Miss. 200; *Smith v. Wood*, 37 Texas, 616; *Townsend v. Jennison*, 44 Vt. 315.

SECT. 3589. — In construing 12 St. 259, it was held that, by accepting the medium offered and surrendering Treasury notes, the holder waived his claim, independently of whether that medium was or was not a legal tender in payment. *Savage v. United States*, 92 U. S. 382; 8 Ct. Cl. 545.



## TITLE XL.

## THE PUBLIC MONEYS.

SECT. 3591. — *Cooke v. United States*, 91 U. S. 399.

SECTS. 3595, 3608, 3615. — The clause as to Charlestown was repealed by 19 St. 155, which also discontinues the depositories at Buffalo, New York, Santa Fé, New Mexico, and Pittsburgh.

SECT. 3596. — See note, § 35.

SECT. 3615. — *United States v. Schlesinger*, 14 F. R. 685.

SECT. 3617. — See notes, § 563, cl. 4, 784; 15 A. G. Op. 387, 654. 22 St. 616 provides that, on and after July 1, 1883, all moneys received for the transportation of private despatches over any and all telegraph lines owned or operated by the United States, shall be paid into the United States Treasury, as required by § 3617. Lumber made at the saw-mill on the Grande Ronde Indian reservation, is the property of the Indians thereon, and not of the government within the purview of § 3618; and the proceeds of its sale may be disposed of by the agent for the benefit of the Indians, without reference to § 3617. *United States v. Sinnott*, 11 Sawyer, 398; 26 F. R. 84. The amount received by the customs officers on the northern frontier for each blank, manifest, or clearance, sold under § 2648, does not come within the provision of this section requiring the gross sums of all moneys received, from whatever source, to be paid into the Treasury. 15 A. G. Op. 654. A United States marshal is an officer of the United States entitled to the custody of money, which he may receive as disbursing officer of the government, or by virtue of civil or criminal processes, in all of which cases he receives it in his official capacity. *Henry v. Sowles*, 28 F. R. 481.

SECT. 3618. — See preceding note; *South Boston Iron Co. v. United States*, 18 Ct. Cl. 166; 15 A. G. Op. 322. 19 St. 249 inserts after "Army" in the fifth line, "or of materials, stores, or supplies, sold to officers and soldiers of the Army." The sales included within the exceptions of this section are controlled by other sections. See § 3672; 15 A. G. Op. 322. 18 St. 125, § 9, and 20 St. 163, § 3, provide for the disposal of unserviceable articles or materials belonging to the Life-Saving Service, and the use of the proceeds. By 18 St. 200, 371, unserviceable ordnance stores and materials are to be sold. By 18 St. 401, § 1, the proceeds of all sales of subsistence-supplies are thereafter to be exempt from being covered into the Treasury, and are to be immediately available for the purchase of fresh supplies. 20 St. 284 provides that from and after April 1, 1879, the value of issues of small stores is to be credited to a fund designated as the "small-stores fund," the resources of the fund to be thereafter used in the purchase of supplies of small stores for issue.

SECT. 3620. — 19 St. 249 inserts after "law" in the fifth line, "and draw from the same only in favor of the persons to whom payment is made." By 18 St. 204, moneys appropriated for charitable purposes are to be placed to the credit of the proper fiscal officer of the beneficiary, and to be paid out only on his checks, which are to state the purpose to which the avails thereof are to be applied, provided, that checks for less than \$20 may be drawn in the fiscal officer's own name, stating that they are for "small



claims," a certified list being sent to the disbursing officer, setting forth the amount and nature of each claim, and each claimant's name.

The checks drawn under this section, as amended, may be made payable only to the persons entitled to payment, or to bearer, or to order, as may be directed by the Secretary of the Treasury. 15 A. G. Op. 288, 303. The amendment made to this section by 19 St. 249, is from § 1 of St. March 3, 1857, with this difference, that it does not contain the exception there found to the regulation that checks must be drawn only in favor of the persons to whom payment is made, viz., of payments in sums under \$20, in which cases the disbursing agent was permitted to draw in his own name, stating that it was to pay small claims. 15 A. G. Op. 303. Under this section as amended, the Treasurer and assistant treasurers of the United States may be authorized to pay the checks of disbursing officers, where they are drawn in favor of the persons to whom payment is to be made, but are payable to order or bearer. The manner in which checks shall be drawn is subject to regulation by the Secretary of the Treasury. 15 A. G. Op. 288.

SECT. 3622. — See note, § 3625. 19 St. 249 changes "Department" to "Departments" in the nineteenth line. A marshal, when sued by the government upon his official bond, in order to set off a credit must show that the claim has been legally presented, and, except in certain cases, disallowed at the Treasury. *Watkins v. United States*, 9 Wall. 759. This section does not authorize the Secretary of the Treasury to institute a new system of rendering accounts, as by permitting disbursing officers to render theirs otherwise than monthly. It was designed to enable him to deal with particular cases in which accidental circumstances make it proper to give more time for rendering accounts. 16 A. G. Op. 222.

St. Jan 31, 1823, ch. 9, §§ 3, 4 (3 St. 723), was treated as superseded. 2 Com. D. 1772.

SECT. 3623. — The disbursing officers are not authorized to draw, nor the Treasurer to pay, out of specific appropriations, other sums than those authorized by law on account of the appropriations respectively. *United States v. Morgan*, 28 F. R. 48.

SECT. 3624. — See note, § 3217. A full transcript of the accounts rendered by a collector is evidence against the surety on his official bond. *United States v. Gausson*, 19 Wall. 198. A collector of internal revenue, when sued upon his bond, is sued as a person accountable for public money, and it is his accountability to the United States as a recipient of such money that renders him liable to suit, although in point of fact the money was received by him as a collector. This section and §§ 3217, 3625, have for their object the enforcement of the liabilities of officers who are accountable for public money; but though they extend to revenue officers, they cannot properly be regarded as revenue laws. 16 A. G. Op. 143, 146.

SECT. 3625. — 19 St. 249, after "Treasury" in the fifth line, inserts "or the Commissioner of Customs, as the case may be."

Laches is not imputed to the government, and the mere failure to bring suit when an officer or agent neglects to render an account as required by law, will not discharge the sureties on the bond of such officer or agent. *United States v. Kirkpatrick*, 9 Wheat. 720. So also the failure of the proper officer to recall a delinquent paymaster, as provided for by St. April 24, 1816, ch. 69, does not discharge the surety on his bond. *United States v. Vanzandt*, 11 Wheat. 184. The sureties on a bond are not discharged from liability by the mere fact that the government has made a proposition to give time, and to suspend the right to sue, upon certain conditions and contingencies which are not proved to have been complied with. *United States v. Nicholl*, 12 Wheat. 505. The failure of the proper officer to institute suit against a delinquent within the time prescribed by law, will not release the sureties on the bond of such delinquent. *Dox v. Postmaster-General*, 1 Pet. 318; see *Miller v. Stewart*, 9 Wheat. 680. A judgment upon a warrant



of distress is a bar to any subsequent action for the same cause. *United States v. Nourse*, 9 Pet. 8; see *Cary v. Curtis*, 3 How. 246. A distress warrant issued under § 3625 has all the effect of a judgment, and the party indebted must get rid of it, by showing that none, or a portion only, of the sum is due. *Armstrong v. United States*, Gilpin, 399. But see *ex parte Randolph*, 2 Brock. 447; *United States v. Taylor*, 3 McLean, 539. A distress-warrant issued by the Solicitor of the Treasury under this section is constitutional. *Murray v. Hoboken Co.*, 18 How. 272. A warrant of distress is conclusive evidence of the facts recited in it, as well as of the authority to make the levy so far as to justify the marshal in making it, but the question of indebtedness may be the subject of a suit, and the levy may provide security for the event of the suit. *Id.* See *Porter v. United States*, 2 Paine, 313. Where the account of an officer has been once stated, and settled at the Treasury Department, the law gives no power to the auditor to open and resettle it of his own authority. This act does not apply to every commissioned officer of the Army or Navy who may be intrusted with public money, but only to those regularly appointed disbursing officers who have given official bonds, with sureties for the faithful discharge of their duties. It does not embrace a mere acting purser in the Navy. *Ex parte Randolph*, 2 Brock. 447. The requirement, as by § 3622, of settlements by officers at short periods, is merely directory to the officers, and forms no part of the contract with the sureties. *United States v. Kirkpatrick*, 9 Wheat. 720; *United States v. Nicholl*, 12 Wheat. 505. The sureties are not responsible for moneys placed by the government in their principal's hands after the legal termination of his office. *Id.*; *United States v. Vanzandt*, 11 Wheat. 184.

SECT. 3637. — See note, § 3625. No appeal from the decision of the district judge could be taken under the cited act of 1820. *United States v. Nourse*, 6 Pet. 470.

SECT. 3639. — See note, § 2619; *United States v. Adams*, 11 Sawyer, 103; 24 F. R. 348; 5 A. G. Op. 81. A clerk of the Collector of Customs is not an officer of the United States under this section. *United States v. Smith*, 124 U. S. 531.

SECT. 3640. — St. Aug. 5, 1861, ch. 46, § 6 (12 St. 313), was omitted from the Revision, the suspension thereby created being regarded as temporary. 2 Com. D. 1776.

St. March 3, 1881, ch. 133, § 1 (21 St. 435), authorizes and directs the Secretary of the Treasury,—

“to transport free of charge silver coin when requested to do so; *Provided*, That an equal amount in coin or currency shall have been deposited in the Treasury by the applicant or applicants.”

SECT. 3643. — See preceding note.

SECT. 3646. — St. Feb. 16, 1885, ch. 123 (23 St. 306), changes “one thousand,” in the last line, to “twenty-five hundred.” Special acts authorizing the issue of duplicate checks are, *e. g.*: 22 St. 283, 486, 654, 708; 24 St. 1, 686, 687, 798.

SECT. 3648. — The direction of the President will be presumed when money is advanced by the direction of the head of the proper department; and for money advanced contrary to this law and misappropriated by the officer, his sureties are liable. *United States v. Cutter*, 2 Curtis, 617; *The Floyd Acceptances*, 7 Wall. 666; *Williams v. United States*, 17 Pet. 144; 1 How. 290. The President may authorize the Secretary of the Treasury to make the advances. *Williams v. United States*, *supra*.

*Value of the service rendered.* — This section was intended to prevent a department from anticipating the performance of an agreement, by keeping the payment within the value of the service. It does not apply where there is a complete performance, although the government may not have received any benefit in consequence of the destruction of the subject-matter of the agreement. *McClure v. United States*, 19 Ct. Cl. 173.

SECT. 3649. — A customs officer authorized to seize property claimed as forfeited under the customs laws, and who makes a seizure, is an “agent having charge of” the claim



within the meaning of this section, and upon a report from him recommending that the claim be compromised, the Solicitor of the Treasury is authorized to make recommendations to the Secretary of the Treasury concerning the same matter 16 A. G. Op. 570.

SECT. 3651. — This in effect prohibits the exchange of gold and silver coin for United States notes by the Treasurer, assistant treasurers, or other depositaries of public funds 16 A. G. Op. 381. But it does not prohibit the employment of an agent to transmit funds, either an individual banker or a bank; and if money is deposited in a bank contrary to law it may be recovered, as the agents of the government do not bind it when they transcend their powers. *United States v. The City Bank*, 6 McLean, 130.

SECT. 3653. — See note, § 3529. Various appropriation acts provide as follows: —

“The amount paid from moneys hereby appropriated for the transportation of gold coin, from San Francisco to New York after the passage of this act, shall not exceed one-fourth of one per centum, and for the transportation of silver coin one per centum and for intermediate points at proportionate rates corresponding to the distance.” [22 St. 8.]

“That the Secretary of the Treasury be, and he is hereby, authorized and directed to transport, free of charge, silver coins when requested to do so: *Provided*, That an equal amount in coin or currency shall have been deposited in the Treasury by the applicant or applicants; and that there is hereby appropriated \$10,000, or so much thereof as may be necessary, for that purpose, and that the same be available from and after the passage of this act.” [22 St. 312.]

“Hereafter whenever it is practicable contracts for the transportation of moneys, bullion, coin, notes, bonds, and other securities of the United States, and paper shall be let to the lowest responsible bidder therefor, after notice to all parties having means of transportation.” [23 St. 204.]

SECT. 3654. — By St. March 3, 1875, ch. 131, § 4 (18 St. 402), this provision —

“was intended and shall be deemed and held to limit the compensation to be allowed to any disbursing officer who disbursed moneys appropriated for and expended in the construction of any public building to three-eighths of one per centum for said services.”

SECT. 3656. — 19 St. 143, ch. 287, § 1, directs the Secretary of the Treasury to discontinue from Sept. 30, 1876, the depositories at Buffalo, Santa Fé, and Pittsburgh 18 St. 85, ch. 328, § 1 (as amended by 18 St. 355), limited the compensation to the depositories at Buffalo, Louisville, and Pittsburgh. See 8 Ct. Cl. 217, 233, 235; 10 Id. 229.

SECT. 3657. — By St. Aug. 7, 1882, ch. 433 (22 St. 306) —

“Any disbursing agent who has been or may be appointed to disburse any appropriation for any United States court-house and post-office, or other building or grounds, not located within the city of Washington, shall be entitled to the compensation allowed by law to collectors of customs for such amounts as have been or may be disbursed.”

SECT. 3659. — *Angarica v. Bayard*, 127 U. S. 255. 19 St. 58 transfers the custody of securities held in trust for certain Indian tribes from the Secretary of the Interior to the United States Treasurer. By 21 St. 70 and 21 St. 131, ch. 85, § 6, said Secretary may deposit Indian trust funds in the Treasury, and interest is to be paid semi-annually thereon. This section relates only to trusts which the executive cannot interfere with or dispose of without further legislation, and does not apply to such portions of the awards under the Spanish Claims Commissions as were temporarily reserved and invested by the Secretary of State to meet the expenses of the commission, unless paid by Spain. *United States v. Bayard*, 4 Mackey, 310.



## TITLE XLI.

## APPROPRIATIONS.

SECT. 3660. — See note, § 414. By the appropriation of a stated amount for a specified purpose, Congress merely authorizes that amount to be applied to the purpose indicated, and does not designate a specific parcel of money. *Hukill's Case*, 16 Ct. Cl. 562; 16 A. G. Op. 214. This provision and later sections of this title confine the estimates for appropriations, by the heads of departments, to expenditures required under existing laws and those required for the public service during the ensuing fiscal year. *Wilder's Case*, 16 Ct. Cl. 528; *Pitman v. United States*, 20 Id. 253, 256; *Conn. Mut. Life Ins. Co. v. United States*, 21 Id. 195. But when an appropriation is made for a general purpose contemplating many acts to be done by an executive department, its agency is general within those limits. *Leavitt v. United States*, 34 F. R. 623. See *Minis v. United States*, 15 Pet. 423; *Cook v. Hamilton County*, 6 McLean, 112; *Collins v. United States*, 15 Ct. Cl. 22.

SECT. 3661. — 16 A. G. Op. 128.

SECT. 3662. — See note, § 170. A statute allowing a fixed annual salary to an officer without limit as to time is not abrogated or suspended by a mere appropriation of a less amount for a particular year. *United States v. Langston*, 118 U. S. 389; 21 Ct. Cl. 10; *State v. Steele*, 57 Texas, 200; *Collins's Case*, 15 Ct. Cl. 22. But it is otherwise when the later appropriation is expressly made as "full compensation" (*United States v. Fisher*, 109 U. S. 143; *United States v. Mitchell*, Id. 146); or whenever it contains words which by clear implication repeal the previous law. *Strong v. United States*, 34 F. R. 17, 22. And if the existence of the office depends upon annual appropriations, the incumbent cannot prolong it by continuing to perform its duties. *Beaman's Case*, 19 Ct. Cl. 5; *Peden's Case*, 21 Id. 189; *Bradley's Case*, 98 U. S. 104; 13 Ct. Cl. 166. So in hiring a building, the Postmaster-General has authority to bind the government only for the current fiscal year. *Conn. Mutual Life Ins. Co. v. United States*, 21 Ct. Cl. 195. A public officer may recover the lawful compensation of his office, although he has accepted a less amount and receipted in full therefor. *Adams v. United States*, 20 Ct. Cl. 115. Executive officers can neither increase nor diminish a salary established by statute. *Dyer v. United States*, 20 Ct. Cl. 166.

SECT. 3663. — "Plan" in the fifth line changed to "plans" by 19 St. 249. See note, § 3733.

SECT. 3669. — See note, § 414. By 19 St. 176, ch. 289, § 4, the estimates for appropriations for the Indian service are to be so presented as to show the amounts required for each of the agencies in the several States or Territories, and for said States and Territories respectively. 21 St. 458, ch. 134, provides for the annual estimates of the District of Columbia. See also 20 St. 102, ch. 180, § 3; 21 St. 155, ch. 121, § 2. By 18 St. 85, ch. 328, § 4, and 21 St. 155, the Secretary of the Treasury is to submit annually to Congress detailed estimates of appropriations required for the expenses of the national loan. The provision of § 5 of this act that balances for which reappropriation may be needed are to be reported to Congress was repealed by 20 St. 130, ch. 191, § 4.



SECT. 3672. — See note, § 3618; 15 A. G. Op. 323. 19 St. 249 inserts after "kind," in the third line of this section:—

"Except materials, stores, or supplies sold to officers and soldiers of the Army, or to exploring or surveying expeditions authorized by law."

SECT. 3673. — See note, § 177; 15 A. G. Op. 196. 20 St. 167, ch. 312, authorizes the Secretary of the Navy to issue his requisitions for advances to disbursing officers and agents of the Navy under a "General account of advances."

SECT. 3674. — St. Feb. 25, 1882, ch. 16 (22 St. 4), provides:—

"That the Postmaster-General may, by appointment under his hand and official seal, delegate to the Third Assistant Postmaster-General authority to sign in his stead all warrants, registered and countersigned by the Auditor of the Treasury for the Post-Office Department, for the payment of money from the public Treasury on account of the postal service.

"SEC. 2. That warrants signed by the said Third Assistant Postmaster-General shall be in all cases of the same validity as if they had been signed by the Postmaster-General himself."

SECT. 3678. — See notes, §§ 167, 3620.

SECT. 3679. — 15 A. G. Op. 124, 151, 271. This section and § 3732 are to be construed together. *Id.* 209. By St. June 22, 1874, ch. 388 (18 St. 144), no contract is to be made thereafter for the rent of any building, or part thereof in Washington not then in use by the government for its purposes, until an appropriation therefor is expressly made by Congress. 19 St. 370, ch. 106, contains a like provision as to buildings in the District of Columbia, which is to be "regarded as notice to all contractors or lessors of any such building or any part of building." This act is violated by hiring a building to be used as an office by the officer assigned to the duty of taking charge of the construction of the State, War and Navy Department building. 15 A. G. Op. 274. See also 21 St. 210, ch. 225. By 18 St. 420, ch. 132, § 6, appropriations for Indian supplies are not to be exceeded in any year.

See note, § 3662. Sects. 3679, 3732, apply to the public service in general and must yield to special provisions relating to a particular department. *New York Central R. Co. v. United States*, 21 Ct. Cl. 468; 15 A. G. Op. 209, 274. Sects. 3679, 3732 should be construed together. 15 A. G. Op. 209. The exception contained in § 3732, in favor of contracts or purchases in the War and Navy Departments for clothing, &c., withdraws such contracts or purchases from the prohibition of this section. 15 A. G. Op. 124; *Bradley v. United States*, 98 U. S. 104; *Leavitt v. United States*, 34 F. R. 626. This section yields to the special authority conferred upon the Postmaster-General to enter into contracts for carrying the mails. A contract made by him under § 3956 for postal-car facilities, the liability of government being dependent upon future appropriations, is valid, and becomes operative upon the happening of the contingency. If such a contract does not exceed the appropriation, it will be valid although the money appropriated may be used. *New York Central R. Co. v. United States*, 21 Ct. Cl. 468. A lease of a building by the post-office department for a term of years, founded on an annual appropriation, binds the government only until the end of that year, with a future option in it from year to year till the end of the lease. *McCollum v. United States*, 17 Ct. Cl. 92. A written statement by a paymaster of the Army that he believes an account to be correct, and that he would pay it if he had public funds available for the purpose, does not involve the government in any contract for the future payment of money in excess of the appropriations. 15 A. G. Op. 271. Persons contracting with the government for partial services under general appropriation acts are not bound to know the condition of the fund appropriated as shown by the books of the Treasury or of the department with which he is negotiating. *Dougherty v. United States*, 18 Ct. Cl. 496.

SECT. 3680. — See note, § 56.



SECT. 3682. — 15 A. G. Op. 434. The words "contingent," "incidental" and "miscellaneous," as used in appropriation bills to qualify the word "expenses," have a technical meaning and are limited to the minor and unimportant disbursements incidental to the business of a department, which cannot well be foreseen, and which it would be useless to specify more accurately. Such appropriations are not to be used for clerk hire. *Dunwoody v. United States*, 22 Ct. Cl. 269.

SECT. 3683. — The words "any articles" are substituted for "books, periodicals, pictures, or engravings, or other thing" in the cited act. 1 Com. D. 112. St. Aug. 4, 1886, ch. 902 (24 St. 235), makes provision and appropriation, with actual necessary expenses —

"To enable the Secretary of the Treasury to employ a suitable person to inspect all public buildings and examine into their requirements for furniture and other furnishings, including fuel, lights, and other current expenses. . . . And all furniture now owned by the United States in other buildings shall be used as far as practicable, whether it corresponds with the present regulation plans for furniture or not."

St. July 7, 1884, ch. 332 (23 St. 196), contained a similar provision with the proviso —

"that a report in detail of all such inspection shall be made to the Secretary of the Treasury who shall annually transmit the same to Congress."

SECT. 3684. — St. Aug. 7, 1882, ch. 433 (22 St. 305), making an appropriation for government offices at Rochester, New York, contains the proviso —

"that no act passed authorizing the Secretary of the Treasury to purchase a site and erect a public building thereon shall be held or construed to appropriate money unless the act in express language makes such appropriations."

SECT. 3687. — See note, § 257. By 21 St. 210, ch. 225, the Secretary of the Treasury is to make to Congress each year a statement giving the amount received under this section, and a detailed statement of how the money appropriated thereunder has been expended.

SECT. 3689. — See note, § 1059. The first subdivision of this section, relating to the Southern Claims Commission, was repealed by 20 St. 178, ch. 329, § 1, par. 16; 21 St. 23, ch. 34, § 2.

EXECUTIVE, Cl. 1. The abandoned and captured property act did not repeal the confiscation act of March 3, 1862. *United States v. Winchester*, 99 U. S. 372. It did not confiscate or obliterate the property of the original owner, though disloyal, but merely made the government a trustee. *United States v. Klein*, 13 Wall. 128; *Rice v. United States*, 122 U. S. 619. Under it a factor, who has simply made advances on the property, is not the "owner." *United States v. Villalonga*, 23 Wall. 35. A corporation may be such owner. *United States v. Home Ins. Co.*, 22 Wall. 99. An administrator's proof of his own loyalty satisfies the requirement of proof of the owner's loyalty. *Carroll v. United States*, 13 Wall. 151; 14 A. G. Op. 515.

The owner must look for indemnity to the government, and not to the captors or special agents of the Treasury to whom they delivered the captured property. *Lamar v. Browne*, 92 U. S. 187. The government is not liable when the property was not captured, seized, or sold, pursuant to the statute and the proceeds were not paid into the Treasury. *Spencer v. United States*, 91 U. S. 577. And the presumption that public officers have done their duty does not warrant the inference that property delivered by a captor to a Treasury agent was sold and the proceeds covered into the Treasury. *United States v. Ross*, 92 U. S. 281; 14 A. G. Op. 515. It is for the government to plead its counterclaim, if any, in the Court of Claims, and not attempt to deduct it when the amount decreed is demanded. *United States v. O'Grady*, 22 Wall. 641; see *United States v. Alexander's Cotton*, 2 Wall. 404.



CL. 3. An action lies under this provision to recover back a tax on land illegally collected under the direct-tax laws. *Seabrook v. United States*, 21 Ct. Cl. 39; *Simons v. United States*, 19 Id. 601.

Under "The Treasury Department," the subdivision as to expenses of National Loan was repealed by 18 St. 85, ch. 328, § 4. By 19 St. 249, "§ 3441" was substituted in place of the last fifteen words of this subdivision.

As to refunding internal revenue taxes illegally collected, see *White v. Arthur*, 10 F. R. 80, 88; *Clinkenbeard v. United States*, 21 Wall. 65; *Philadelphia v. Collector*, 5 Id. 720; *Dorsheimer v. United States*, 2 Ct. Cl. 103. Upon the subdivision "Redemption of Stamps," see note, § 3426.

The subdivision as to "Distributive shares of fines, penalties, and forfeitures (customs)," was abolished by 18 St. 186, ch. 391, § 2; see note, § 3090; *Re Jayne*, 28 F. R. 422; *Hahn's Case*, 14 Ct. Cl. 305.

As to the next clause, providing for repayment to importers of excess of deposits, see note, § 989. St. Aug. 5, 1882, ch. 390 (22 St. 260), provides:—

"For repayment to importers the excess of deposits for unascertained duties, or duties or other moneys paid under protest, including interest and costs in judgment cases, three hundred thousand dollars, which sum is hereby made available for the payment of all claims to which the appropriation is applicable which are not payable from the permanent annual appropriation provided for in § 3689 of the Revised Statutes: *Provided*, That no portion of this appropriation shall be expended for the payment of claims known as 'charges and commissions cases.'"

St. Aug. 5, 1882, ch. 389, § 85 (22 St. 256), provides:—

"That from and after July 1, 1882, and of each year thereafter the Secretary of the Treasury shall cause all unexpended balances of the permanent and indefinite appropriations for collecting the revenue from customs which shall have remained upon the books of the Treasury for two fiscal years to be carried to the surplus fund and covered into the Treasury. And it shall be the duty of the Secretary of the Treasury to include in his next estimates to Congress, and annually thereafter, a statement specifying in detail the number and class of officers and employees of every grade and nature, with the rate of compensation to each, that may in his judgment be necessary to properly conduct the business of collecting the revenue at each port of entry in the United States, together with an estimate of the amounts required for contingent expenses at each of said ports, and for such additional expenses of the service as cannot be otherwise specifically provided for."

Under the "War Department," (1) As to "Bounty to Soldiers," see *Philbrook v. United States*, 8 Ct. Cl. 523. The time limited by the cited act of 1866, for filing claims for additional bounty, was extended to Jan. 30, 1875, by 18 St. 79, ch. 303, and to July 1, 1880, by 19 St. 74, ch. 166. As to bounty to colored soldiers, see 20 St. 377, ch. 182. In the second subdivision, relating to "National Asylum," 18 St. 319 substituted "home" for "asylum" wherever it occurs in this clause; and the subdivision was repealed by 18 St. 343, ch. 129, § 1, par. 4. See 20 St. 377, ch. 182, § 1, par. 7. By 24 St. 251, the estimates for the support of the Home for Disabled Soldiers are to be submitted by items. St. Oct. 2, 1888, ch. 1069 (25 St. 543), provides —

"shall apply to all appropriations made for the maintenance of the National Home for Disabled Volunteer Soldiers: *Provided further*, That it shall be the duty of the managers of said Home, on or before the first day of October in each year, to furnish to the Secretary of War estimates, in detail, for the support of said Home for the fiscal year commencing on the first day of July thereafter, and the Secretary of War shall annually include such estimates in his estimates for his Department."

In the last subdivision, the words "Laborers, workmen, and mechanics," are to receive a broad and liberal construction, and include all who are employed and paid by the day, though, in common parlance, they may not be included within them. 14 A. G. Op. 128.

SECT. 3690. — A similar provision in an act of 1795 is construed in 2 A. G. Op. 442.



SECT. 3691. — 7 A. G. Op. 1, 14. St. Aug. 31, 1852, ch. 108, § 10 (10 St. 98), was treated as constructively repealed by the cited act of 1870. 2 Com. D. 1792.

By 18 St. 72, ch. 285, § 2, balances of appropriations for Quartermaster's and Commissary Departments prior to July 1, 1872, are to be carried to the surplus fund. By St. June, 20, 1874, ch. 328, § 5 (18 St. 85, see 24 St. 288; 15 A. G. Op. 357), the Secretary of the Treasury, from July 1 of each year, is to cause all unexpended balances of appropriations which have remained on the books of the Treasury for two fiscal years to be carried to the surplus fund and covered into the Treasury, excepting certain permanent specific appropriations. Stipulations in Indian treaties made prior to June 20, 1874, for the payment of annuities, &c., are contracts within the meaning of the proviso to § 5 of St. 1874, and their fulfilment must not be prevented by it. 15 A. G. Op. 632. See also St. July 7, 1884, ch. 334, § 3 (23 St. 254), which act further provides:—

“That the Secretary of the Treasury shall, at the commencement of each session of Congress, report the amount due each claimant whose claim has been allowed in whole or in part to the Speaker of the House of Representatives and the presiding officer of the Senate, who shall lay the same before their respective Houses for consideration. And hereafter all estimates of appropriations and estimates of deficiencies in appropriations intended for the consideration and seeking the action of any of the committees of Congress shall be transmitted to Congress through the Secretary of the Treasury, and in no other manner; and the said Secretary shall first cause the same to be properly classified, compiled, indexed, and printed, under the supervision of the chief of the division of warrants, estimates, and appropriations of his Department.”

SECT. 3692. — See note, § 3618. 19 St. 249 inserts, in the third line, after “Army”—

“or for the sale of materials, stores, or supplies sold to officers and soldiers of the Army.”



## TITLE XLII.

## THE PUBLIC DEBT.

SECT. 3694. — See note, § 3513. 18 St. 371, ch. 130, § 11, authorized the Secretary of the Treasury, at such times as might be necessary, to give public notice of redemption, in coin, at par, of any 5-20 bonds, and provided that interest on the selected bonds should cease in three months after such notice. By 20 St. 265, ch. 24, four per cent bonds were to be exchanged at par for 5-20 and other bonds, and interest on the redeemed bonds might be allowed for three months.

SECT. 3696. — See note, § 3513.

SECT. 3697. — 21 St. 435, ch. 133, § 2, authorizes the Secretary of the Treasury to apply surplus money in the Treasury to redeem United States bonds, which, when redeemed, are to be cancelled.

SECT. 3699. — The Secretary may fix a currency price for disposing of gold within a limited period, although he may at any time change such period or the price. 15 A. G. Op. 413.

SECT. 3701. — *Tennessee v. Whitworth*, 117 U. S. 136. This exemption applies to United States notes issued under the Loan and Currency Acts of 1862 and 1863. *Bank v. Supervisors*, 7 Wall. 26. This provision is complied with, as to State taxation, by exempting the bonds as issued, and their par value, instead of their market value, may be deducted from the personal estate. *People v. Commissioners*, 76 N. Y. 64. The Ohio statute, providing that the statement of each person required to list property, shall set forth "the monthly average amount or value for the time he held or controlled the same, within the preceding year, of all moneys, credits, or other effects, within the time invested in, or converted into bonds or other securities of the United States," does not conflict with this section. *Shotwell v. Moore*, 45 Ohio St. 632; 129 U. S. 590.

SECT. 3702. — This applies only to destroyed or defaced interest-bearing bonds, and not to coupons destroyed or defaced after separation from the bonds. 15 A. G. Op. 438.

SECT. 3705. — A registered bond, called in for redemption, and proved to have been lost, may be paid upon a bond of indemnity being thus given. 15 A. G. Op. 468.

SECT. 3708. — This penalty can be recovered only by a *qui tam* action brought by the informer, and not by indictment. *United States v. Laescki*, 29 F. R. 699.



## TITLE XLIII.

## PUBLIC CONTRACTS.

SECT. 3709. — See further note, § 1059; 14 A. G. Op. 683; 15 Id. 226, 256, 419, 484, 545. By 18 St. 177, ch. 389, § 6, and 18 St. 420, ch. 132, § 9, bidders on account of the Indian service, in amounts exceeding \$5000, are to accompany their bids with certified checks for five per cent on the amount bid, such deposit to be forfeited in case the contract is awarded to the bidder and not duly executed. 20 St. 36, ch. 58, authorizes the Secretary of War to prescribe rules and regulations for bids for contracts under the War Department; and in place of the remainder of that act, St. March 3, 1883, ch. 120 (22 St. 487), substitutes the following:—

“And he may require every bid to be accompanied by a written guarantee, signed by one or more responsible persons, to the effect that he or they undertake that the bidder, if his bid is accepted, will, at such time as may be prescribed by the Secretary of War or the officer authorized to make a contract in the premises, give bond, with good and sufficient sureties, to furnish the supplies proposed or to perform the service required. If after the acceptance of a bid and a notification thereof to the bidder he fails within the time prescribed by the Secretary of War or other duly authorized officer to enter into a contract and furnish a bond with good and sufficient security for the proper fulfilment of its terms, the Secretary or other authorized officer shall proceed to contract with some other person to furnish the supplies or perform the service required, and shall forthwith cause the difference between the amount specified by the bidder in default in the proposal and the amount for which he may have contracted with another party to furnish the supplies or perform the service for the whole period of the proposal to be charged up against the bidder and his guarantor or guarantors, and the sum may be immediately recovered by the United States for the use of the War Department in an action of debt against either or all of such persons.”

*United States v. Odeneal*, 10 F. R. 617. The “public exigency” does not form an exception when the service is voluntarily continued after the emergency is past; but this provision is construed liberally, and the validity of the contract does not depend upon the degree of skill or wisdom exercised by the government officer. *United States v. Speed*, 8 Wall. 77; *Solomon v. United States*, 19 Id. 17; *Emery’s Case*, 4 Ct. Cl. 401; *Henderson’s Case*, Id. 75; *Mason’s Case*, Id. 495; *Child’s Case*, Id. 176; *Thompson’s Case*, 9 Id. 187. Time is of the essence of a contract for military supplies in time of war. *Jones’s Case*, 11 Id. 733; 15 A. G. Op. 253. It cannot be assumed that the public exigencies require the immediate performance of a contract which involves the expenditure of \$200,000, and requires years for its execution. 10 A. G. Op. 28. And if the performance of a contract entered into without advertisement is not to be entered upon until the lapse of three months thereafter, this is strong evidence that there was no public exigency which excused advertising. 15 A. G. Op. 538, 544. Unless there is an exigency in fact, or one has been declared to exist by the head of a department, a contract made without advertising is void. A modification which makes, in all essentials, a new contract, is prohibited by this section. *Schneider v. United States*, 19 Ct. Cl. 547. Where the public exigency requires it, a contract for the purchase of goods from a person who does not usually deal in such goods, and who does not possess them at the time of negotiating, is valid under this section, though no advertising was done. *Wentworth’s Case*, 5 Ct. Cl. 302.

A contract for “personal services” is one by which the individual contracted with renders his personal service to the government through its agents, thus himself becoming



the servant of the government. A contractor for the erection of a building is not such a servant. 15 A. G. Op. 235, 243, 253. The service contemplated is that of the party contracted with, and not personal service, which he shall employ. 15 A. G. Op. 538, 546. A contract for surveying land included in a reservation is a contract for personal services. 10 A. G. Op. 261.

The clause as to "open purchase or contract" does not apply to a contractor with the government. 15 A. G. Op. 253.

The government advertisement and the proposals in response thereto are not parts of the subsequent contract, the terms of which cannot be contradicted or varied thereby. *Harvey's Case*, 8 Ct. Cl. 501. It is competent to insert in an advertisement for proposals that the officer, who is to act upon them, reserves the right to reject any and all bids, if, in his judgment, the interests of the government requires it. 14 A. G. Op. 682. The head of a department who advertises for proposals for supplies therefor is the only judge of the matters of fact involved in their acceptance or rejection. 6 A. G. Op. 226. A contract made pursuant to advertisement cannot, by virtue of a condition in it, be renewed at the pleasure of the parties to it, no proposition to that effect being stated in the proposals. 13 A. G. Op. 174. A covenant in a contract to furnish "sufficient guards and escorts to protect the contractor while engaged in the fulfilment of this contract" is void under this section, where the advertisement and proposals refer only to such military protection as the necessities and interests of the service may admit. *McKee's Case*, 12 Ct. Cl. 504.

An officer who has let a contract without complying with the law requiring him to advertise for bids, cannot, by permitting performance under it to proceed to any extent, make such contract binding upon the government. 15 A. G. Op. 538, disapproving 10 Id. 416. See 6 Id. 406. A contract forfeited for non-compliance with its terms cannot be renewed unless an advertisement for proposals is made. 4 A. G. Op. 283. If the government allows a contract, entered into without the publication of the advertisement required by law to be made, to be performed without questioning its validity, a third person cannot be heard to allege that it was void at law. *Driscoll v. United States*, 13 Ct. Cl. 15, 569; 96 U. S. 421. An award of a contract by the issuance of an order of the Postmaster-General in the usual way and its transmittal to the bidder is sufficient, and, when received by the latter, is beyond recall. The government is bound, although it was contemplated that a more formal contract should be entered into, if the failure to enter into it was not attributable to the bidder. 15 A. G. Op. 226. It is within the discretion of the Postmaster-General to limit an advertisement for proposal for postage stamps to "steel plate engravers and plate printers," the purpose of the limitation being to confine the submission of proposals to such persons only as can satisfactorily furnish the articles needed. Where the advertisement requires the proposals to be made on blank forms furnished by the Department, the omission or erasure of immaterial words in a bidder's proposition does not vitiate his bid. *Id.*

SECT. 3711. — By 20 St. 131, ch. 194, the Commissioners of the District of Columbia are to make and enforce such rules relative to the sale of coal in the District as will insure full weight to the purchaser, and such building regulations as they deem advisable.

SECT. 3714. — See note, § 3709. St. Feb. 27, 1877, ch. 69 (19 St. 249), adds at the end of this section: —

"And all agents or contractors for supplies or service as aforesaid shall render their accounts for settlement to the accountant of the proper department for which such supplies or services are required, subject, nevertheless, to the inspection and revision of the officers of the Treasury in the manner before prescribed."

St. July 5, 1884, ch. 217 (23 St. 110; see also 24 St. 97), provides: —

"That hereafter all purchases of horses, mules, or oxen, wagons, carts, drays, ships and other seagoing vessels, also all other means of transportation, shall be made by the Quartermaster's Department.



by contract, after due legal advertisement except in cases of extreme emergency; and hereafter all purchases and contracts of every kind made by the Quartermaster's Department shall be promptly reported to the Secretary of War, for transmission annually to Congress: *Provided also*, That hereafter the Quartermaster-General and his officers, under his instructions, wherever stationed, shall receive, transport, and be responsible for all property turned over to them, or any one of them, by the officers or agents of any Government survey, for the National Museum, or for the civil or naval departments of the Government, in Washington or elsewhere, under the regulations governing the transportation of Army supplies, the amount paid for such transportation to be refunded or paid by the Bureau to which such property or stores pertain."

The approval of the Secretary of War is necessary to a contract made by a surgeon and medical purveyor for ice for a hospital. *Parish v. United States*, 8 Wall. 489. It is the duty of the Secretary of War to issue an order to suspend the payment of all claims against the government where there exists a well-grounded suspicion, or facts tending strongly to the conclusion, that contracts have been entered into and debts incurred contrary to law, and in disregard of the rights of the government. *United States v. Adams*, 7 Wall. 463.

SECT. 3716. — See note, § 3709. A contract made without advertisement and bearing date July 17, for hay to be delivered from Aug. 10 to Sept. 25, is valid, as that might be the most expeditious manner for the immediate procurement of that article under the circumstances. *McKee's Case*, 12 Ct. Cl. 504.

SECT. 3717. — St. March 3, 1875, ch. 133, § 2 (18 St. 452), provides, —

"That in all contracts for material for any public improvement, the Secretary of War shall give preference to American material; and all labor thereon shall be performed within the jurisdiction of the United States."

SECT. 3718. — 6 A. G. Op. 40, 99. By Res. No. 30 (20 St. 253), material for steam-boilers for the Navy may be purchased at the lowest market price without advertisement, provided that specifications are sent to the principal dealers and manufacturers, and the inspection and tests are public.

The lowest bid may be accepted, if it substantially complies with the law, notwithstanding it designates a different time for completing the contract than the advertisement fixed. 10 A. G. Op. 140. The words, "when time will permit," apply only to such supplies as the wants of the service make it necessary to purchase for immediate use when there is not time to abide the delay of advertising. They do not apply to contracts to run through three years, when there is on hand a sufficient quantity of the article for the present wants of the service. 4 A. G. Op. 475.

SECT. 3721. — 21 St. 509, ch. 147, provides for the purchase by advertisement of tobacco for the Navy. 22 St. 288, defining the words "ordnance" and "gunpowder" in this section, was repealed by 23 St. 159, § 4.

SECT. 3722. — 15 A. G. Op. 227. The cited act was regarded as superseding Res. 8 of March 27, 1854 (10 St. 592). 2 Com. D. 1830.

SECT. 3725. — The cited act was treated as superseding 9 St. 334, 621, and 5 St. 648, 703. Id.

SECT. 3732. — See notes, §§ 3662, 3679, 3714; *Collins's Case*, 15 Ct. Cl. 35; 15 A. G. Op. 124, 210, 239, 257. A person who enters into a contract with an officer of the government must look to the statute under which it is made, and see that his contract comes within the terms of the law. *The Floyd Acceptances*, 7 Wall. 666, 680. A contract made by a Navy agent for piles to be used in a dry-dock, to be delivered after Congress should make further appropriations, is not valid. 4 A. G. Op. 490. Under this section the head of a department may bind the government only in two cases: where the contract is expressly authorized by law, and where there is an appropriation already made large enough to fulfil it. In the first case, there is an express power to contract for



the work ; in the second, there is an implied power to contract for so much work as the appropriation will pay for. 9 A. G. Op. 18. This section and § 3679 should be construed together. Under this section the heads of the War and Navy Departments, in the absence of appropriations, are authorized to purchase or contract for clothing, subsistence, forage, fuel, quarters, or transportation, not exceeding the necessities of the current year. Sect. 3679 does not prohibit such contracts. 15 A. G. Op. 209. The exception in this section in favor of contracts or purchases in the War and Navy Departments for clothing, subsistence, &c., withdraws such contracts or purchases from the prohibition of § 3679, Rev. Stats., and they may be made though there is no appropriation adequate to their fulfillment, if the necessities of the current year are not exceeded. 15 A. G. Op. 124. If money has been appropriated for a specific object, the head of the department charged with the expenditure of it may use so much as may be necessary, with a view to the subsequent completion of the work if Congress shall provide therefor ; but he cannot bind the government to pay any sum in excess of that appropriated. 4 A. G. Op. 600. Where an appropriation has been made for a certain purpose, and a consul in a distant country is instructed by the Department of State to make purchases thereunder, such purchases are legal though it turns out a year and a half afterwards, when the consul's bill is presented, that the appropriation is exhausted. *Leavitt v. United States*, 34 F. R. 623. Where the authority to contract for a work in behalf of the United States depends wholly upon an appropriation made for the purpose, no officer thereof can create a liability therefor beyond the sum appropriated, and a contractor cannot recover more than was appropriated, no matter what the extent of his work. But where an act authorizes a thing to be done absolutely, and makes an insufficient appropriation or none at all, it is different. *Shipman v. United States*, 18 Ct. Cl. 138.

To be "authorized by law," a contract must appear to have been made either in pursuance of express authority given by statute, or of authority necessarily inferrible from some duty imposed upon, or from some power given to, the person assuming to contract on behalf of the government. 15 A. G. Op. 235.

SECTS. 3733, 3734. — St. March 3, 1875, ch. 130 (18 St. 371), restricts expenditures upon public buildings and provides that —

"no money shall be paid nor contracts made for payment for any site for a public building in excess of the amount specifically appropriated therefor."

See also 18 St. 275, ch. 476, which authorizes the Secretary of the Treasury to suspend work on public buildings and to set aside selection of sites.

SECT. 3735. — By 18 St. 286, Res. 6, this section does not —

"apply to, or include, mail-bags, mail locks and keys, postal cards, postage stamps, newspaper wrappers, or stamped envelopes."

SECT. 3736. — See note, § 356. Notwithstanding this provision, the United States may take mortgages of real estate to secure the payment of debts due to the government. *Neilson v. Lagow*, 12 How. 98, 107 ; *Van Brocklin v. Tennessee*, 117 U. S. 154. Where the legal title has previously been conveyed to trustees for the purpose of paying a debt due the United States, their purchase of the equitable title with money of the government merely relieves the land from incumbrance, and is not such a purchase of land as is forbidden by the statute. *Neilson v. Lagow*, *supra*. At the discretion of Congress, the United States may acquire and hold in any State, by voluntary arrangement or under the right of eminent domain, real estate needed in the execution of any of their powers. *Harris v. Elliott*, 10 Pet. 25 ; *Kohl v. United States*, 91 U. S. 367 ; *United States v. Fox*, 109 U. S. 513 ; *United States v. Great Falls Manuf. Co.*, 112 Id. 645 ; *Fort L. R. v. Lowe*, 114 Id. 531 ; 16 A. G. Op. 544. An act of Congress making an appropriation



“for permanent defences” at a particular point, does not authorize the purchase of a tract of land as a site for a proposed fort there. 11 A. G. Op. 201; *United States v. Tichenor*, 12 F. R. 415; 8 Sawyer, 142. See *Re Rugheimer*, 36 Id. 369.

SECT. 3737. — This act annuls the contract and not merely the transfer. *Wanless's Case*, 6 Ct. Cl. 123; see 15 A. G. Op. 151, 227; 16 Id. 62, 261, 277. And when a contract has been transferred contrary to the provisions of this section, a suit cannot be maintained for damages for the breach by the United States. *Wheeler's Case*, 5 Ct. Cl. 504. But a contract is not so vitiated by an attempted assignment that the parties to the latter cannot revoke it, and the contractor recover on the original contract after it has been fully performed. *Dougherty v. United States*, 18 Ct. Cl. 496. This statute does not attach turpitude to the assignment of a claim or the execution of powers of attorney, and applies alike to citizens and non-resident aliens. *Bailey v. United States*, 15 Ct. Cl. 490. If payment has been made upon a power of attorney which was in due form, the validity of the payment cannot be questioned. *Id.* If a contractor gives a power of attorney coupled with an interest in the performance of the contract, by which the person who held it was to sign and receipt for all moneys due under the contract, the case is within this section, and the government may, if it chooses, annul the contract. 15 A. G. Op. 235. No formal or written transfer is necessary to bring the case within the prohibition. *Francis's Case*, 11 Ct. Cl. 638. It applies to the voluntary transfer of a claim against the United States upon a contract to carry the mails, by way of mortgage when completed and made absolute by judicial sale. *St. Paul R. Co. v. United States*, 112 U. S. 733; 18 Ct. Cl. 405. If the right to receive the rent due for the use of real property is transferred by virtue of a decree of court transferring the legal title thereto, there is no assignment of the claim within this section. *Mitts v. United States*, 19 Ct. Cl. 79. But it refers only to claims against the United States which can be presented by the claimant to some department or officer thereof for payment, or prosecuted in the Court of Claims. It does not apply to the interests which co-partners or co-contractors have *inter sese* in a government contract (*Hobbs v. McLean*, 117 U. S. 567; *Field v. United States*, 16 Ct. Cl. 434); or to an assignment of a claim for money due under a government contract (*McCord's Case*, 9 Ct. Cl. 155); or to a claim against the Chinese indemnity fund under the control of the Department of State (*Hubbell v. United States*, 15 Ct. Cl. 546); or where goods are delivered and duly accepted by the United States, in which case action in *quantum meruit* may be maintained by the contractor for the assignee's use (*Wheeler's Case*, 5 Ct. Cl. 504); or where suit is brought on an implied contract for the impressment of the claimant's wagon train, and the government sets up that he was a sub-contractor and the contract void. *Mason's Case*, 14 Ct. Cl. 59. It is intended only for the protection of the United States. 16 A. G. Op. 278; 15 Id. 245. It does not embrace a lease of real estate to be used for public purposes, under which the lessor is not required to perform any service for the government, and has nothing to do, in respect to the lease, except to receive from time to time the rent agreed to be paid. *Freedman's Savings Co. v. Shepherd*, 127 U. S. 505. An agreement which obligates a stranger to a contract entered into between the United States and a contractor to perform one third of the contract by furnishing that proportion of the money, material, or labor necessary to its execution, and subjects him to that proportion of the loss, if there should be any, and authorizes him to receive the same proportion of the profits, is within the prohibition of this section. 16 A. G. Op. 277.

SECT. 3738. — This is in the nature of a direction by the government to its agents; it is not a contract between the government and its laborers, and does not preclude it from making contracts fixing a different length of time as a day's work. *United States v. Martin*, 94 U. S. 400; 10 Ct. Cl. 276; 16 A. G. Op. 58. See 13 Id. 29; 12 Id. 520. This section does not apply to mechanics, workmen, and laborers who are employed by one



who has a contract with the government. 14 A. G. Op. 37, 45. See note, § 3682. It repeals so much of the act of 1862 (12 St. 587) as required that the hours of labor in navy yards should conform to those of private establishments, but not that part of it which required that the rate of wages should conform to the rate paid at such establishments. *Averill v. United States*, 14 Ct. Cl. 200. But independently of that act, if an employe in the public service works twelve hours per day, is paid by the day and accepts the payment, he cannot be heard to allege that every eight hours constituted a day's work under this section. *Id.* See *Driscoll v. United States*, 13 Ct. Cl. 15.

SECT. 3739. — See note, § 2058. A member of Congress cannot be employed as counsel to assist the district attorney. 2 A. G. Op. 38. But neither this section nor § 3741 apply where a contract was entered into between the government and a person who was subsequently elected to Congress before the congress to which he was elected has met and before he has been sworn in as a member thereof. 15 A. G. Op. 280. A contract properly entered into is not affected by the subsequent election of the person who is a party to it to Congress. 5 A. G. Op. 697.

SECTS. 3740–3742. — 15 A. G. Op. 151, 280. 19 St. 249 inserts, after "member of," in each of these three sections, the words "or delegate to." A partnership of which a member of Congress forms part cannot contract with the government. But if such member withdraw therefrom, the contract may be consummated with the other partners. 4 A. G. Op. 47.

SECT. 3743. — 19 St. 249 inserts, after "United States," the words "the Second Comptroller of the Treasury of the United States, or the Commissioner of Customs, respectively, according to the nature thereof."

SECT. 3744. — See notes, §§ 512, 1059, 3709. This act is in the nature of a Statute of Frauds. The contracts, to bind the United States, must be actually reduced to writing, and signed by the contracting parties; the signing of the preliminary memoranda being insufficient. *Clark v. United States*, 95 U. S. 539; *Salomon v. United States*, 19 Wall. 17; *South Boston Iron Co. v. United States*, 118 U. S. 42; 18 Ct. Cl. 165; *Lindsey's Case*, 4 Id. 359; *Jones's Case*, 11 Id. 733; *Steele v. United States*, 19 Id. 181. But the contract is only made void as an executory contract, and if the goods have been actually received and used by the government, their value may be recovered in the Court of Claims. *Burchiel's Case*, 4 Ct. Cl. 549. The provision requiring contracts made by the departments named in this section to be in writing and signed, applies to such as are made in an emergency without advertising for proposals. *Cobb v. United States*, 18 Ct. Cl. 514, citing *Clark v. United States*, 95 U. S. 539, and overruling *Cobb & Co.'s Case*, 7 Ct. Cl. 470. This statute extends not merely to purchasing agents, but to all officers in the War, Navy, and Interior Departments, including the secretaries themselves. It embraces "every contract" made by them. *Danold's Case*, 5 Ct. Cl. 65; *Henderson's Case*, 4 Id. 75. It does not require that contracts made by the Post-office Department for the rent of buildings should be in writing. *Little v. United States*, 19 Ct. Cl. 272. Nor does it prevent a recovery for supplies in fact delivered to and used by the government. *Dougherty v. United States*, 18 Ct. Cl. 496; *Clark v. United States*, 95 U. S. 539. If a contract is executed according to this section, the party claiming under it need not show that it has been filed as is provided herein. *Power v. United States*, 18 Ct. Cl. 263. An oral agreement to accept corn instead of oats, a written contract calling for the latter, is void under this section. *Mitchell v. United States*, 19 Ct. Cl. 39. Compensation for work actually done under an oral agreement enlarging the work required by a written contract may be recovered on an implied assumpsit. *Wilson v. United States*, 23 Ct. Cl. 77.



## TITLE XLIV.

## THE PUBLIC PROPERTY.

PROPERTY of the United States is exempt by the Federal Constitution from taxation under the authority of a State. *Van Brocklin v. Tennessee*, 117 U. S. 151.

SECT. 3749. — See note, § 3684. St. March 3, 1879, ch. 182, § 1 (20 St. 377), authorizes the Secretary of the Treasury to lease, for not more than five years, such unoccupied and unproductive public property under his control as may not be authorized to be leased under existing law, and he is to report such leases annually to Congress.

The approval of the Secretary of the Treasury is necessary to the validity of such a sale made by the Solicitor. *United States v. Jonas*, 19 Wall. 598. Under §§ 3749, 3750, the Solicitor may, with the approval of the Secretary, rent or sell lands acquired in satisfaction of judgments on bonds of internal revenue collectors. 16 A. G. Op. 144, 386.



## TITLE XLV.

### PUBLIC PRINTING, ADVERTISEMENTS, AND PUBLIC DOCUMENTS.

SECT. 3758. — See note, § 3767. By 18 St. 85, the title of this officer is changed to Public Printer, —

“and he shall be deemed an officer of the United States, and said office shall be filled by appointment by the President by and with the advice and consent of the Senate.”

SECT. 3759. — As to the bond, see note, § 3767.

SECT. 3760. — See notes, §§ 504, 3767. 18 St. 288 requires this officer to keep and report a separate and exact account in detail of all expenditures for printing, mailing, and binding the Congressional Records. 21 St. 515, 516, provides for the distribution of the same and the semi-monthly index thereto.

SECT. 3762. — See note, § 3785. St. Jan. 13, 1883, ch. 23 (22 St. 402), provides: —

“That for extra work, ordered in emergencies, and performed on Sundays or legal holidays, or between the hours of midnight and eight ante meridian, excepting that done by regular organized night forces, the Public Printer is hereby authorized to pay such extra prices as the customs of the trade and the justice of the case may require.”

SECT. 3763. — See note, § 3767. By 19 St. 231, the Public Printer “shall pay no greater price for composition than 50 cents per thousand ems and 40 cents per hour for time work to printers and book-binders.” 24 St. 91 (see also *Id.* 607; 25 St. 57), grants fifteen days leave of absence, with pay, to employes in the Government Printing Office, and 25 St. 352 extends this to thirty days. As to the holidays for the employes, see 21 St. 304, Res. 22. The prices paid for folding books, pamphlets, speeches, and the Daily Record, are prescribed by 19 St. 143, ch. 287, and 21 St. 210, ch. 225. By 25 St. 57, the Public Printer is to rigidly enforce the provisions of the eight hour law in the Department under his charge. Additional pay to the night force is provided for by 25 St. 586, 926.

St. Feb. 1, 1888, ch. 4 (25 St. 18), provides: —

“That the sum of \$10,000, or so much thereof as may be necessary, is hereby appropriated to pay 25 per centum in addition to the amount paid for day labor to the employees of the Government Printing Office, such as compositors, pressmen, stereotypers, laborers, press-feeders, Record folders, and engineers, who were exclusively employed on the night forces of the Government Printing Office during the second session of the Forty-Ninth Congress: *Provided*, That in estimating the said 25 per cent, credit shall be given the Government for whatever has already been paid, or is now being paid to said employees above the rates for day work.”

SECT. 3764. — In respect of the matter provided for, the Congressional Printer takes the place of the former contract printer, and not of the Superintendent. 2 Com. D. 1847.

SECT. 3767. — The cited act of 1866 was deemed to supersede 10 St. 722. 2 Com. D. 1848. 19 St. 2 strikes out, in the sixth and seventh lines, “of the quality and in the quantity specified in the advertisement,” and adds in place thereof, “as specified in the schedule to be furnished to applicants by the Congressional Printer, setting forth in detail the quality and quantities required for the public printing.” By 19 St. 102, the Public Printer is to employ only thoroughly skilled workmen, and, in purchasing materials not already due under contracts, he is to invite proposals, either by advertisement or cir-



cular, as the Joint Committee on Public Printing may direct, and shall make contracts with the lowest responsible bidder, making return to said Committee; the President is to appoint, with the advice and consent of the Senate, as Public Printer, with that title, a practical printer versed in the art of book-binding, to take charge of and manage the government printing, who shall give bond, in the sum of \$100,000, to be approved by the Secretary of the Interior. By 19 St. 143, the office embraces also that known as Congressional Printer, where the latter title is employed in appropriation acts. See notes, §§ 3758, 3763.

St. Dec. 21, 1882, ch. 5 (22 St. 397), provides:—

“That it is lawful for the Public Printer to purchase in the open market, and without previous advertisement, such supplies as the Government Printing office may require, of ink, rollers, composition for making rollers, tapes, press-blankets, and lubricating oils; taking care that only the lowest market prices be paid for the quality of the articles purchased; and when practicable, issue circulars for bids from persons capable of supplying them.”

SECT. 3768. — See preceding note.

SECT. 3772. — See note, § 3679. The last twenty-nine words are new. 2 Com. D. 1849. In the first line “furnising” was changed to “furnishing” by 19 St. 249.

SECT. 3778. — See 24 St. 255, allotting the appropriation thereby made. 22 St. 564 authorizes the acceptance of private proposals for printing maps, &c., for the Census reports. St. Feb. 1, 1878, ch. 10 (20 St. 22), authorizes this Committee—

“to give permission to the Public Printer to purchase material in open market, whenever in their opinion it would not promote the public interest to advertise for proposals and to make contracts for the same: *Provided, however,* that the purchases authorized by this act shall not in any term of six months, exceed the sum of \$50 for any particular article required.”

SECT. 3779. — See notes, §§ 3732, 3798. Res. 2 of 21 St. 59 (Dec. 22, 1879), provides:—

“That the Secretary of the Treasury, at the request of a Senator, Representative, or Delegate in Congress, the head of a department or bureau, art association, or library, be, and he is hereby authorized to furnish impressions from any portrait or vignette which is now, or may hereafter be, a part of the engraved stock of the Bureau of Engraving and Printing, at such rates and under such conditions as he may deem necessary to protect the public interests.”

SECT. 3780. — 15 A. G. Op. 544. Amended by St. Feb. 12, 1883, ch. 43 (22 St. 414), so as to read:—

“And when the probable cost of the maps or plates accompanying one work or document exceeds \$1200, the lithographing or engraving thereof shall be awarded to the lowest and best bidder, after advertisement, by the Congressional Printer, under the direction of the Joint Committee on Public Printing. But the committee may authorize him to make immediate contracts for lithographing, or engraving whenever, in their opinion, the exigencies of the public service do not justify advertisements for proposals.”

SECTS. 3785, 3786. — 15 A. G. Op. 616. By 20 St. 5, members of Congress may have bound at the Government Printing Office, upon payment of the actual cost of such binding, any books, charts, or documents published by authority of Congress. St. June 20, 1878, ch. 359 (20 St. 206), provides that:—

“Hereafter no binding shall be done for any department of the government except in plain sheep or cloth, and no books shall be printed and bound except when the same shall be ordered by Congress or are authorized by law, except record and account books, which may be bound in Russia leather, sheep fleathers and skivers, when authorized by the head of a department, and this restriction shall not apply to the Congressional Library. And when any department shall require printing to be done the Public Printer shall furnish to such department an estimate of the cost by the principal items for said printing so called for; and he shall place to the debit of such department the cost of the same, on certification of the head of the department, Supreme Court, Court of Claims, or Library of Congress, that said printing is necessary; and the Public Printer is hereby authorized to employ three additional clerks of the third class, to make the estimates.”



20 St. 267 inserts in this act, after the words "Congressional Library," the following "nor to the Library of the Surgeon-General's Office." 20 St. 323 further adds to this the clause: "nor to the library of the Patent Office, nor to the Library of the Department of State." The clause in the act of 1878 that "no books shall be printed and bound except when the same shall be ordered by Congress or are authorized by law," prohibits the practice which existed, under implied authority of law, of printing and binding reports made in the course of departmental business, and requires that for doing such work there must be express statutory authority. 16 A. G. Op. 57. 21 St. 46 provides that the necessary printing of the National Board of Health be done at the Government Printing Office, the cost not to exceed \$10,000 per annum. St. March 3, 1883, ch. 143 (22 St. 635), provides (see also 22 St. 334):—

"That there may be bound for each Senator, Representative, or Delegate in Congress, one copy of each book or document issued or ordered by authority of Congress during the term of service of such Senator, Representative, and delegate; but this provision shall not be construed as allowing any binding as aforesaid to be done of any books or documents issued during any former Congress of which said Senator, Representative, or Delegate was not a member."

Res. 11 of April 15, 1886 (24 St. 341), provides:—

"That the reports of committees, the evidence and papers submitted therewith, or any part thereof, printed by order of Congress, may be reprinted at the Public Printing Office, at the instance of Senators, Representatives, and Delegates in Congress, upon payment in advance to the Public Printer of the cost thereof with ten per centum added, the same as if originally printed in the Congressional Record."

St. March 3, 1885, ch. 360 (23 St. 485; see also 22 St. 637; 24 St. 9, as to storage), appropriates —

"To enable the Public Printer, with the approval of the Secretary of the Interior, to purchase a site in the vicinity of the Public Printing Office, and to erect thereon a storehouse for the reception of certain material connected with the Public Printing Office, \$15,000; the storehouse to be erected under the supervision of the Architect of the United States Capitol; the cost of the site and building not to exceed the sum herein appropriated, which may be available from the passage of this act."

St. July 31, 1886, ch. 827 (24 St. 194; see also 25 St. 52), provides —

"That hereafter no printing shall be done in the Surgeon's-General's Office, and all printing for said office shall be done by the Public Printer, and charged to the appropriations made by law applicable to such service."

St. Aug. 4, 1886, ch. 902 (24 St. 255; see also Id. 543; 25 St. 547, 979), provides:—

"For printing and binding for Congress, including the proceedings and debates, \$910,000; and printing and binding for Congress chargeable to this appropriation, when recommended to be done by the Committee on Printing, shall be so recommended in a report containing an estimate of the cost thereof, together with a statement from the Public Printer of the amount and cost of work previously ordered by Congress within the fiscal year for which this appropriation is made (all reserve work shall be bound in sheep); and the heads of the Executive Departments, before transmitting their annual reports to Congress the printing of which is chargeable to this appropriation, shall cause the same to be carefully examined and shall exclude therefrom all matter, including engravings, maps, drawings, and illustrations except such as they shall certify in their letters transmitting such reports to be necessary and to relate entirely to the transaction of public business: . . . And hereafter the scientific reports known as the monographs and bulletins of the Geological Survey shall not be published until specific and detailed estimates are made therefor, and specific appropriations made in pursuance of such estimates; and no engraving for the annual reports, or for such monographs and bulletins, or of illustrations, sections, and maps, shall be done until specific estimates are submitted therefor and specific appropriations made based on such estimates: *Provided*, That these limitations shall not apply to the current fiscal year, nor to any of the reports, mineral resources, monographs, or bulletins that may have been transmitted for publication to the Public Printer prior to the passage of this act: *Provided further*, That all printing and engraving for the Geological Survey, the Coast and Geodetic Survey, the Hydrographic Office of the Navy Department,



and the Signal Service shall hereafter be estimated for separately and in detail, and appropriated for separately for each of said Bureaus. And no more than an allotment of one-half of the sum hereby appropriated shall be expended in the two first quarters of the fiscal year, and no more than one fourth thereof may be expended in either of the last two quarters of the fiscal year, except that, in addition thereto, in either of said last quarters, the unexpended balances of allotments for preceding quarters may be expended."

SECT. 3789. — St. July 7, 1884, ch. 332 (23 St. 227), provides, —

"That it shall not be lawful for the head of any Executive Department or of any Bureau, branch, or office of the Government, to cause to be printed, nor shall the Public Printer print, any document or matter of any character whatever except that which is authorized by law and necessary to administer the public business, nor shall any Bureau officer embrace in his annual or other report to be printed any matter not directly pertaining to the duties of his office as prescribed by law,

"That the Joint Committee on Public Printing is hereby instructed to examine into the numbers printed into the various documents, reports, bills, and other papers published by order of Congress, or of either House thereof, and of the Congressional Record, and to report a bill in December next, making such reductions in the numbers and cost of printing, and such changes and reductions in the distribution of said publications as they may deem expedient with a report giving their reasons therefor; and that the said committee is also instructed to investigate the printing and binding for the Executive Departments, executed at the Government Printing Office and at the branch printing offices and binderies in the various Departments and report a bill in December next, making such reductions in expenses and imposing such checks as they may deem expedient, with a report giving their reasons therefor; and said committee is further instructed to make any other investigations calculated in their opinion to reduce the cost of the public printing, and report the result thereof; and the said committee is hereby authorized to summon and to examine experts and witnesses, and to call upon the heads of Executive Departments and the Public Printer for such information regarding the preceding matters as they may desire; and any expenses necessarily incurred in making the investigations aforesaid shall be defrayed equally from the contingent funds of the two Houses of Congress."

SECT. 3790. — See note, § 3785.

SECT. 3797. — As to blanks and printed or engraved matter supplied to postmasters by the Postmaster-General for the money-order business, and estimates therefor by the Public Printer and the Chief of the Bureau of Engraving and Printing of the Treasury Department, see 22 St. 527, § 2.

SECT. 3798. — By 18 St. 204, ch. 455, § 1, par. 1, the Congressional Printer is to print —

"Only such limited number of the annual reports of the Executive Departments and necessary accompanying reports of subordinates, as may be deemed necessary for the use of Congress: *Provided* that no expensive maps or illustrations shall be printed without the special order of Congress."

In paragraph 5 the words "Chief of the Bureau of Statistics" is substituted for "Special Commissioner of the Revenue," by 18 St. 319.

SECT. 3800. — See note, § 510. 20 St. 13 provides for the printing and distribution of the Biennial Register.

SECT. 3801. — By 22 St. 642, Res. 24, the Congressional Directory and Congressional Record may be printed and sold at cost. By 22 St. 390, Res. 61, the Public Printer is to print fifty additional copies of the Congressional Record and forward the same to State and Territorial libraries, free of charge. 23 St. 273 provides for the distribution of the Congressional Globe, and directs the Secretary of the Interior to report to Congress the libraries to which these documents are forwarded, and the number of volumes delivered to each.

SECT. 3802. — "Appropriation" changed to "appropriation" in first line by 19 St. 250.

SECT. 3803. — By 25 St. 156, § 5, the Secretary of State is to provide for the daily publication by the Public Printer of proceedings of the arbitration conference with certain foreign nations.



SECT. 3807. — The provision as to an alphabetical index was repealed by 18 St. 404, § 9, which provides that the Congressional Printer shall print the laws from the stereotype plates of the edition, prepared under the direction of the Department of State, with the index thereof.

SECT. 3808. — The words "and postal conventions" are new. 2 Com. D. 1856.

SECT. 3809. — By Res. 31, 21 St. 306, the Public Printer, upon receiving the notice hereby required, is to furnish to all applicants copies of bills and reports and other public documents thereafter printed by order of Congress, and distributed from the Document Rooms of the Senate and House on said applicants paying the cost of such printing with 10% added.

SECT. 3811. — 18 St. 319 changes "Secretary of the Treasury" to "Comptroller of the Currency," and adds, after "banks" in the second line, the words "and banks under State and Territorial laws."

SECT. 3813. — See note, § 3801.

SECTS. 3814, 3822. — See note, § 414.

SECT. 3821. — By 22 St. 335, the Public Printer is to keep an account of the actual cost of all printing and binding done for the Patent Office, and state such cost in his annual report.

SECT. 3823. — See note, § 3941; 15 A. G. Op. 527, 616. This section does not prevent the Postmaster-General prescribing the condition that the publication shall be done for a less price than the prescribed rates. Wright's Case, 15 Ct. Cl. 80. It is doubtful whether so much of the act of 1867, as gave the clerk of the House of Representatives power to make contracts on behalf of Executive Departments, was permanent in its nature within the meaning of § 5595. 15 A. G. Op. 527. See note, § 3941.

SECT. 3826. — See notes, §§ 65, 67, 853, 3941; 14 A. G. Op. 576; 15 Id. 282, 594. By St. March 3, 1875, ch. 128, § 1, par. 2 (18 St. 340), the mail-lettings for Maryland, Virginia, and the District of Columbia are to be advertised in not more than one newspaper published in the District of Columbia, and at prices satisfactory to the Postmaster-General, not exceeding the customary rates paid in Washington for ordinary commercial advertisements, and so much of § 3826 as refers to the publication of advertisements in newspapers is repealed, and the Postmaster-General is to cause an advertisement of the mail-lettings of each State and Territory to be posted conspicuously, for at least sixty days before the time of such letting, in each post-office therein. It is discretionary with each head of department, whether he will make the publication referred to in this section in one or more papers of the District of Columbia. 14 A. G. Op. 576; 103 U. S. 721. St. July 12, 1876, ch. 179, § 1 (19 St. 78), repeats this last provision, and adds that no other advertisement of such lettings shall be required as to general mail-lettings. St. July 31, 1876 ch. 246 (19 St. 102), provides, —

"That all executive proclamations, and all treaties required by law to be published, shall be published in only one newspaper the same to be printed and published in the District of Columbia and to be designated by the Secretary of State and in no case of advertisement for contracts for the public service shall the same be published in any newspaper published and printed in the District of Columbia unless the supplies or labor covered by such advertisements are to be furnished or performed in said District of Columbia."

The advertising of mail-lettings is further regulated by St. May 17, 1878, ch. 107 (20 St. 61), § 4 of which act provides that post-office advertisements, notices, proposals, and advertising, are to be paid for at a price not exceeding the commercial rates. See also 20 St. 206, § 1, par. 6. St. Jan. 21, 1881, ch. 25 (21 St. 317), provides that all advertising required to be done in the District of Columbia by any department shall be given to one daily and one weekly newspaper of each of the two principal political parties, and to one daily and one weekly neutral newspaper: provided that the regular commercial



rates of these newspapers be not exceeded, and that no advertisement be paid for unless published in accordance with § 3828. By St. July 5, 1884, ch. 234 (23 St. 157), as no newspaper is published in Alaska, the Postmaster-General may contract, under a miscellaneous advertisement for the necessary postal service there for the fiscal year ending June 30, 1885, without inviting proposals therefor by publication in a newspaper.

While § 853 (see note thereto) treats of the publication of government notices in general, this section treats of such notices when required to be published in the District of Columbia. Their joint effect was to allow the compensation fixed by § 853, unless, under § 3826 that was more than is paid by private individuals for like services. 18 St. 343, ch. 128, § 1, repeals § 3826 for every purpose connected with claims for such services. 15 A. G. Op. 594.

SECT. 3827. — 15 A. G. Op. 529. 18 St. 231, § 1, par. 1, repeats this provision.

SECT. 3828. — See note, § 3826. The authority to advertise may be by general order, as well as special. *United States v. Odeneal*, 10 F. R. 616. This provision extends to offices connected as specified wherever located. 16 A. G. Op. 616.



## TITLE XLVI.

### THE POSTAL SERVICE.

#### CHAPTER I.

##### POST-OFFICES AND POSTMASTERS.

**SECT. 3829.**—The power to discontinue a post-office and thereby vacate the office is incident to the power to establish it, unless its exercise is restrained by some provision in the acts of Congress. *Ware v. United States*, 4 Wall. 617, 632; *Ex parte Hennen*, 12 Peters, 261; *Perkins's Case*, 20 Ct. Cl. 438; *Embry v. United States*, 12 Ct. Cl. 455. By the civil-service act of 1883, § 6, cl. 2 (see note, § 1753), the Postmaster-General is to arrange in classes the several clerks and persons employed or in the public service at each post-office. The fact that a postmaster is appointed by the President with the advice and consent of the Senate, under a statute providing that he is to hold his office for four years, unless sooner removed by the President, does not interfere with the Postmaster-General's power to discontinue the office. If he exercises his power and discontinues the office, there can no longer be a postmaster at that place. *Ware v. United States*, *supra*. As to what constitutes a vacancy, see *United States v. Roberts*, 9 How. 501; *United States v. Pearce*, 2 McLean, 14; *Embry v. United States* 12 Ct. Cl. 455. If the issue is upon the neglect of the postmaster himself, it is not competent to give in evidence neglect in the assistant acting under him, as the relation of master and servant does not exist between the postmaster and his sworn assistant. *Dunlap v. Munroe*, 7 Cranch, 242.

**SECT. 3830.**—See note, § 3852. By 18 St. 23, the commissions of postmasters appointed by the President are to be made out and recorded in the Post-office Department, to bear the seal of that Department, but only after being signed by the President, and countersigned by the Postmaster-General. The reduction of a postmaster's office from a Presidential appointment, by a decrease of salary, to one of the fourth class, does not vacate the office and thus give the Postmaster-General the power of appointment. 16 A. G. Op. 18.

**SECTS. 3832, 3833.**—Sect. 2 of 12 St. 530 (1862), was omitted from the Revision upon the view that, being operative only during the civil war, for the exigency for which it was passed, it was superseded by the cited consolidated act of 1872. The revisers also suggested that § 305 of St. 1872 be omitted, upon the ground that laws thus devolving prosecutions for offences against United States laws on State tribunals are invalid, but this provision was incorporated in § 3833. 2 Com. D. 1885. Sect. 3833 does not make the State courts Federal courts for this purpose, and such suits instituted in the State courts are removable to the United States circuit court under § 2 of St. 1875. *New Orleans Nat. Bank v. Merchant*, 18 F. R., 841.

**SECT. 3834.**—By 22 St. 527, this section is made applicable to postal notes, as well as to money orders. By 19 St. 335, postmaster's bonds may, by the direction of the Postmaster-General, be approved and accepted, and the approval and acceptance signed by the First-Assistant Postmaster-General in the name of the Postmaster-General.

As to postmasters' bonds, see *P. G. v. Early*, 12 Wheat. 136; *United States v. Hodges*, 13 How. 478; *P. G. v. Norvell*, Gilpin, 106; *P. G. v. Rice*, Id. 554; *P. G. v. Fennell*, 1



McLean, 217; *P. G. v. Reeder*, 4 Wash. 678; *Dox v. P. G.*, 1 Peters, 118; *Locke v. P. G.*, 3 Mason, 446; *United States v. Roberts*, 9 How. 501; *Jones v. United States*, 18 Wall. 662; *United States v. Keebler*, 9 Id. 83; *United States v. Saylor*, 31 F. R. 543; *Alvord v. United States* 13 Blatch. 279; *United States v. Davis, Deady*, 294; *United States v. Morrison*, Chase Dec. 521; *United States v. Mason*, 2 Bond, 183; 15 A. G. Op. 471. Postmasters are not liable for the loss of letters through their employees' negligence. *Keenan v. Southworth*, 110 U. S. 474; *Fitzgerald v. Burrill*, 106 Mass. 446; *Dunlap v. Munroe*, 7 Cranch, 242; *Franklin v. Low*, 1 Johns. 396. A postmaster who robs a carrier of the contents of a bag which he has delivered to him, is, with his sureties, liable on his bond. *United States v. Jones*, 36 F. R. 759.

SECT. 3835. — *United States v. Kershner*, 1 Bond, 432. St. Feb. 4, 1879, ch. 45 (20 St. 281), adds to this section the following:—

“Hereafter, when a deficiency shall be discovered in the accounts of any postmaster, who after the adjustment of his accounts fails to make good such deficiency, it shall be the duty of the Sixth Auditor of the Treasury Department to notify the Postmaster-General of such failure, and upon receiving such notice the Postmaster-General shall forthwith deposit a notice in the post-office at Washington, District of Columbia, addressed to the sureties respectively upon the bonds of said post-master, at the office where he or they may reside, if known; but a failure to give or mail such notice, shall not discharge such surety or sureties upon such bond.”

SECT. 3836. — This section applies only where the office is vacant. *United States v. Wright*, 1 N. J. L. J. 4. The act of March 3, 1825, providing for releasing the sureties of a deputy postmaster, where suit is not brought within two years after a default, did not apply to a default which occurred before the passing of the act. *P. G. v. Rice, Gilpin*, 554. Under that act, suit was to be brought against the sureties of the postmaster within two years from the time the postmaster made default, or the statute barred the action against the government. *P. G. v. Fennell*, 1 McLean, 217; *United States v. Mark's Sureties*, 3 Wall. C. C. 358.

St. March 3, 1879, ch. 180, § 31 (20 St. 362), provides, —

“Any person performing the duties of postmaster, by authority of the President, at any post-office where there is a vacancy for any cause, shall receive for the term for which the duty is performed the same compensation to which he would have been entitled if regularly appointed and confirmed as such postmaster; and all services heretofore rendered in like cases shall be paid for under this provision.”

SECT. 3838. — Lack of demand under a bond for twenty years is a mere equitable presumption of payment and not an absolute limitation. *P. G. v. Rice, Gilpin*, 554. The limitation begins to run at the time when the law requires the moneys to be paid over, and not from the failure to pay the department's draft. *P. G. v. Fennell*, 1 McLean, 217; *United States v. Eddy*, 28 F. R. 227; *United States v. Marks*, 3 Wall. Jr., 358.

SECT. 3939. — St. March 3, 1885, ch. 342 (23 St. 386), in making an appropriation for rent, light, and fuel, provides, —

“That the Postmaster-General may in the disbursement of this appropriation, apply part thereof to the purpose of leasing premises for use for post-offices of the first, second, and third classes at a reasonable annual rental, to be paid quarterly for a term not exceeding five years; and whenever any building or part of a building under lease becomes unfit for use as a post-office, no rent shall be paid until the same shall be put in a satisfactory condition by the owner thereof for occupation as a post-office, or the lease may be cancelled, at the option of the Postmaster-General; and a lease shall cease and terminate whenever a post-office can be moved into a Government building.”

SECT. 3844. — The last clause of the cited act is here omitted as being covered by a general provision on that subject under Crimes. 2 Com. D. 1888. St. March 3, 1883, ch. 142 (22 St. 602), provides, —



"In order to ascertain the amount of the postal receipts of each office, the Postmaster-General may require postmasters to furnish the department with certified copies of their quarterly returns to the Auditor at such times and for such periods as he may deem necessary in each case."

SECT. 3845. — See note, § 3835.

SECT. 3847. — In the absence of a prohibition, a postmaster may deposit money received for postage with his own funds. *Trafton v. United States*, 3 Story, 646.

SECT. 3848. — *Boody v. United States*, 1 Wood. & M. 150.

SECT. 3852. — By § 5 of St. July 12, 1876, ch. 179 (19 St. 78) (repealing § 11 of 18 St. 231, ch. 456), postmasters are divided into four classes: the first class embracing those whose annual salaries are \$3,000 or more; the second class, those whose annual salaries are less than \$3,000, but not less than \$2,000; the third class, those whose annual salaries are less than \$2,000, but not less than \$1,000; the fourth class, all those whose annual compensation, exclusive of their commissions on the money-order business of their offices, amount to less than \$1,000. By § 6 —

"postmasters of the first, second, and third classes shall be appointed and may be removed by the President by and with the advice and consent of the Senate, and shall hold their offices for four years unless sooner removed or suspended according to law; and postmasters of the fourth class shall be appointed and may be removed by the Postmaster-General, by whom all appointments and removals shall be notified to the Auditor for the Post-office Department."

Sects. 7, 8, of this act provide in detail for the respective compensations of the four classes. By § 9 —

"the salaries of postmasters of the first, second, and third classes shall be re-adjusted by the Postmaster-General once in two years, and in special cases, on the application of the postmaster, as much oftener as the Postmaster-General may deem expedient."

By § 10, the Postmaster-General is to make all orders assigning or changing the salaries of postmasters in writing, and record them in his journal, and notify the change to the Auditor, &c. By § 11, offices at the intersection of mail-routes may be designated as distributing or separating offices. By § 12, no salary of any postmaster is to exceed \$4000, except that at New York, which remains at \$6000. Section 1 of 20 St. 140, ch. 259, provides, in part, as to the compensation of postmasters of the fourth class; that commissions may be withheld and the postmasters subjected to criminal penalties, when they make false returns; and restricts postmasters and others in the postal service as to the sale of stamps, cards, and envelopes, with penalties for violations of any of these provisions. *United States v. Williamson*, 26 F. R. 690. Aiders and abettors are included in the penalty for false returns. *United States v. Snyder*, 14 F. R. 554; 8 Id. 805, 3 McCrary, 377. A land-grant road carrying the mails without an express contract with the Postmaster-General was subject to the reductions of compensation ordered by § 1 of the acts of 1876 and 1878. *Jacksonville R. Co. v. United States*, 21 Ct. Cl. 155.

SECT. 3854. — *United States v. Vilas*, 124 U. S. 86. As to readjusting salaries, see 24 St. 308, and 22 St. 487. As to the compensation of postmasters under the act of 1845, see 4 A. G. Op. 391. In making the biennial readjustment, the Postmaster-General has no discretion, as it is a ministerial act. The statute is mandatory, and left to the discretion of the Postmaster-General when the first readjustment should be made, with the limitation that it must take place within two years. When the readjustment takes place, it only establishes the amount of the salary for two years thereafter, and can only be made when there are quarterly returns for two years preceding, on which it can be based. *United States v. Vilas*, 124 U. S. 86; *The Postmasters' Cases*, 12 Ct. Cl. 226. The journal in which the readjustments of the salaries of postmasters are recorded is not a judicial record to which absolute verity is ascribed, but evidence *aliunde* is competent to show a mistake in the date of an entry therein. *The Postmasters' Cases*, *supra*.



St. March 3, 1883, ch. 142 (22 St. 602), provides, —

"SEC. 2. That the compensation of postmasters of the fourth class shall be fixed upon the basis of the whole of the box-rents collected at their offices and commissions upon the amount of cancelled postage-due stamps (provided for in § 270 of the Revised Laws and Regulations, edition of 1879), and on postage stamps, official stamps, stamped envelopes, postal cards, and newspaper and periodical stamps cancelled on matter actually mailed at their offices, and on amounts received from waste paper, dead newspapers, printed matter, and twine sold, at the following rates, namely: On the first \$50 or less per quarter, one hundred per centum; on the next \$100 or less per quarter, sixty per centum; on the next \$200 or less per quarter, fifty per centum; and on all the balance, forty per centum, the same to be ascertained and allowed by the Auditor of the Treasury for the Post-Office Department in the settlement of the accounts of such postmasters upon their sworn quarterly returns: *Provided*, That when the compensation of any postmaster of this class shall reach \$250 for four consecutive quarters each, exclusive of commissions on money-order business, and when the returns to the auditor for four consecutive quarters shall show him to be entitled to a compensation in excess of \$250 per quarter, the auditor shall report such fact to the Postmaster-General, who shall assign the office to its proper class, and fix the salary of the postmaster as provided by section one of this act: *Provided further*, That in no case shall there be allowed to any postmaster of this class a compensation greater than \$250 in any one of the first, three quarters of any fiscal year, exclusive of money-order commissions, and in the last quarter of each fiscal year there shall be allowed such further sum as he may be entitled to under the provisions of this act, not exceeding for the whole fiscal year the sum of \$1000 exclusive of money-order commissions.

"SEC. 3. That the Postmaster-General shall make all orders relative to the salaries of postmasters; and any change made in such salaries shall not take effect until the first day of the quarter next following the order; and the auditor shall be notified of any and all changes of salaries.

"SEC. 4. That the salaries of postmasters of the first, second and third classes shall be readjusted by the Postmaster-General, the first adjustment (under this act) to take effect simultaneously with the reduction of the rates of postage, and thereafter at the beginning of each fiscal year; and the salary of the postmaster at Washington City, District of Columbia, shall be \$5000; and in no case shall the salary of any postmaster exceed the sum of \$6000, except in the city of New York, where the salary of the postmaster shall remain as now fixed by law, at \$8000 per annum."

SECTS. 3855, 3856. — See note, § 3852. In the fifth line of § 3856, "crease" changed to "increase" by 18 St. 319. A deputy-postmaster's salary, once fixed, cannot be increased prior to the Postmaster-General's executive act readjusting it and taking effect prospectively. *United States v. McLean*, 95 U. S. 750. The provision of § 3856 concerning the payment of a debt in subsidiary silver coins applies to officers of the government who receive its dues and pay its obligations. 16 A. G. Op. 138.

SECT. 3859. — By 23 St. 156, —

"the Postmaster-General is authorized to designate postmasters at money-order post-offices as disbursing officers for the payment of the salaries of officers and employees of the postal service, and for such other payments as postmasters are now authorized to make from postal revenues."

SECT. 3860. — See note, § 3839. Under § 3860, in connection with §§ 3679, 3732, the Postmaster-General has authority to bind the government for rent only for the fiscal year. *Conn. Mut. L. Ins. Co. v. United States*, 21 Ct. Cl. 195. See also *Campbell v. James*, 18 Blatch. 96; 2 F. R. 342.

St. March 17, 1882, ch. 41 (22 St. 49), amended by St. May 9, 1888, ch. 231 (25 St. 135), to read as follows, provides, —

"That the Postmaster-General be, and he is hereby, authorized to investigate all claims of postmasters for the loss of money-order funds, postal funds, postage-stamps, stamped envelopes, newspaper wrappers, and postal cards, belonging to the United States in the hands of such postmasters, resulting from burglary, fire, or other unavoidable casualty, and if he shall determine that such loss resulted from no fault or negligence on the part of such postmasters, to pay to such postmasters, or credit them with the amount so ascertained to have been lost or destroyed, and also to credit postmasters with the amount of any remittance of money-order funds or postal funds made by them in compliance with the instructions of the Postmaster-General, which shall have been lost or stolen while in transit by mail from the office of the remitting postmaster to the office designated as his depository, or after arrival at such depository office and before the postmaster at such depository office has become responsible therefor: *Provided*,



That no claim exceeding the sum of \$2000 shall be paid or credited until after the facts shall have been ascertained by the Postmaster-General and reported to Congress, together with his recommendation thereon, and an appropriation made therefor: *And provided further*, That this act shall not embrace any claim for losses as aforesaid which accrued more than fifteen years prior to March 17, 1882, and all such claims must be presented to the Postmaster-General within six months from such latter date, except claims for postal funds which may be received, considered and allowed, if presented within six months after the passage of this act, in cases where the postmaster had, at or about the time of the loss, made report thereof to the Post-Office Department or to an inspector or special agent of the Department; and no claim for losses which may hereafter accrue shall be allowed unless presented within six months from the time the loss occurred. <sup>1</sup>

"SEC. 2. That it is hereby made the duty of the Postmaster-General to report his action herein to Congress annually, with his reasons therefor in each particular case."

By St. March 3, 1885, ch. 342 (23 St. 385, 386), —

"postmasters are authorized, with the approval of the Postmaster-General, to assign at any time any clerk or employee of their respective post-offices to duty in any branch thereof: *Provided always*, That an employé shall be paid from money-order funds for such time as he is engaged in money-order work. . . . And whenever any building or part of a building under lease becomes unfit for use as a post-office, no rent shall be paid until the same shall be put in a satisfactory condition by the owner thereof for occupation as a post-office, or the lease may be cancelled, at the option of the Postmaster-General; and a lease shall cease and terminate whenever a post-office can be moved into a government building."

Without such statute or the Postmaster-General's authority, a postmaster cannot, at government expenses, employ clerks in the money-order department. *United States v. Chase*, 29 F. R. 616.

St. July 24, 1888, ch. 702 (25 St. 346), appropriates, —

"For rent, light, and fuel to post-offices of the third class, \$450,000: *Provided*, That there shall not be allowed for the use of any third-class post-office for rent a sum in excess of \$300, nor more than \$60 for fuel and lights in any one year.

"The Postmaster-General may hereafter allow rent, light, and fuel at the offices of third class in the same manner as he is now authorized by law to do in the case of offices of the first and second class: *Provided*, That no contract for rent for a third-class post-office shall be made for a longer period than one year, nor shall the aggregate allowance for rent made in any year exceed the amount appropriated for such purpose."

SECTS. 3863, 3864. — It is not competent for a court or jury to revise the Postmaster-General's decision. *United States v. Wright*, 11 Wall. 648; *Reeside v. United States*, 8 Id. 38.

SECT. 3863. — Neither a court nor jury can revise the decision of the Postmaster-General as to the allowance of extra compensation; and if he allows such compensation, his decision as to the manner of making it and its amount is also final. *United States v. Wright*, 11 Wall. 648.

SECT. 3864. — Where under the act of Feb. 28, 1861 (12 St. 177), for the discontinuance of postal service, when in the opinion of the Postmaster-General such service cannot, for any reason whatever, be safely maintained on any route or at any place, the Postmaster-General notified a contractor in one of the rebellious States of the "suspension" of his route; and that he would be held responsible for a renewal when the Postmaster-General should deem it safe to renew the service, and the contract provided for one month's pay if the service was discontinued or curtailed, it was held that the contractor was entitled to a month's service. *Reeside v. United States*, 8 Wall. 38.



## CHAPTER II.

## CARRIERS, BRANCH OFFICES, AND RECEIVING-BOXES.

SECT. 3865. — By 18 St. 231, letter carriers are not to be employed in places having less than 30,000 population, except where free delivery was then established. 20 St. 317, of which act §§ 3, 4, are amended by 22 St. 185, ch. 373, provides for two classes of letter carriers in cities of 75,000 population, and authorizes the Postmaster-General to establish a third grade known as auxiliaries, &c. This act further provides in § 4 that “no boxes for the collection of mail-matter by carriers shall be placed inside of any building except a public building or railroad-station;” and by § 5 that —

“Letter-carriers shall be employed for the free delivery of mail-matter, as frequently as the public convenience may require, at every place containing a population of 50,000 within the delivery of its post-office, and may be so employed at every place containing a population of not less than 20,000 within its corporate limits, and at post-offices which produced a gross revenue for the preceding fiscal year of not less than \$20,000 : *Provided*, This act shall not affect the free delivery in towns and cities where it is now established.”

By 23 St. 387, §§ 3–6, and 24 St. 220, provision is made for immediate delivery of letters specially stamped, &c., and persons making immediate delivery are to be considered in the postal service.

SECT. 3866. — By 20 St. 317 (cited *supra*), the carriers of the first class, who have been in service one year, receive \$1000 per annum; those of the second class receive \$800; carriers in cities of less than 75,000 receive \$850 salary; and the auxiliaries receive \$400 per year. St. Jan. 3, 1887, ch. 14, (24 St. 355), repealing all laws inconsistent therewith, provides: —

“That letter-carriers shall be employed for the free delivery of mail-matter, as frequently as the public business may require, at every incorporated city, village, or borough containing a population of 50,000 within its corporate limits, and may be so employed at every place containing a population of not less than 10,000, within its corporate limits, according to the last general census, taken by authority of State or United States law, or at any post-office which produced a gross revenue, for the preceding fiscal year, of not less than \$10,000 : *Provided*, This act shall not affect the existence of the free delivery in places where it is now established : *And provided further*, That in offices where the free delivery shall be established under the provisions of this act, such free delivery shall not be abolished by reason of decrease below 10,000 in population or \$10,000 in gross postal revenue, except in the discretion of the Postmaster-General.

“SEC. 2. That there may be in all cities which contain a population of 75,000 or more three classes of letter-carriers, as follows : Carriers of the first class, whose salaries shall be \$1000 per annum; of the second class, whose salaries shall be \$800 per annum; and of the third class, whose salaries shall be \$600 per annum.

“SEC. 3. That in places containing a population of less than 75,000 there may be two classes of letter-carriers as follows : Carriers of the second class, whose salaries shall be \$850 per annum, and of the third class, whose salaries shall be \$600 per annum.”

By 25 St. 844, —

“the Postmaster General may, when if in his judgment the good of the service so requires make contract for necessary supplies for the free-delivery service for a period not exceeding four years.”

22 St. 53, and 23 St. 156, 385, provide that portions of the amounts thereby appropriated —

“may be used, in the discretion of the Postmaster-General, for the establishment, under existing law, of the free-delivery system in cities where it is not now established.”



23 St. 60 allows to such carriers fifteen days leave of absence in each year without loss of pay, during whose absence substitutes may be employed, to be paid for services rendered at the rate of \$600 per annum. St. May 24, 1888, ch. 308 (25 St. 157), provides:—

“That hereafter eight hours shall constitute a day's work for letter-carriers in cities or postal districts connected therewith, for which they shall receive the same pay as is now paid as for a day's work of a greater number of hours. If any letter-carrier is employed a greater number of hours per day than eight he shall be paid extra for the same in proportion to the salary now fixed by law.”

SECT. 3867.—By 20 St. 355, § 1, cl. 6, “postal clerks, route agents, and mail route messengers shall not be required to wear uniform other than a cap or badge.”

SECT. 3868.—A letter deposited in one of these receiving boxes is “mailed” (as to notice of dishonor of a promissory note). *Casco Nat. Bank v. Shaw*, 10 Atl. Rep. 67. So is one delivered to a letter carrier. *Pearce v. Langfit*, 101 Penn. St. 507. St. March 3, 1887, ch. 388 (24 St. 569), provides:—

“That no boxes for the collection of mail-matter by carriers shall be placed inside of any building except a public building, or a building which is freely open to the public during business hours, or a railroad station.”

SECT. 3872.—See notes, §§ 3875, 3886. St. June 23, 1874, ch. 456 (18 St. 231), leaving § 3872 unaffected, further provides:—

“SEC. 5. That on and after January 1, 1875, all newspapers and periodical publications mailed from a known office of publication or news agency, and addressed to regular subscribers or news agents, postage shall be charged at the following rates: On newspapers and periodical publications, issued weekly and more frequently than once a week, two cents for each pound or fraction thereof and on those issued less frequently than once a week three cents for each pound or fraction thereof.

“SEC. 6. That on and after January 1, 1875, upon the receipt of such newspapers and periodical publications at the office of mailing, they shall be weighed in bulk, and postage paid thereon by a special adhesive stamp, to be devised and furnished by the Postmaster-General, which shall be affixed to such matter, or to the sack containing the same, or upon a memorandum of such mailing, or otherwise, as the Postmaster-General may, from time to time, provide by regulation.

“SEC. 7. That newspapers, one copy to each actual subscriber residing within the county where the same are printed, in whole or in part, and published, shall go free through the mails: but the same shall not be delivered at letter-carrier offices or distributed by carriers unless postage is paid thereon as by law provided.”

Sect. 5 of the act of 1874 and § 3872, are to be construed together, and newspapers deposited in an office within the post-office district in which the subscribers live, are chargeable at the rate of one cent a copy. 16 A. G. Op. 233.

The words “periodicals” refer to a printed literary paper, printed and published periodically in parts or numbers at definite intervals. Such a paper, when addressed to news agents or regular subscribers, is entitled, under § 5 of St. 1874, to pass through the mails at the rate of postage prescribed for periodical publications. 15 A. G. Op. 345.

St. June 9, 1884, ch. 73 (23 St. 40), provides:—

“That the rate of postage on newspaper and periodical publications of the second class, when sent by others than the publisher or news agent, shall be one cent for each four ounces or fractional part thereof, and shall be fully prepaid by postage-stamps affixed to said matter.”



## CHAPTER III.

## MAIL-MATTER.

SECT. 3875. — See note, § 44. St. March 3, 1879, ch. 180 (20 St. 358), provides, in part, as follows:—

“SEC. 7. That mailable matter shall be divided into four classes: First, written matter; Second, periodical publications; Third, miscellaneous printed matter; Fourth, merchandise.

“SEC. 8. Mailable matter of the first class shall embrace letters, postal cards, and all matters wholly or partly in writing, except as hereinafter provided.

“SEC. 9. That on mailable matter of the first class, except postal cards and drop letters, postage shall be prepaid at the rate of three cents for each half ounce or fraction thereof; postal cards shall be transmitted through the mails at a postage charge of one cent each, including the cost of manufacture; and drop letters shall be mailed at the rate of two cents per half ounce or fraction thereof, including delivery at letter-carrier offices, and one cent for each half ounce or fraction thereof where free delivery by carrier is not established. The Postmaster-General may, however, provide, by regulation, for transmitting unpaid and duly certified letters of soldiers, sailors, and marines in the service of the United States to their destination, to be paid on delivery.

“SEC. 10. That mailable matter of the second class shall embrace all newspapers and other periodical publications which are issued at stated intervals, and as frequently as four times a year and are within the conditions named in sections twelve and fourteen.

“SEC. 11. Publications of the second class except as provided in § 25, when sent by the publisher thereof, and from the office of publication, including sample copies, or when sent from a news agency to actual subscribers thereto, or to other news agents, shall be entitled to transmission through the mails at two cents a pound or fraction thereof, such postage to be prepaid, as now provided by law.

“SEC. 12. That matter of the second class may be examined at the office of mailing, and if found to contain matter which is subject to a higher rate of postage, such matter shall be charged with postage at the rate to which the inclosed matter is subject: *Provided*, That nothing herein contained shall be so construed as to prohibit the insertion in periodicals of advertisements attached permanently to the same.

“SEC. 13. That any person who shall submit, or cause to be submitted, for transportation in the mails any false evidence to the postmaster relative to the character of his publications, shall be deemed guilty of a misdemeanor, and, upon conviction thereof in any court of competent jurisdiction, shall for every such offence be punished by a fine of not less than \$100 nor more than \$500.

“SEC. 14. That the conditions upon which a publication shall be admitted to the second class are as follows: First, It must regularly be issued at stated intervals, as frequently as four times a year, and bear a date of issue, and be numbered consecutively. Second. It must be issued from a known office of publication. Third. It must be formed of printed paper sheets, without board, cloth, leather, or other substantial binding, such as distinguish printed books for preservation from periodical publications. Fourth. It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers; *Provided, however*, That nothing herein contained shall be so construed as to admit to the second class rate regular publications designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates.

“SEC. 15. That foreign newspapers and other periodicals of the same general character as those admitted to the second class in the United States may, under the direction of the Postmaster General, on application of the publishers thereof or their agents, be transmitted through the mails at the same rates as if published in the United States. Nothing in this act shall be so construed as to allow the transmission through the mails of any publication which violates any copyright granted by the United States.

“SEC. 16. That publishers of matter of the second class may without subjecting it to extra postage, fold within their regular issues a supplement; but in all cases the added matter must be germane to the publication which it supplements, that is to say, matter supplied in order to complete that to which it is added or supplemented, but omitted from the regular issue for want of space, time, or greater convenience, which supplement must in every case be issued with the publication.

“SEC. 17. That mail matter of the third class shall embrace books, transient newspapers, and periodicals, circulars, and other matter wholly in print (not included in section twelve), proof sheets, corrected proof sheets, and manuscript copy accompanying the same, and postage shall be paid at the rate of one cent for each two ounces or fractional part thereof, and shall fully be prepaid by postage stamps affixed to



said matter. Printed matter other than books received in the mails from foreign countries under the provisions of postal treaties or conventions shall be free of customs duty, and books which are admitted to the international mails exchanged under the provisions of the Universal Postal Union Convention may, when subject to customs duty, be delivered to addresses in the United States under such regulations for the collection of duties as may be agreed upon by the Secretary of the Treasury and the Postmaster-General.

"SEC. 18. That the term 'circular' is defined to be a printed letter, which, according to internal evidence, is being sent in identical terms to several persons. A circular shall not lose its character as such, when the date and the name of the addressee and of the sender shall be written thereon, nor by the correction of mere typographical errors in writing.

"SEC. 19. That 'printed matter' within the intendment of this act is defined to be the reproduction upon paper, by any process except that of handwriting, of any words, letters, characters, figures, or images, or of any combination thereof, not having the character of an actual and personal correspondence.

"SEC. 20. Thatailable matter of the fourth class shall embrace all matter not embraced in the first, second, or third class, which is not in its form or nature liable to destroy, deface, or otherwise damage the contents of the mail bag, or harm the person of any one engaged in the postal service, and is not above the weight provided by law, which is hereby declared to be not exceeding four pounds for each package thereof, except in case of single books weighing in excess of that amount, and except for books and documents published or circulated by order of Congress, or official matter emanating from any of the departments of the government or from the Smithsonian Institution, or which is not declared nonailable under the provision of § 3893 of the Revised Statutes, as amended by the act of July 12, 1876, or matter appertaining to lotteries, gift concerts, or fraudulent schemes or devices.

"SEC. 21. That all matter of the fourth class shall be subject to examination and to a postage charge at the rate of one cent an ounce or fraction thereof, to be prepaid by stamps affixed. If any matter excluded from the mails by the preceding section of this act, except that declared nonailable by § 3893 as amended, shall, by inadvertence, reach the office of destination, the same shall be delivered in accordance with its address: *Provided*, That the party addressed shall furnish the name and address of the sender to the postmaster at the office of delivery, who shall immediately report the facts to the Postmaster-General. If the person addressed refuse to give the required information, the postmaster shall hold the package subject to the order of the Postmaster-General. All matter declared nonailable by § 3893 as amended, which shall reach the office of delivery, shall be held by the postmaster at the said office subject to the order of the Postmaster-General.

"SEC. 22. Thatailable matter of the second class shall contain no writing, print, mark, or sign thereon or therein in addition to the original print, except as herein provided, to wit, the name and address of the person to whom the matter shall be sent, and index figures of subscription book, either written or printed, the printed title of the publication, the printed name and address of the publisher or sender of the same, and written or printed words or figures or both, indicating the date on which the subscription to such matter will end," &c.

In § 14 of this act "regular publications designed primarily for advertising purposes," mean publications chiefly or principally designed for advertising purposes. — a question of fact to be determined by the Postmaster-General. 16 A. G. Op. 303.

By 22 St. 455, ch. 92, upon all mail-matter of the first class, as defined by the act just quoted, postage is to be charged, on and after Oct. 1, 1883, at the rate of two cents for each half ounce or fraction thereof, and acts fixing a different rate upon first-class matter are repealed. St. March 3, 1885, ch. 342 (23 St. 387), further provides that, on such first-class matter, —

"postage shall be charged, on and after July 1, 1885, at the rate of two cents for each ounce or fraction thereof; and drop letters shall be mailed at the rate of two cents per ounce or fraction thereof, including delivery at letter-carrier offices, and one cent for each ounce or fraction thereof where free delivery by carrier is not established. That all publications of the second class, except as provided in § 25 of said act, when sent by the publisher thereof, and from the office of publication, including sample copies, or when sent from a news agency to actual subscribers thereto, or to other news agents, shall, on and after July 1, 1885, be entitled to transmission through the mails at one cent a pound or a fraction thereof, such postage to be prepaid as now provided by law. And any article or item in any newspaper or other publication may be marked for observation, except by written or printed words, without increase of postage."



St. June 18, 1888, ch. 394 (25 St. 187), as amended by 25 St. 496, by striking out the last sentence of § 2 (here omitted), and adding § 3, provides —

“SEC. 13. That any person who shall submit, or cause to be submitted to any postmaster or to the Post-Office Department or any officer of the postal service any false evidence, relative to the character of any publication, for the purpose of securing the admission thereof at the second-class rate for transportation in the mails, shall be deemed guilty of a misdemeanor, and for every such offence, upon conviction thereof, shall be punished by a fine of not less than \$100 nor more than \$500.”

“SEC. 2. That any person who shall, with intent to defraud, falsely forge or counterfeit the signature of any postmaster, assistant postmaster, chief clerk, or clerk upon or to any money-order or postal-note, or blank therefor provided or issued by or under the direction of the Post-Office Department of the United States, or of any foreign country, and payable in the United States, or any material signature or indorsement thereon, or any material signature to any receipt or certificate of identification thereon; any person who shall falsely alter, or cause or procure to be falsely altered in any material respect, or knowingly aid or assist in falsely so altering any such money-order or postal-note; any person who shall, with intent to defraud, pass, utter, or publish any such forged or altered money-order or postal-note knowing any material signature or indorsement thereon to be false, forged, or counterfeited, or any material alteration therein to have been falsely made; any postmaster, assistant postmaster, or clerk employed in any post-office or branch post-office who shall issue any money-order or postal-note, without having previously received or paid the full amount of money payable therefor, with the purpose of fraudulently obtaining or receiving, or fraudulently enabling any other person, either directly or indirectly, to obtain or receive from the United States, or any officer or agent thereof, the sum of money specified in such money-order or postal-note; any person who, with intent to defraud the United States, transmits, or presents to, or causes or procures to be transmitted to or presented to any officer, or at any office of the Government of the United States any money-order or postal-note, knowing the same to contain any forged or counterfeited signature to the same or to any material indorsement, receipt, or certificate thereon, or material alteration therein unlawfully made, or to have been unlawfully issued without previous payment of the amount required to be paid upon such issue, shall, upon conviction, be punishable by fine of not more than \$5000, or by imprisonment at hard labor for not less than one year and not more than five years.

“SEC. 3. That all matter otherwise mailable by law, upon the envelope or outside cover or wrapper of which, or any postal-card upon which, any delineations, epithets, terms, or language of an indecent, lewd, lascivious, obscene, libellous, scurrilous, defamatory, or threatening character, or calculated by the terms or manner or style of display and obviously intended to reflect injuriously upon the character or conduct of another may be written or printed, or otherwise impressed or apparent, are hereby declared non-mailable matter, and shall not be conveyed in the mails, nor delivered from any post-office nor by any letter-carrier, and shall be withdrawn from the mails under such regulations as the Postmaster-General shall prescribe; and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be non-mailable matter, and any person who shall knowingly take the same or cause the same to be taken from the mails, for the purpose of circulating or disposing of, or of aiding in the circulation or disposition of the same, shall, for each and every offence, upon conviction thereof, be fined not more than \$5000, or imprisoned at hard labor not more than five years, or both, at the discretion of the court.”

St. Jan. 20, 1888, ch. 2 (25 St. 1), provides:—

“That mailable matter of the second-class shall contain no writing, print, or sign thereon or therein in additions to the original print, except as herein provided, to wit: the name and address of the person to whom the matter shall be sent, index figures of subscription book either printed or written, the printed title of the publication and the place of its publication, the printed or written name and address without addition of advertisement of the publisher or sender, or both, and written or printed words or figures, or both, indicating the date on which the subscription to such matter will end, the correction of any typographical error, a mark except by written or printed words, to designate a work or passage to which it is desired to call attention; the words ‘sample copy’ when the matter is sent as such, the words ‘marked copy’ when the matter contains a marked item or article, and publishers or news agents may enclose in their publications, bills, receipts, and orders for subscriptions thereto, but the same shall be in such form as to convey no other information than the name, place of publication, subscription price of the publication to which they refer and the subscription due thereon. Upon matter of the third class or upon the wrapper or envelope enclosing the same or the tag or label attached thereto the sender may write his own name, occupation, and residence or business address, preceded by the word ‘from,’ and may make marks other than by written or printed words to call attention to any word or passage in the text, and may correct



any typographical errors. There may be placed upon the blank leaves or cover of any book or printed matter of the third-class a simple manuscript dedication or inscription not of the nature of a personal correspondence. Upon the wrapper or envelope of third-class matter or the tag or label attached thereto may be printed any matter available as third-class, but there must be left on the address side a space sufficient for a legible address and necessary stamps. With a package of fourth-class matter prepaid at the proper rate for that class, the sender may enclose any available third-class matter, and may write upon the wrapper or cover thereof, or tag or label accompanying the same, his name, occupation, residence or business address, preceded by the word 'from,' and any marks, numbers, names, or letters for purpose of description, or may print thereon the same, and any printed matter not in the nature of a personal correspondence, but there must be left on the address side or face of the package a space sufficient for a legible address and necessary stamps. In all cases directions for transit, delivery, forwarding, or return shall be deemed part of the address; and the Postmaster-General shall prescribe suitable regulations for carrying this section into effect.

"SEC. 2. That matter of the second, third, or fourth class containing any writing or printing in addition to the original matter other than as authorized in the preceding section shall not be admitted to the mails, nor delivered, except upon payment of postage for matter of the first-class, deducting therefrom any amount which may have been prepaid by stamps affixed, unless by direction of the Postmaster-General such postage shall be remitted; and any person who shall knowingly conceal or enclose any matter of a higher class in that of a lower class, and deposit or cause the same to be deposited for conveyance by mail, at a less rate than would be charged for both such higher and lower class matter, shall for every such offence be liable to a penalty of \$10."

SECT. 3875. — Similar provisions relate to interstate mail, and do not authorize the importation without duty of dutiable articles by foreign mail. *Von Cotzhausen v. Nazro*, 15 F. R. 899. Letters in the post are not attachable by process from a State court. 5 A. G. Op. 560. It is only in exceptional cases that letters in transit can be reclaimed by the writer. 7 A. G. Op. 76. A person to whom a letter is sent in care of another is entitled to demand it. 12 A. G. Op. 136; 13 Id. 481. For cases where there are different claimants, as, *e. g.*, the members of a dissolved copartnership, see *Wylie v. Pearson*, 14 F. R. 61; 13 A. G. Op. 395, 406. See note, § 3892.

SECTS. 3878, 3879. — For a definition of newspaper in 1842, see 4 A. G. Op. 10; and in 1845, 4 A. G. Op. 407. St. June 23, 1874, ch. 456, § 8 (18 St. 231), provides that all mailable matter of the third class, referred to in these sections —

"may weigh not exceeding four pounds for each package thereof, and postage shall be charged thereon at the rate of one cent for each two ounces or fraction thereof; but nothing herein contained shall be held to change or amend § 134 of St. 1872."

St. March 3, 1875, ch. 130, § 1 (18 St. 371), amended the above provision of 1874 by changing the words "two ounces" to "one ounce." This amendment is constitutional. *United States v. James*, 13 Blatch. 207.

St. July 24, 1888, ch. 702 (25 St. 347), provides, —

"That hereafter the postage on seeds, cuttings, bulbs, roots, scions, and plants shall be charged at the rate of one cent for each two ounces or fraction thereof, subject in all other respects to the existing law."

SECT. 3880. — This applies only to mail matter between this and foreign countries, on which postage is charged by weight according to the metric system. 15 A. G. Op. 224.

SECT. 3886. — As to what constitutes a newspaper, see 4 A. G. Op. 10, 407; 15 Id. 345. An initial letter marked upon a newspaper does not render it liable to letter postage. *Teal v. Felton*, 12 How. 284.

St. July 12, 1876, ch. 179, § 15 (19 St. 82), provides: —

"SEC. 15. That transient newspapers and magazines, regular publications designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates, and all printed matter of the third class, except unsealed circulars, shall be admitted to and be transmitted in the mails at the rate of one cent for every two ounces or fractional part thereof, and one cent for each two additional ounces or fractional part thereof, and the sender of any article of the third class of mail-matter may write his or



her name or address therein, or on the outside thereof, with the word 'from' above or preceding the same, or may write briefly or print on any package the number and names of the articles inclosed. Publishers of newspapers and periodicals may print on the wrappers of newspapers or magazines sent from the office of publication to regular subscribers the time to which subscription therefor has been paid. And addresses upon postal cards and unsealed circulars may be either written, printed, or affixed thereto, at the option of the sender."

SECT. 3888.—An unstamped letter of advice, relating merely to an article shipped, may be transmitted therewith outside the mail. *United States v. U. S. Express Co.*, 5 Biss. 91; *United States v. Chaloner*, 1 Ware, 214; *Tanner v. Hughes*, 53 Penn. St. 289.

SECTS. 3890, 3891.—See note, § 3894; *New Orleans National Bank v. Merchant*, 18 F. R. 847. A mailable packet of merchandise is included in § 3891, though not in terms. *United States v. Blackman*, 5 McCrary, 438; 17 F. R. 837; *United States v. Beaty*, Hempst. 487. The Postmaster-General cannot require a deputy postmaster to deliver mail matter in violation of his State laws, as, *e. g.*, insurrectionary papers. 8 A. G. Op. 489. But a postmaster may properly refuse to deliver mail matter to one who intends to distribute it in opposition to the public carriers (9 Id. 161); or to persons who assume a name in which letters are addressed, for the purpose of defrauding the public. Id. 454; *United States v. Denicke*, 35 F. R. 407.

SECT. 3892.—The purpose of this provision is to protect mailed letters until actually received by the persons to whom they are addressed. *United States v. McCready*, 11 F. R. 225; *United States v. Hilbury*, 29 Id. 705; *United States v. Parsons*, 2 Blatch. 104; *United States v. Sander*, 6 McLean, 598; *United States v. Lancaster*, 2 Id. 431; *United States v. Pearce*, Id. 14; *United States v. Tanner*, 6 Id. 128. It is not essential under this section, as it is under § 5469, that the letter taken should contain anything of value. *United States v. Davis*, 33 F. R. 865; *United States v. Mulvaney*, 4 Parker C. C. 164; *United States v. Pond*, 2 Curtis, 265; *United States v. Driscoll*, 1 Lowell, 303; *United States v. Nutt*, 23 Int. Rev. Rec. 386; *United States v. Thoma*, 25 Id. 171; *United States v. Eddy*, 1 Biss. 227. If a postmaster refuses to deliver valuable letters, on which postage has been prepaid, the remedy is by *mandamus* or *replevin*, and not by injunction. *Boardman v. Thompson*, 12 F. R. 675. See note, § 3875 *supra*. As to the offence of intercepting letters of post-office employees, see *United States v. Bellew*, 2 Brock. 280; *United States v. Nott*, 1 McLean, 499; *United States v. Oliver*, 4 L. Rep. 197.

SECT. 3893.—This section, as amended by St. July 12, 1876, ch. 186, was further amended by St. Sept. 26, 1888, ch. 1039 (25 St. 496; 19 St. 90), to read as follows:—

"SEC. 3893. Every obscene, lewd, or lascivious book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character, and every article or thing designed or intended for the prevention of conception or procuring of abortion, and every article or thing intended or adapted for any indecent or immoral use, and every written or printed card, letter, circular, book, pamphlet, advertisement or notice of any kind giving information, directly or indirectly, where or how, or of whom, or by what means any of the hereinbefore mentioned matters, articles, or things may be obtained or made, whether sealed as first-class matter or not, are hereby declared to be non-mailable matter, and shall not be conveyed in the mails, nor delivered from any post-office nor by any letter-carrier; and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be non-mailable matter, and any person who shall knowingly take the same, or cause the same to be taken, from the mails, for the purpose of circulating or disposing of, or of aiding in the circulation or disposition of the same, shall, for each and every offence, be fined upon conviction thereof not more than \$5,000, or imprisoned at hard labor not more than five years, or both, at the discretion of the court. And all offences committed under the section of which this is amendatory, prior to the approval of this act, may be prosecuted and punished under the same in the same manner and with the same effect as if this act had not been passed: *Provided*, That nothing in this act shall authorize any person to open any letter or sealed matter of the first-class not addressed to himself."

This act is constitutional. *United States v. Bennett*, 16 Blatch. 338; *Ex parte Jackson*, 96 U. S. 727; 14 Blatch. 245.



"*Obscene, lewd, or lascivious.*" The test is whether the tendency of the matter is to deprave and corrupt the minds and morals of those open to lascivious influences. *United States v. Wightman*, 29 F. R. 636; *United States v. Bebout*, 28 Id. 523; *United States v. Britton*, 17 Id. 731; *United States v. Bennett*, 16 Blatch. 333; *United States v. Smith*, 11 F. R. 663; *United States v. Slenker*, 32 Id. 691; *Larison v. State* (N. J.), 9 Atl. Rep. 700; *Smith v. State*, 5 S. W. Rep. 510. This statute does not apply to matter which is profane or coarse (*United States v. Smith, supra*); or an abusive collection notice. *Ex parte Doran*, 32 F. R. 76. It applies to extracts from standard books upon medicine and surgery, intended for general circulation, if of an indecent character (*United States v. Chesman*, 19 F. R. 497; *Com. v. Landis*, 8 Phila., 453); to a postal card imputing illicit intercourse to a person other than the person to whom it is addressed (*United States v. Pratt*, 2 Am. L. T. Rep. n. s. 228); or to a quack medical advertisement of articles for producing abortion or preventing conception. *United States v. Kelly*, 3 Sawyer, 566; *Bates v. United States*, 11 Biss. 70; 10 F. R. 92, and note. The words "designed or intended for the prevention of conception or procuring abortion" simply describe the article made contraband in the mails, and include any article or thing designed in a manner calculated to secure its use by any one, for the purpose of preventing conception or procuring abortion. Congress has power to provide in this respect only for the protection of the mails, not to legislate for the prevention of abortion in the States. *United States v. Bott*, 11 Blatch. 346. The fact that the obscene papers were sent through the mail in the real or supposed interest of science, philosophy, or morality, is immaterial. *United States v. Slenker, supra*.

In *Ex parte Jackson*, 96 U. S. 727; 14 Blatch. 245; and 16 A. G. Op. 5, it was held that evidence of the contents of these letters, if sealed, must be obtained otherwise than by opening them, and that a search-warrant judicially is necessary to warrant them. But the provision has been held to apply to sealed letters. *United States v. Gaylord*, 17 F. R. 438; 11 Biss. 438; *United States v. Hanover*, 17 F. R. 444; *United States v. Britton*, Id. 731; *United States v. Thomas*, 27 Id. 882; *United States v. Morris*, 18 Id. 900; 9 Sawyer, 439, overruling *United States v. Loftis*, 12 F. R. 671; 8 Sawyer, 194; *Thomas v. State*, 103 Ind., 419; *United States v. Foote*, 13 Blatch. 418; *Re Jackson*, 14 Id. 245. *Contra*, especially as to purely personal writings mailed under seal in an unobjectionable envelope. *United States v. Comerford*, 25 F. R. 902; *United States v. Mathias*, 36 Id. 892; *United States v. Williams*, 3 Id. 484. See also *United States v. Wightman*, and *United States v. Bebout, supra*; *United States v. Chase*, 27 F. R. 807; *United States v. Kaltmeyer*, 16 Id. 760. As to decoy letters, see *United States v. Whittier*, 5 Dillon, 35; *Bates v. United States*, 10 F. R. 92, and note; *United States v. Bott*, 11 Blatch. 346; *United States v. Foye*, 1 Curtis, 364; *United States v. Pond*, 2 Id. 265; *United States v. Cottingham*, 2 Blatch. 470; *United States v. Moore*, 19 F. R. 39; *Ex parte Jackson*, 96 U. S. 727; *United States v. Rapp*, 30 F. R. 818. It does not prohibit publication, or transportation in any other way, as merchandise; or relate to motives, or the truth of the published matter. *United States v. Bebout, supra*; *Von Cotzhausen v. Nazro*, 11 Biss. 44; 15 F. R. 899; 25 Int. Rev. Rec. 342; 12 A. G. Op. 399, 538. To warrant a conviction under it, it must be proved, 1st, that the defendant, or his agent, deposited, or caused to be deposited, the paper in question in the post-office for mailing; 2d, that the defendant knew of the objectionable matter in the paper; 3d, that the paper is indecent. *United States v. Bebout, supra*; *Bates v. United States, supra*; *United States v. Clark*, 37 F. R. 106. Unlawful detention of a letter is a conversion, for which trover lies against the postmaster. *Teal v. Felen*, 12 How. 284.

It is not necessary that the indictment should give a definite or detailed description of the alleged obscene pamphlet; such information may be obtained by an order for a bill of particulars, and for the exhibition to the defendant of the article itself. An indictment



alleging that the defendant mailed a certain obscene, lewd, and lascivious paper, which referred to the paper only by its title, and described and identified it in no other way, neither the date of the issue complained of being given, nor the article or articles upon which the accusation was based being identified by title or contents, is insufficient on demurrer. *United States v. Harmon*, 34 F. R. 872.

"*Notice.*" A letter enclosed in a sealed envelope, or a written slip of paper without address or signature, if it gives the prohibited information, is a "*notice*" within the meaning of this section. That it was not volunteered, but sent in reply to a letter asking for the information, is immaterial. *United States v. Foote*, 13 Blatch. 418.

SECT. 3894. — *United States v. Patty*, 2 F. R. 664. See notes, §§ 3929, 5480. "Illegal," in the first line, was stricken out by 19 St. 90. As thus amended, the act applies to both legal and illegal lotteries. 15 A. G. Op. 203. But not to letters suspected to contain advertisements of lotteries. 16 A. G. Op. 5. The act is constitutional. *Ex parte Jackson*, 96 U. S. 727; *Re Jackson*, 14 Blatch. 245. As to sealed letters, see *Id.* and preceding note. It applies only to the use of the mails by lottery dealers and others, for purposes of deception, and not to citizens who send them letters enclosing funds to buy lottery tickets. *United States v. Mason*, 22 F. R. 707; *Commerford v. Thompson*, 1 *Id.* 417; 2 Flippin, 611; *United States v. Noelke*, 17 Blatch. 554; 1 F. R. 426; *United States v. Stickle*, 15 *Id.* 798. It applies to letters or circulars sent in reply to decoy letters written by a detective. *United States v. Moore*, 19 F. R. 39; *United States v. Duff*, 19 Blatch. 9; 6 F. R. 45. Under it a lottery ticket is not a "letter"; but a schedule printed on the back of such ticket, stating the prizes offered, is a "circular." *United States v. Clark*, 22 F. R. 708; *Thomas v. State*, 103 Ind. 419. Thus an offer by mail of city bonds, with prizes, may be a circular. *United States v. Zeisler*, 30 F. R. 499. As to what constitutes a lottery, see *Kohn v. Koehler*, 96 N. Y. 362; *Hall v. Ruggles*, 56 *Id.* 427; *People v. Noelke*, 94 *Id.* 137; *State v. Lumsden*, 89 N. C. 572.

"*Sending anything to be conveyed*" relates not to sending to the post-office, but to knowingly forwarding or causing to be forwarded through the mail. *United States v. Dauphin*, 20 F. R. 625; *United States v. Parsons*, 2 Blatch. 107. After a letter has left the post-office, and is actually in transit, it is the property of the person to whom it is addressed. *United States v. Jackson*, 29 F. R. 503; *United States v. Jones*, 31 *Id.* 718, 725.

SECT. 3895. — This probably does not apply to dutiable articles mailed from a foreign country, the sending of which is forbidden by the postal-union treaty. *Von Cotzhausen v. Nazro*, 11 Biss. 44; 15 F. R. 899. It confers no power to seize or detain suspected letters. 16 A. G. Op. 5. It does not authorize the Postmaster-General to order the detention of mail matter after it has reached its destination and been distributed by the postmaster ready for delivery, though there may be a well-grounded suspicion that it is, or has been attempted to be, circulated in violation of law. 14 A. G. Op. 143.

## CHAPTER IV.

### POSTAGE.

SECT. 3896. — See notes, §§ 44, 3875; *Dewee's Case*, Chase Dec. 531. The franking privilege was abolished in Jan. 1873, by 17 St. 421. See *Dewee's Case*, Chase Dec. 531. By 19 St. 335, ch. 103, §§ 5, 6, 7; 20 St. 10, ch. 3 and 20 St. 355, ch. 180, § 1, par. 4, the Vice-President, Senators, Representatives, the Secretary of the Senate, the Clerk of the House and Heads of Departments, may send and receive through the mails all public documents, without payment of postage, the name and office of the sender being written thereon. 16 A. G. Op. 271. See also § 13 of the earlier act of 1874.



ch. 456 (18 St. 231), and St. 1875, ch. 128, § 3, 5. By 19 St. 335, § 5, matter relating exclusively to the business of the United States is to be marked "official business." This does not extend to the Executive, and does not forbid the use of stamps by the Executive Departments. 15 A. G. Op. 262. If a member of Congress addresses an inquiry on official business to a department, the reply may properly be addressed to the person concerned in a penalty-envelope and sent unsealed to the member, to be by him forwarded to its destination; but the use of such envelope must be strictly confined to the department and the person who desires the information. 16 A. G. Op. 501. Sect. 29 of St. March 3, 1879, ch. 180 (20 St. 355), extending St. March, 1877, ch. 103, §§ 5, 6 (19 St. 835), does not impose upon such departments the duty of furnishing such envelopes to their various subordinates throughout the United States. 16 Id. 455. Under the above 19 St. 335, ch. 103, § 7, members-elect of either house of Congress, are entitled to exercise the franking privilege as to public documents as soon as the term for which they were elected commences, although no session of Congress has convened, and they have not qualified. 16 A. G. Op. 271.

St. August 5, 1882, ch. 389 (22 St. 255), and St. March 3, 1883, ch. 128 (22 St. 563), provide, —

"SEC. 2. That the Secretaries, respectively, of the Departments of State, of the Treasury, War, Navy, and of the Interior, and the Attorney-General, are authorized to make requisitions upon the Postmaster-General for the necessary amount of official postage-stamps for the use of their departments, not exceeding the amount stated in the estimates submitted to Congress; and upon presentation of proper vouchers therefor at the Treasury, the amount thereof shall be credited to the appropriation for the service of the Post-Office Department for the same fiscal year. And it shall be the duty of the respective departments to enclose to Senators, Representatives and Delegates in Congress, in all official communications requiring answers, or to be forwarded to others, penalty envelopes addressed as far as practicable, for forwarding or answering such official correspondence."

St. July 5, 1884, ch. 234, § 3 (23 St. 158), amends § 29 of 20 St. 355, ch. 180, by extending the above §§ 5, 6, of 19 St. 355 to —

"all officers of the United States Government, not including members of Congress, the envelopes of such matter in all cases to bear appropriate indorsements containing the proper designation of the office from which or officer from whom the same is transmitted, with a statement of the penalty for their misuse. And the provisions of said §§ 5, 6, are hereby likewise extended and made applicable to all official mail-matter of the Smithsonian Institution: *Provided*, That any Department or officer authorized to use the penalty envelopes may enclose them with return address to any person or persons from or through whom official information is desired, the same to be used only to cover such official information, and indorsements relating thereto: *Provided further*, That any letter or packet to be registered by either of the Executive Departments, or Bureaus thereof, or by the Agricultural Department, or by the Public Printer, may be registered without the payment of any registry fee; and any part-paid letter or packet addressed to either of said Departments or Bureaus may be delivered free; but where there is good reason to believe the omission to prepay the full postage thereon was intentional, such letter or packet shall be returned to the sender: *Provided further*, That this act shall not extend or apply to pension agents or other officers who receive a fixed allowance as compensation for their services, including expenses of postages. And § 3915 of the Revised Statutes of the United States, so far as the same relates to stamps and stamped envelopes for official purposes, is hereby repealed."

SECT. 3898. — By 20 St. 355, ch. 180, § 26, mail-matter of the first class, upon which one full rate is prepaid, is to be delivered — payment of any deficiency to be collected by special stamps. The words "one full rate of postage" mean simply the amount of postage required to be paid for a half ounce of such matter. Sect. 151 of the act of 1872 (the first sentence of § 3898) used the words "unpaid rate," which meant such rate or rates of postage as had not been paid on the letter or other matter at the time of mailing it, and with which it was then chargeable by law, in addition to the rate, or rates of postage which had been paid thereon. 14 A. G. Op. 186.



SECT. 3900. — Blake v. Ins. Co., 67 Texas, 163.

SECTS. 3902, 3904. — 20 St. 355, ch. 180, § 9, provides for a regulation like that in § 3902, payment being made on delivery; see note, § 3875.

SECT. 3905. — See note, § 3872.

SECT. 3909. — St. June 23, 1874, ch. 456, § 9 (18 St. 231), provides, —

“That the Postmaster-General, when in his judgment it shall be necessary, may prescribe, by regulation, an affidavit in form, to be taken by each publisher of any newspaper or periodical publications sent through the mails under the provisions of this act, or news agent who distributes any of such newspapers or periodical publications under the provisions of this act, or employee of such publisher or news agent, stating that he will not send, or knowingly permit to be sent, through the mails any copy or copies of such newspaper or periodical publications except to regular subscribers thereto, or news agents, without prepayment of the postage thereon at the rate of one cent for each two ounces or fractional part thereof; and if such publisher or news agent, or employee of such publisher or news agent, when required by the Postmaster-General or any special agent of the Post-Office Department to make such affidavit, shall refuse so to do, and shall thereafter, without having made such affidavit deposit any newspapers in the mail for transmission, he shall be deemed guilty of a misdemeanor, and, on conviction, shall be fined not exceeding one thousand dollars for each refusal; and if any such person shall knowingly and wilfully mail any such matter without the payment of postage as provided by this act, or procure the same to be done with the intent to avoid the prepayment of postage due thereon; or if any postmaster or post-office official shall knowingly permit any such matter to be mailed without the prepayment of postage as provided in this act, and in violation of the provisions of the same, he or they shall be deemed guilty of a misdemeanor, and, on the conviction thereof, shall be fined not more than \$1,000, or imprisoned not exceeding one year, one or both, in the discretion of the court.”

## CHAPTER V.

### POSTAGE-STAMPS AND ENVELOPES.

SECT. 3914. — See notes, §§ 389, 3875. St. July 12, 1876, ch. 179, § 14 (19 St. 82), provides that, —

“no stamped envelopes or newspaper-wrappers shall be sold by the Post-Office Department at less (in addition to the legal postage) than the cost, including all salaries, clerk-hire, and other expenses connected therewith.”

22 St. 333, makes the appropriation in § 1 of St. May 4, 1882 (22 St. 52), for the manufacture of stamped envelopes and newspaper wrappers, —

“available, so far as necessary, for the purchase of letter-sheet envelopes on which postage-stamps of the denominations now in use on ordinary envelopes shall be placed.”

SECT. 3915. — See notes, §§ 396, 3896. The addition at the end of this section made by 19 St. 250 (see 15 A. G. Op. 262), was repealed by 23 St. 158. The words “nor any printing except a printed request” prohibit the printing of black lines, marks, or characters, upon the envelopes furnished by the Post-Office Department, except the return request. 13 A. G. Op. 466.

By 19 St. 335, ch. 103, § 6 (see note, § 3896), each executive department is to provide for itself and its subordinate officers the necessary envelopes, on which, in addition to the department indorsement, the penalty for their unlawful use is to be stated. St. June 25, 1874, ch. 456 (18 St. 231), provides that thereafter, —

“no envelope, as furnished by the government, shall contain any lithographing and engraving, nor any printing except a printed request to return the letter to the writer.”

By St. March 3, 1879, ch. 180, § 32 (20 St. 355), the public are to be supplied, under regulations prescribed by the Postmaster-General, with letter-sheet envelopes; with double



postal cards, bearing two one-cent stamps, and so arranged for the address that they may be forwarded and returned, to be sold for two cents each; and also a double-letter envelope with like arrangement for the address, provided that no money shall be paid for royalty or patent on any of the articles named.

By 23 St. 387, §§ 3-6, and 24 St. 220, provision is made for the immediate delivery of specially stamped letters. Section 3 of 23 St. 387 was amended by St. Jan. 16, 1889 (25 St. 650), by adding thereto, —

*“ Provided, however, That the omission by the sender to place the lawful postage upon a letter bearing such special delivery stamp and otherwise entitled to immediate delivery under the provisions of this section shall not hinder or delay the transmission and delivery thereof as provided herein, but each lawful postage shall be collected upon its delivery, in the manner now provided by law for the collection of deficient postage resulting from the overweight of letters.”*

SECT. 3916. — See preceding note, and note, § 3875. By 20 St. 355, ch. 180, § 1, par. 7, and 21 St. 206, postal cards at two cents each for foreign postal service are to be provided; and by § 9 of 20 St. 355, postal cards are to be transmitted through the mails at a postage charge of one cent each, including the cost of manufacture. Sect. 3916, in its original form, did not authorize the Postmaster-General to enter into any contract for the future payment of money to persons supplying the government with postal cards, in the absence of an appropriation available for that purpose. 14 A. G. Op. 107.

SECT. 3917. — See note, § 3915.

SECTS. 3918, 3920. — As to postmaster's claims for losses, see 22 St. 29, stated in note, § 3860. St. June 17, 1879, ch. 259, § 1, par. 3 (20 St. 140), prohibits, under criminal penalties, any postmaster, or other person connected with the postal service, intrusted with the sale or custody of postage-stamps, stamped envelopes, or postal cards, from using or disposing of them in payment of debts, or by way of purchase, or pledge, or except for cash, or for a different sum than the values indicated on their faces, or than is charged by the department for like quantities, or otherwise than is provided by law and the regulations. The government must prove that the stamps thus used were received by the postmaster from the department. *United States v. Williamson*, 26 F. R. 690. A postmaster can only dispose of stamps thus intrusted to him at their face value, for cash, to third persons. *United States v. Douglass*, 33 F. R. 381.

SECT. 3921. — 20 St. 240 authorizes the Postmaster-General to adopt and distribute a uniform cancelling ink or other appliance.

SECT. 3922. — Counts in an indictment under this section and § 3924 may be properly joined under § 1024 *ante*, although one charges a misdemeanor and the other a felony. *United States v. Spintz*, 18 F. R. 377.

SECT. 3923. — St. March 3, 1879, ch. 180, § 28 (20 St. 355), prohibits, under criminal penalties, any person from using or attempting to use, in payment of postage, cancelled postage-stamps, or cleansing the same for re-use, or knowingly having the same in his possession with intent to sell, or sell or offer to sell the same, or use or attempt to use the same in payment of postage, &c.

## CHAPTER VI.

### REGISTERED LETTERS.

SECT. 3926. — 25 St. 504 authorizes the Postmaster-General to advertise for and purchase improved registered mail locks and keys therefor.

SECT. 3929. — The effect of this section and of §§ 3926, 4027, 4041, is that, so long as the Postmaster-General is satisfied that a person is engaged in one of the described



schemes, such person, although the ordinary mail is open to him for the receipt or transmission of ordinary mail matter, is not entitled to receive through the mail either the registered letters or money-orders provided for in the law; and that while the Postmaster-General is not so satisfied, these systems cannot be refused, the deprivation continuing only while the person is so engaged, and while the Postmaster-General is satisfied that he is so engaged. *New Orleans Nat. Bank v. Merchant*, 18 F. R. 841. No penalty is affixed to the senders of these letters, and it appears to be a forced construction to apply the penalties of § 3894 to them. *Commerford v. Thompson*, 1 F. R. 421.

## CHAPTER VIII.

### CONTRACTS FOR CARRYING THE MAILS.

SECTS. 3941, 3942. — See notes, §§ 389, 3826. By St. July 12, 1879, ch. 179, § 1, par. 1 (19 St. 78), the Postmaster-General is to cause advertisements of general mail-lettings to be conspicuously posted up in each post-office in the State and Territory embraced therein for at least sixty days before the time of such general letting, no other advertisement thereof to be required. See also 18 St. 348; note, § 3826, *ante*; and St. March 1, 1881, ch. 96, § 1 (21 St. 374), which latter act further makes it the duty of the Postmaster-General, when temporary service on any mail-route is required, to advertise for proposals therefor by posting in the post-offices at the termini of such route and upon a bulletin-board in a public place in the Post-Office Department building at Washington, for at least ten days prior to such letting. St. June 12, 1879, ch. 20 (21 St. 11), provides, —

“That in cases where special service has already been placed on new routes, the Postmaster-General may, in his discretion, extend such service until the time when service can be obtained by advertisement, not exceeding in any case one year. And whenever an accepted bidder shall fail to enter into contract, or a contractor on any mail-route shall fail or refuse to perform the service on said route according to his contract, or when a new route shall be established or new service required, or when, from any other cause, there shall not be a contractor legally bound or required to perform such service, the Postmaster-General may make a temporary contract for carrying the mail on such route, without advertisement, for such period as may be necessary, not in any case exceeding one year, until the service shall have commenced under a contract made according to law. And any provision of statute in conflict with this provision is hereby repealed.”

21 St. 170, ch. 167, authorizing the Postmaster-General to treat the mail transportation between East Saint Louis and the Union Depot in St. Louis as other than railroad service, and to let the same to the lowest bidder, was repealed by 22 St. 53, 454. 23 St. 157 authorizes the Postmaster-General to pay a sum not exceeding the lowest rate which private individuals, express companies, and others, may pay for transportation between said points.

Sect. 3941, not § 3823, furnishes the rule applicable to advertisements of mail-lettings by the Postmaster-General. Under it that officer has power to select the medium of advertising, and to limit by agreement the compensation therefor, notwithstanding the paper which published the advertisement is one of those selected by the clerk of the House of Representatives under § 3823. 15 A. G. Op. 527. The act of 1872 did not include among the cases where advertisements were not required those in which routes had been left vacant by the actual or virtual abandonment of contracts partially performed. 14 A. G. Op. 651. If the Post-Office Department accepts a proposal for carrying the mails, a contract is created of the same force and effect as though it had been entered into in writing by the parties. *Garfield v. United States*, 93 U. S. 242.

SECT. 3942. — The general policy of the law requires executory contracts for carrying the mails to be made in writing and signed by the contractor. 15 A. G. Op. 482. If



bids have been received, pursuant to an advertisement, for carrying the mail by railroad or steamboat, and they are not satisfactory, the Postmaster-General may disregard them and make a contract therefor without advertising. 5 A. G. Op. 373.

SECT. 3943. — St. May 17, 1878, ch. 107, § 5 (20 St. 61), repealing so much of this section, and of §§ 3956, 3970, as conflicts therewith, provides, by § 5, that —

“When from any cause it may become necessary to make a new contract for carrying the mails upon any water route between ports of the United States, upon which mail service has previously been performed, the Postmaster-General may contract with the owner or master of any steamship, steamboat or other vessel plying upon the waters or between ports of the United States, for carrying the mail upon said route for any length of time not exceeding four years and without advertising for proposals therefor whenever the public interest and convenience will thereby be promoted; but the price paid for such service shall in no case be greater than the average price paid under the last preceding or then existing regular contract upon the same route. And the Postmaster-General may contract with the owners or masters of steamships, steamboats, or other vessels plying upon the waters or between ports of the United States for carrying the mails upon such routes where no mail service has previously been performed, without advertising for proposals therefor; but no contract for such new service shall be for a longer time than one year. No contract for carrying the mails between the United States and any foreign port shall be for a longer time than two years, unless otherwise directed by Congress.”

By St. March 3, 1885, ch. 342 (23 St. 386) —

“The Postmaster-General is authorized to contract for inland and foreign steamboat mail service, when it can be combined in one route, where the foreign office or offices are not more than 200 miles distant from the domestic office, on the same terms and conditions as inland steamboat service, and pay for the same out of the appropriation for inland steamboat service.”

Sect. 3943 gives exceptional authority to contract in the cases within it, and dispenses with advertising. 13 A. G. Op. 565.

SECTS. 3945-3952. — St. June 23, 1874, ch. 456 (18 St. 235), provides by subsections 245, 247, of § 12, —

“SEC. 245. That every proposal for carrying the mail shall be accompanied by the bond of the bidder, with sureties approved by a postmaster, and in cases where the amount of the bond exceeds five thousand dollars, by a postmaster of the first, second, or third class, in a sum to be designated by the Postmaster-General in the advertisement of each route; to which bond a condition shall be annexed, that if the said bidder shall, within such time after his bid is accepted as the Postmaster-General shall prescribe, enter into a contract with the United States of America, with good and sufficient sureties, to be approved by the Postmaster-General, to perform the service proposed in his said bid, and, further, that he shall perform the said service according to his contract, then the said obligation to be void, otherwise to be in full force and obligation in law; and in case of failure of any bidder to enter into such contract to perform the service, or, having executed a contract, in case of failure to perform the service, according to his contract, he and his sureties shall be liable for the amount of said bond as liquidated damages, to be recovered in an action of debt on the said bond.

“No proposal shall be considered unless it shall be accompanied by such bond, and there shall have been affixed to said proposal the oath of the bidder, taken before an officer qualified to administer oaths, that he has the ability, pecuniarily, to fulfil his obligations, and that the bid is made in good faith, and with the intention to enter into contract and perform the service in case his bid is accepted.

“SEC. 247. That any postmaster who shall affix his signature to the approval of any bond of a bidder, or to the certificate of sufficiency of sureties in any contract before the said bond or contract is signed by the bidder or contractor and his sureties, or shall knowingly, or without the exercise of due diligence, approve any bond of a bidder with insufficient sureties, or shall knowingly make any false or fraudulent certificate, shall be forthwith dismissed from office, and be thereafter disqualified from holding the office of postmaster, and shall also be deemed guilty of a misdemeanor, and, on conviction thereof, be punished by a fine not exceeding \$5000, or by imprisonment not exceeding one year, or both.”

By subsection 253, bids are to be accompanied by a certified check when the annual compensation exceeds \$5000; the deposit is to be forfeited on failure, or returned on performance of the proposal; and proposals exceeding \$5000 are not to be considered unless



accompanied by check or bond. St. Aug. 11, 1876, ch. 260 (19 St. 129), amends subdivisions 246, 251, of the above § 12, by providing, in § 251, for proceedings on the failure of the lowest bidder to enter into contract, &c., or on failure of the contractor to perform service; and by amending § 246 to read as follows:—

“SEC. 246. That before the bond of a bidder, provided for in the aforesaid section, is approved, there shall be indorsed thereon the oaths of the sureties therein, taken before an officer qualified to administer oaths, that they are owners of real estate worth in the aggregate a sum double the amount of said bond, over and above all debts due and owing by them, and all judgments, mortgages, and executions against them, after allowing all exemptions of every character whatever. Accompanying said bond and as a part thereof, there shall be a series of interrogatories, in print or writing, to be prescribed by the Postmaster-General, and answered by the sureties under oath showing the amount of real estate owned by them, a brief description thereof, and its probable value, where it is situated, in what county and State the record evidence of their title exists. And if any surety shall knowingly and wilfully swear falsely to any statement made under the provisions of this section he shall be deemed guilty of perjury, and, on conviction thereof, be punished as is provided by law for commission of the crime of perjury.”

A guaranty in the form prescribed by the Department, except that the time prior to which the contract is to be executed is left blank, is not sufficient. 3 A. G. Op. 475. A bond accompanying a proposal for carrying the mail, though signed elsewhere, is to be regarded as made at Washington. The capacity of a married woman to contract as surety for her husband and to subject her separate property to liability, must be determined by the laws of the District of Columbia; under which she cannot thus bind her property. 15 A. G. Op. 471. As payment of a less sum than one cent cannot be practically made, that constitutes the lowest amount at which a bid can be entertained by the Postmaster-General. 14 A. G. Op. 56. Sect. 3950 does not authorize the Postmaster-General to annul a contract where there were competitors at the bidding and the lowest bidder subsequently transferred the contract to the next highest bidder. 9 A. G. Op. 331. Under § 28 of St. July 2, 1836, if one or two or more contractors for carrying the mail entered into a combination to prevent bidding, the Postmaster-General could annul the contract between the firm and the government and relet the route. 3 A. G. Op. 436. After once advertising and failing to secure a contractor, a contract cannot lawfully be made with a party who has not been a bidder, on a proposition informally submitted for the contract term. 13 A. G. Op. 473. See *United States v. Oliver*, 36 F. R. 758.

SECT. 3953. — If a single certified check, less in amount than is required, accompanies the bids of one person for two or more routes, it may authorize a contract for any one of such routes if the amount is sufficient for the same taken singly. 14 A. G. Op. 631. A check or draft drawn upon a national bank, accompanied by a letter of credit from the bank upon which it was drawn, covering the amount of the check or draft, is a sufficient compliance with § 4 of the act of 1871. 13 A. G. Op. 534. The certified check or draft deposited by a bidder, where he obtains the contract, should be returned to him as soon as he files an acceptable bond. But if the contract is not awarded to him, the check or draft should be returned as soon as an award is made. 13 A. G. Op. 477. Bank notes or other currency cannot be substituted for a certified check. A single check does not meet the requirements of this section where several persons bid for distinct routes. Checks or drafts are required to be duly stamped. A certified check drawn by a bidder, payable to the order of the person who at the time is Postmaster-General, but omitting any reference to his official position, does not satisfy the statute. 14 A. G. Op. 631.

SECT. 3954. — Changed and amended by 19 St. 130, to read as follows after “proposal” in the fifth line:—

“or having entered into such contract shall wrongfully refuse or fail to perform such service, shall, for any such failure or refusal, be deemed guilty of a misdemeanor, and be punished by a fine of not more than \$5000, and by imprisonment for not more than twelve months. And the failure or refusal of any



such person or persons to enter into such contract in due form, or having entered into such contract the failure or refusal to perform such service, shall be prima-facie evidence in all actions or prosecutions arising under this section that such failure or refusal was wrongful."

A contractor who executes separate contracts in due form for the conveyance of mail on different routes and who enters upon and performs service on part of them, but fails to do so on the others, is not discharged from liability incurred to the government because the Department, for administrative purposes merely, cancelled the contracts which he failed to perform. 14 A. G. Op. 18.

SECT. 3955. — 20 St. 355, ch. 180, § 30, inserts "or require" after "accept" in the second line.

SECT. 3956. — See note, § 3943; *N. Y. Central R. v. United States*, 21 Ct. Cl. 468. A statute ordering a reduction of railway compensation does not extend to an existing valid contract, although a modification of an implied contract may be inferred from notice and unqualified acceptance of the reduced compensation. *Chicago R. Co. v. United States*, 104 U. S. 680, 687; *Eastern R. Co. v. United States*, 20 Ct. Cl. 23. The limitation of four years is not controlled by §§ 3679, 3752. *C. M. R. Co. v. United States*, 14 Ct. Cl. 125.

SECT. 3960. — 3 A. G. Op. 1, 542. A proposal for expedited and increased service, with the order accepting it, does not constitute a new contract, and is authorized by §§ 3960, 3961. *Griffith v. United States*, 22 Ct. Cl. 165.

SECT. 3961. — St. April 7, 1880, ch. 48, § 2 (21 St. 71), contains the proviso—

"That the Postmaster-General shall not hereafter have the power to expedite the service under any contract either now existing or hereafter given to a rate of pay exceeding fifty per centum upon the contract as originally let."

SECT. 3962. — It is discretionary with the Postmaster-General to make a reduction from the pay of mail contractors for failure to perform their contracts. 14 A. G. Op. 179. See 15 Id. 440. If a railroad admits its delay and the reasonableness of the Postmaster-General's reduction therefor, it cannot recover. *Jacksonville R. Co. v. United States*, 21 Ct. Cl. 155. If a contractor has been allowed to carry mail under several contracts and for many years by a route which is probably a deviation from that fixed by the contracts, the Postmaster-General cannot give the contracts a retroactive construction and impose fines upon the contractor, nor make retroactive deductions from his pay. *Carr v. United States*, 22 Ct. Cl. 152. The first sentence of this section was not repealed by St. 1879, ch. 180, § 5 (20 St. 355), nor by St. 1880, ch. 206 (21 St. 177). The act of 1879 applied to railway mail service alone and was obligatory upon the Postmaster-General in the cases it mentioned, and permissive as to all other cases. This section authorizes him to do what the act of 1879 obliged him to do. If a contractor admits his delay in delivering mails and the reasonableness of the deduction made, he cannot recover. *Jacksonville R. Co. v. United States*, *supra*; *Chicago Railway Co. v. United States*, 127 U. S. 406.

SECT. 3963. — St. May 17, 1878, ch. 107, §§ 2, 3 (20 St. 61), prohibits, under penalties, the subletting or transfer of any mail contracts without the consent in writing of the Postmaster-General; and provides that, in case of unlawful sublettings, a copy of the contract is to be filed and notice given to the Sixth Auditor, &c. Sect. 3, St. 1878, contemplates only a written contract. 16 A. G. Op. 280. Sects. 2, 3, of St. 1878, do not impose any greater liability on the sureties upon contracts, existing when it took effect, than they originally incurred. But § 3 is not to be so construed as to diminish the rights which the sureties have upon the amount which had become due the original contractor before his contract was sublet. Both sections applied to contracts existing when they were enacted, as well as to such as might thereafter be made. 16 A. G. Op. 61.



St. May 4, 1882, ch. 106 (22 St. 54), appropriating for inland transportation by star routes, provides —

“That whenever any contractor or subcontractor shall sublet his contract for the transportation of the mail on any route for a less sum than that for which he contracted to perform the service, the Postmaster-General may, whenever he shall deem it for the good of the service, declare the original contract at an end, and enter into a contract with the last subcontractor, without advertising, to perform the service on the terms at which the last subcontractor agreed with the original contractor or former subcontractor to perform the same: *Provided*, That such last subcontractor shall enter into a good and sufficient bond, and that the original contractor shall not be released from his contract until a good and sufficient bond has been made by such last subcontractor and accepted by the Post-Office Department: *Provided, further*, That when a contract hereafter made is declared void on account of its having been sublet, the contractor shall not be entitled to one month's extra pay as provided for by law: *And provided further*, That if any person shall hereafter perform any service for any contractor or subcontractor in carrying the mail, he shall, upon filing in the department his contract for such service, and satisfactory evidence of its performance, thereafter have a lien on any money due such contractor or subcontractor for such service to the amount of the same; and if such contractor or subcontractor shall fail to pay the party or parties who have performed service as aforesaid the amount due for such service within two months after the expiration of the quarter in which such service shall have been performed, the Postmaster-General may cause the amount due to be paid said party or parties and charged to the contractor, provided that such payment shall not in any case exceed the rate of pay per annum of the contractor or subcontractor: *And provided further*, That where any person, corporation, or partnership shall have contracts for the performance of mail service upon more than one route, and any failure to perform the service according to contract on any one or more of such routes shall occur, no payment shall be made for service on any of the routes under contract with such person, corporation, or partnership until such failure has been removed and all penalties therefor fully satisfied.”

Sect. 3963 does not prevent a principal, for whom a contractor is agent, from holding the latter to his agency, at least so far as money received by the latter under the contract is concerned. *Oregon Steamship Co. v. Otis*, 100 N. Y. 446; 27 Hun, 452; *Frye v. Burdick*, 67 Maine, 408; *Littlefield v. Pinkham*, 72 Id. 369.

## CHAPTER IX.

### CARRYING THE MAIL.

SECT. 3964. — *Decker v. Baltimore R. Co.*, 30 F. R. 724. Congress, under its power to establish “post-offices and post-roads,” may regulate the entire postal system of the country. *Ex parte Jackson*, 96 U. S. 727. Railroads are post-roads under the United States statutes, and a contract which grants the exclusive privilege to do telegraphing along any railroad is void as against public policy. *Pensacola Tel. Company, v. W. U. Tel. Co.* 96 U. S. 1; *W. U. Tel. Co. v. B. & O. Tel. Co.*, 23 F. R. 12; 19 Id. 660; *P. & B. R. Co. v. United States*, 13 Ct. Cl. 199. Post-roads are the property of the States through which they pass, the United States having a mere right of transit over them for the purpose of carrying the mail; the latter cannot construct a post-road within a State without its consent, but Congress may establish such a road already opened and made a public highway by the State. *Cleveland R. Co. v. Franklin Canal Co.*, 1 Pitts. L. J. 142. Letter-carrier routes in cities are post-routes. *Blackham v. Gresham*, 16 F. R. 609. Under § 5263 *et seq.*, the right of telegraph companies to lay lines, &c., is the same in streets of the District of Columbia as over post-roads generally. *Hewett v. W. U. Tel. Co.*, 4 Mackey (D. C.), 424.

In numerous acts of Congress authorizing bridges across navigable waters, it is provided that the structure shall be a post-route, as 22 St. 114, 422, 461; 23 St. 39, 43-47, 105, 310, 334, 445. Post routes in different States are established by 22 St. 13, ch. 27,



and 572, ch. 139. Provision is made for selling post-route maps by 20 St. 140, ch. 259, §§ 1, 2, and 355, ch. 180, § 1, par. 3; 23 St. 192, 424; 25 St. 845. 23 St. 3, ch. 9, provides —

“That all public roads and highways while kept up and maintained as such are hereby declared to be post routes.”

SECT. 3965. — It rests in the discretion of the Postmaster-General, where the power has been conferred on him by Congress, to determine at what hours the mail shall leave particular places and arrive at others, and whether it shall leave the same place only once a day or more frequently. Upon this point his decision is absolute, when the discretion is committed to him by the laws of the United States, and cannot be controlled by a State or by the courts. *Niel v. Ohio*, 3 How. 720.

SECT. 3970. — See notes, §§ 3943, 3956. — SECT. 3976. — Repealed by 23 St. 58, § 23.

SECT. 3975. — By St. May 4, 1882, ch. 116 (22 St. 54) —

“The Postmaster-General is authorized to designate postmasters at Presidential post-offices as disbursing officers for the payment of the salaries of the officers and employees of the postal service concerned in the transportation of mails or in their distribution in transit, and for such other payments as they are now authorized to make from postal revenues.”

SECT. 3981. — “Packet” includes newspapers, and mail contractors have no authority to carry newspapers or pamphlets other than in the mail, unless authorized to do so. 4 A. G. Op. 276.

SECT. 3982. — *United States v. Hall*, 9 Am. L. Reg. 232; *United States v. Kockersparger*, Id. 145; *United States v. Thompson*, 9 Law Rep. 451; *United States v. Kimball*, 7 Id. 32; *United States v. Adams*, 1 West. L. J. 315; *United States v. Gray*, 3 Haz. U. S. Reg. 227; *United States v. Pomeroy*, 3 N. Y. Leg. Obs. 143. An unstamped letter relating to merchandise shipped may be lawfully transmitted therewith outside the mails. *United States v. U. S. Express Co.*, 5 Biss. 91; *United States v. Bromley*, 12 How. 88, note. Letters sent by private carrier cannot be charged with postage, although the carriers may be subject to penalties. 4 A. G. Op. 349.

Sect. 3982 applies to the streets of New York as post-routes. *United States v. Eason*, 18 F. R. 590. By reference to pre-existing legislation, it appears that letter-carriers' routes are post-routes within the statute. *Blackham v. Gresham*, 16 F. R. 609. But citizens of a town or city in which free delivery of mail matter has not been established are not prohibited from employing a private dispatch company to carry and deliver, within the municipal limits, sealed letters on which no postage has been paid. The streets of such town or city are not post-routes. 14 A. G. Op. 152.

By 20 St. 355, nothing contained in this section —

“shall be construed as prohibiting any person from receiving and delivering to the nearest post-office or postal car mail-matter properly stamped.”

SECT. 3985. — Under the statutes of 1825 and 1827 it was a fraud upon the revenue for a common carrier to be the bearer of letters, except those of his employers, either with or without recompense. 4 A. G. Op. 159. See Id. 276.

SECT. 3990. — See note, § 3982.

SECT. 3991. — *Von Cotzhausen v. Nazro*, 15 F. R. 899.

SECT. 3992. — A messenger who regularly goes between two points and takes letters intrusted to him for a fee, is not a special but a general messenger, and a common carrier. Such a case was repugnant to the acts of 1825 and 1827. 4 A. G. Op. 159.

SECT. 3994. — In the last line “affecting” changed to “effecting” by 18 St. 319.

SECT. 3995. — This provision has been held to apply only to the mail while in transit, and not to the stopping of a horse when being taken from a stable for use in carrying the mail. *United States v. McCracken*, 3 Hughes, 544. *Contra*, in the case of an innholder,



who, to enforce his lien for liverage, stopped stage-horses in the public highway, while drawing a stage-coach containing the mail. *United States v. Barney*, Id. 545; 3 Hall's L. J. 128. It applies to the stopping of a railway mail train by one who has a judgment and writ of possession from a State court against the railroad company in respect to the lands about to be crossed by such train (*United States v. De Mott*, 3 F. R. 478); to the stopping of such a train, although those guilty are willing to permit the mail car only to pass (*United States v. Clark*, 13 Phila. 476); or to the stopping of a train by discharged railway laborers, although their primary intention may be, not to obstruct the mail, but to obtain a return passage (*United States v. Kane*, 19 F. R. 42; *United States v. Clark*, 23 Int. Rev. Rec. 306); and to any case where those who perform the act complained of know that it will have the effect to retard the passage of the mail, and perform it with that intent. *United States v. Kirby*, 7 Wall. 482; *United States v. Claypool*, 14 F. R. 127. It does not apply to a temporary detention of the mail caused by the carrier's arrest upon a charge of felony. *United States v. Kirby*, *supra*. And, in certain cases in other courts, it has even been held not to apply where the person carrying the mail is taken in custody by a qualified officer holding a warrant for his arrest for an offence which is not a felony, such as fast driving, in violation of a municipal ordinance. *United States v. Hart*, Pet. C. C. 390; 3 Wheeler C. C. 304; 5 A. G. Op. 554; *Penny v. Walker*, 64 Maine, 430. See *United States v. Harvey*, 1 Brunner, 540. A conspiracy to commit an offense described in § 3995 may be an offense under § 5440. *United States v. Stevens*, 2 Haskell, 171.

## CHAPTER X.

### RAILWAY SERVICE.

**SECT. 3997.** — U. P. R. Co. *v. United States*, 16 Ct. Cl. 569. By 22 St. 54, trunk-line facilities are to be extended to the principal cities of the United States, as far as practicable. 22 St. 180, ch. 361, provides for the designation, classification, and compensation of employees in the railway mail service. St. March 3, 1883, ch. 92, § 3 (22 St. 455), provides —

“**SEC. 3.** That the Postmaster-General is hereby directed to make a thorough investigation into the railway mail service of the United States, and report to Congress, in December next, with the data upon which it is based, a more complete system of gauging the rates of pay for carrying the mails on railroad routes if practicable in order to secure the better protection of the interests of the government, and the adjustment of rates of compensation for the service required; and he is authorized to expend, not to exceed \$10,000, out of the appropriation for the transportation of mails, for actual and necessary expenses involved, including such extra compensation as he may deem just and reasonable to officers of the department for specific services rendered which sum shall be immediately available.”

A railway company which conveys the mails over a road which it hires may treat the latter as part of its own road in its dealings with the Post-Office Department. *Railroad Co. v. United States*, 103 U. S. 703; 13 Ct. Cl. 199.

**SECT. 3999.** — If a railroad company has not contracted to deliver mail at a particular point, and the road is not a land-grant road, the Postmaster-General cannot withhold from it any money to which it may be entitled for performing service under its contract to defray the expense of delivering mail at such point. 15 A. G. Op. 397.

**SECT. 4000.** — The person travelling under this provision has not the rights of a passenger, if he is injured by the road's negligence. *Price v. Penn. R. Co.*, 113 U. S. 218. By 20 St. 355, ch. 180, § 3, —

“The Postmaster-General shall, in all cases, decide upon what trains and in what manner the mails shall be conveyed.”



St. March 3, 1887, ch. 346 (24 St. 492), provides —

"That the Postmaster-General be, and he is hereby, authorized to employ such mail-messenger service as may be necessary for the carriage of the mails in connection with railroad and steamboat service, transfer service between depots, over bridges or ferries, between post-offices, post-offices and branch offices or stations, in cases where by the laws and regulations of the Post-Office Department, railroad companies, steamboat companies, and the masters of vessels are not required to deliver into and take from the post-offices the mails carried on their lines or vessels."

SECT. 4001. — *U. P. R. Co. v. United States*, 104 U. S. 662; *C. & N. W. R. Co. v. United States*, 15 Ct. Cl. 232. St. July 12, 1876, ch. 179, § 13 (19 St. 78), provides, —

"SEC. 13. That railroad companies whose railroad was constructed in whole or in part by a land-grant made by Congress, on the condition that the mails should be transported over their road at such price as Congress should by law direct shall receive only eighty per centum of the compensation authorized by this act."

23 St. 156, 386, provides that, —

"If any railroad company shall fail or refuse to transport the mails, when required by the Post-Office Department, upon the fastest train or trains run upon said road, said company shall have its pay reduced fifty per centum of the amount provided by law."

SECT. 4002. — See note, § 4017. By 18 St. 340, ch. 128, the weighing of mails is thereafter to be paid for out of the appropriation for inland transportation. St. July 12, 1876, ch. 179, § 1 (19 St. 78), provides —

"That the Postmaster-General be, and he is hereby, authorized and directed to readjust the compensation to be paid from and after July 1, 1876, for transportation of mails on railroad routes, by reducing the compensation to all railroad companies for the transportation of mails ten per centum per annum from the rates fixed and allowed by § 1 of St. 1873, ch. 231. And the President of the United States is hereby authorized to appoint a commission of three skilled and competent persons, who shall examine into the subject of transportation of the mails by railroad companies, and report to Congress, at the commencement of its next session, such rules and regulations for such transportation and rates of compensation therefor as shall in their opinion be just and expedient, and enable the Department to fulfil the required and necessary service for the public."

The compensation to railroad companies authorized to be fixed by §§ 4002-4005 for the use of railway post-office cars is not affected by § 1 of St. 1876. 15 A. G. Op. 169.

St. March 3, 1879, ch. 180, § 6 (20 St. 355), provides, —

"SEC. 6. That the Postmaster-General shall request all railroad companies transporting the mails to furnish, under seal, such data relating to the operating, receipts and expenditures of such roads as may, in his judgment be deemed necessary to enable him to ascertain the cost of mail transportation and the proper compensation to be paid for the same; and he shall, in his annual report to Congress, make such recommendations, founded on the information obtained under this section, as shall, in his opinion, be just and equitable."

St. March 1, 1881, ch. 96 (21 St. 374) (see also 21 St. 177, ch. 206), provides that —

"Hereafter, when any railroad company fail or refuse to provide railway post-office cars when required by the Post-office Department, or shall fail or refuse to provide suitable safety-heaters and safety-lamps therefor, with such number of saws and axes to each car, for use in case of accident, as may be required by the Post-office Department, said company shall have its pay reduced ten per centum of the rates fixed by" § 4002, as amended by 19 St. 78 (above) and 20 St. 140, ch. 239.

The acts, 19 St. 78, and 20 St. 140, apply only to contracts thereafter made. *Chicago R. Co. v. United States*, 104 U. S. 680; 15 Ct. Cl. 232; 14 Id. 125. See, also, *Reese v. United States*, 8 Wall. 38; 2 Ct. Cl. 481; *Alvord v. United States*, 95 U. S. 336; 9 Ct. Cl. 500; *Steamship Co. v. United States*, 103 U. S. 721; 18 Ct. Cl. 30; *Jacksonville R. Co. v. United States*, 21 Id. 155. Where an unexpired written contract was in



force for the transportation of mails over a line of railroad, at a price authorized by the law in effect when it was entered into, the acts of 1876 and 1878 did not authorize the reduction of such agreed compensation; and a company which performed services after the receipt of an order from the postmaster under such acts, was entitled to recover the contract price therefor. *Chicago R. Co. v. United States*, 104 U. S. 680. But those acts apply where service was rendered under an implied contract after the receipt of notice stating that the compensation had been reduced. No binding contract exists by virtue of an order of the Postmaster-General, stating the compensation to be allowed for carrying the mails from July 1, 1877, to June 30, 1881, unless otherwise ordered. *Eastern R. Co. v. United States*, 20 Ct. Cl. 23.

SECT. 4004. — St. Aug. 4, 1886, ch. 900 (24 St. 220), provides —

“That the Postmaster-General be, and he is hereby, authorized to allow compensation to such railroad companies as had furnished apartments in cars for use as railway post-offices of less than forty feet in length, in cases where such apartments had been furnished in pursuance of an agreement or understanding with the Postmaster-General, the Second Assistant Postmaster-General, or the Superintendent of the Railway Mail Service, that special compensation should be allowed therefor; such allowances to be proportioned to the length of the apartments furnished, and not exceeding a pro rata of the price allowed for a forty-foot car, and for the time unpaid for up to the date when the company was notified by the Department that such payment could not be made because not warranted by the present law.”

SECT. 4005. — By St. March 3, 1879, ch. 180, § 4 (20 St. 358), —

“All cars, or parts of cars, used for the railway mail service, shall be of such style, length, and character, and furnished in such manner, as shall be required by the Postmaster-General, and shall be constructed, fitted up, maintained, heated, and lighted by and at the expense of the railroad companies.”

## CHAPTER XI.

### FOREIGN MAIL SERVICE.

SECTS. 4006, 4016. — St. June 11, 1880, ch. 206 (21 St. 177), in part provides —

“That the Postmaster-General be authorized to remit in favor of the colonies of New Zealand and New South Wales so much of the cost of the overland transportation of the Australian closed mails as he may deem just.”

SECT. 4008. — See note, § 3943. By St. March 3, 1885, ch. 342 (23 St. 387), —

“The Postmaster-General is hereby authorized to enter into contracts for the transportation of any part of foreign mails (including railway transit across the Isthmus of Panama), after legal advertisement, with the lowest responsible bidder, at a rate not exceeding fifty cents a nautical mile on the trip each way actually travelled between the terminal points: *Provided*, That the mails so contracted shall be carried on American steamships, and that the aggregate of such contracts shall not exceed one-half of the sum hereby appropriated.”

## CHAPTER XII.

### SPECIAL, LOCAL, AND ROUTE AGENTS.

SECTS. 4017, 4020. — See note, § 4002. St. June 17, 1878, ch. 259 (20 St. 140, 142), provides that thereafter the *per diem* pay of all special agents appointed under § 4017 —

“Shall only be allowed for their actual and necessary expenses not exceeding \$5 per diem when they are actually engaged in traveling on the business of the department, except such, not exceeding ten in number, as are appointed by the Postmaster-General to duty at such important points as he may



designate, and nine assistant superintendents of railway mail service, who may be detailed to act as superintendents of division of railway mail service who shall each receive a salary of \$2500, per annum, and no more. . . . That hereafter the Postmaster-General may appoint one agent only to superintend the postal railway service, who shall be paid, out of the appropriation for the transportation of the mail on railways, a salary at the rate of \$3500 a year, and no allowances for traveling or incidental expenses. That the Postmaster-General be, and he is hereby, authorized and directed to readjust the compensation to be paid from and after July 1, 1878, for transportation of mails on railroad routes by reducing the compensation to all railroad companies for the transportation of mails five per centum per annum from the rates for the transportation of mails, on the basis of the average weight fixed and allowed by § 1 of 15 St. 79."

By St. June 11, 1880, ch. 206 (21 St. 177), the superintendent of railway mail service and the chief of post-office inspectors shall be paid their actual expenses while travelling on the business of the department; and the words "special agents" and "agents," wherever occurring in § 4017, are changed to "post-office inspectors."

SECT. 4025. — The appointment of these clerks is not for a definite period, and the right to continue a clerk in the service is within the discretion of the Postmaster-General, who may remove from office or reduce the compensation. The prior rights of postal clerks are not affected by St. July 31, 1882 (22 St. 180), which may be referred to as explanatory of legislation. *Gleeson v. United States*, 23 Ct. Cl. 207.

## CHAPTER XIII.

### THE MONEY-ORDER SYSTEM.

SECT. 4027. — See note, § 3929. St. March 3, 1883, ch. 123 (22 St. 526), provides, by § 1, for the issue, for sums under \$5, of money-orders, without corresponding advices, to be known as "postal notes," for which a fee of three cents is to be charged, and which are to be made payable to bearer, to become invalid three months from the last day of the month of issue, after which, for an additional fee of three cents, a duplicate may be issued by the superintendent of the money-order system; by § 2, the provisions of Rev. Stats. §§ 3834, 4027, 4030, 4039, 4041-4046, 4048, are made applicable to postal notes, and an agency is established for the distribution of postal notes to postmasters. Sect. 3 provides —

"That a money-order shall not be issued for more than one hundred dollars, and that the fees for money-orders shall be as follows, to wit: For orders not exceeding \$10, 8 cents. For orders exceeding \$10 and not exceeding \$15, 10 cents. For orders exceeding \$15 and not exceeding \$20, 15 cents. For orders exceeding \$20 and not exceeding \$25, 20 cents. For orders exceeding \$25 and not exceeding \$30, 25 cents. For orders exceeding \$30 and not exceeding \$35, 30 cents. For orders exceeding \$35 and not exceeding \$40, 35 cents. For orders exceeding \$40 and not exceeding \$45, 40 cents. For orders exceeding \$45 and not exceeding \$50, 45 cents. For orders exceeding \$50 and not exceeding \$55, 50 cents. For orders exceeding \$55 and not exceeding \$60, 55 cents. For orders exceeding \$60 and not exceeding \$65, 60 cents. For orders exceeding \$65 and not exceeding \$70, 65 cents. For orders exceeding \$70 and not exceeding \$75, 70 cents. For orders exceeding \$75 and not exceeding \$80, 75 cents. For orders exceeding \$80 and not exceeding \$85, 80 cents. For orders exceeding \$85 and not exceeding \$90, 85 cents. For orders exceeding \$90 and not exceeding \$95, 90 cents. For orders exceeding \$95 and not exceeding \$100, 95 cents."

Sect. 4 provides for compensation of clerks to postmasters at certain money-order offices and for clerical labor in the money-order business. Sect. 5 provides for statements of unpaid money-orders and postal notes.

Sect. 1 of this act is amended by St. Jan. 3, 1887, ch. 13 (24 St. 354), to read as follows: —

"That for the transmission of small sums under \$5 through the mails the Postmaster-General may authorize postmasters at money-order offices, or at such other offices as he may designate, to issue money-orders, without corresponding advices, on an engraved form to be prescribed and furnished by him; and a money-order issued on such new form shall be designated and known as a 'postal note,' and a fee of three cents shall be charged for the issue thereof. Every postmaster who shall issue a postal note under the authority of the Postmaster-General shall make the same payable to bearer, when duly receipted, at any money-order office; and after a postal note has once been paid, to whomsoever it has



been paid, the United States shall not be liable for any further claim for the amount thereof; but a postal note shall become invalid and not payable upon the expiration of three calendar months from the last day of the month during which the same was issued; and the holder, to obtain the amount of an invalid postal-note must forward it to the Superintendent of the Money-Order System, at Washington, District of Columbia, together with an application, in such manner and form as the Postmaster-General may prescribe, for a duplicate thereof, payable to such holder; and an additional fee of three cents shall be charged and exacted for the issue of the duplicate: *Provided*, That all provisions of law applicable to the issue of postal notes at money-order offices, and to postmasters, clerks and other employees therein, shall be equally applicable to offices authorized to issue postal notes under this act."

St. June 29, 1886, ch. 569 (24 St. 87), provides —

"That from and after July 1, 1886, the allowances for clerk-hire made to postmasters of first and second class post-offices, by the Postmaster-General, out of the annual appropriation for clerks in post-offices, shall cover the cost of clerical service of all kinds in such post-offices, including the cost of clerical labor in the money-order business; and that all laws or parts of laws inconsistent or in conflict herewith are hereby repealed.

"SEC. 2. That from and after July 1, 1886, the allowances for clerk-hire in money-order business shall not be separately made, but shall be included in the general allowances for clerk-hire, and shall be based upon, but not to exceed, the rates specified in § 4 of the act of March 3, 1883; and at all money-order exchange offices which are now or may hereafter be established, additional allowances for clerk-hire may be made as provided in said section for international exchange-offices; and postmasters at offices of the first and second classes shall not receive any compensation in addition to their salaries for the transaction of the money-order and postal-note business."

24 St. 86, ch. 568, reduces, from eight cents to five cents, the fee for each domestic money-order not exceeding in amount \$5.

SECT. 4028. — Amended by St. Jan. 30, 1889, ch. 100 (25 St. 654), to read as follows:—

"SEC. 4028. The Postmaster-General may conclude arrangements with the post departments of foreign governments with which postal conventions have been or may be concluded for the exchange, by means of postal orders, of small sums of money, not exceeding one hundred dollars in amount, at such rates of exchange and compensation to postmasters and under such rules and regulations as he may deem expedient; and the expenses of establishing and conducting such systems of exchange may be paid out of the proceeds of the money-order business.

"SEC. 2. That this act shall take effect within six months from the date of its approval by the President."

SECT. 4030. — *Ex parte* Hibbs, 26 F. R. 432. See note, § 4027.

SECT. 4032. — See note, § 4027. St. March 3, 1875, ch. 129 (18 St. 343), provides —

"That on and after July 1, 1875, the fees on money-orders shall be, for orders not exceeding \$15, 10 cents; exceeding \$15 and not exceeding \$30, 15 cents; exceeding \$30 and not exceeding \$40, 20 cents; exceeding \$40 and not exceeding \$50, 25 cents. And no money-order shall be issued for a sum greater than \$50."

SECT. 4037. — 18 St. 320, inserts "be" before "paid" in the second line.

SECT. 4039. — See note, § 4027.

SECT. 4040. — St. May 4, 1882, ch. 116 (22 St. 55), provides, —

"SEC. 3. That the amount of all money-orders which shall have remained unpaid for a period of five years or more after the date of the issue thereof, which amount is to be ascertained and reported annually by the Auditor of the Treasury for the Post-Office Department, shall be covered into the Treasury. But nothing herein shall be so construed as to prevent the payment, out of current money-order funds, by duplicate issued under the authority of the Postmaster-General, of any money-order which has remained unpaid more than five years."

SECT. 4041. — See notes, §§ 3929, 4027.

SECT. 4046. — *United States v. Gilbert*, 17 Int. Rev. Rec. 54.

SECT. 4048. — See note, § 4027.



## CHAPTER XIV.

## ACCOUNTS AND REVENUES.

SECTS. 4049, 4050. — 13 Blatch. 557, in St. March 3, 1875, ch. 128, § 4 (18 St. 340), provides —

“that hereafter the sixth auditor shall keep the accounts in his office so as to show the expenditures of the Post-Office Department under each item of appropriation provided by law.”

SECT. 4053. — *United States v. Young*, 25 F. R. 710.

SECT. 4057. — *United States v. Stockgrowers' Nat. Bank*, 30 F. R. 913. Under this provision, it seems that the United States may recover, in an action brought by it against a mail contractor, money paid to the latter for services performed under orders of the Postmaster-General, expediting and increasing the service, and providing compensation therefor in violation of §§ 3960, 3961. *United States v. Cosgrove*, 26 F. R. 908; *United States v. Barlow*, Id. 903; *United States v. Parker*, cited Id. 912. This section does not extend to cases where an additional allowance was not in excess of the limit fixed by law, where no fraud appears on the part of contractors or of the employés of the department, and where there is no mistake of fact. *Griffith v. United States*, 22 Ct. Cl. 165.



## TITLE XLVII.

## FOREIGN RELATIONS.

SECTS. 4062, 4063. — *Osborn v. United States Bank*, 9 Wheat. 738; *United States v. Rhodes*, 1 Abb. U. S. 32; *United States v. Hand*, 2 Wash. 435; *United States v. Lafontaine*, 4 Cranch C. C. 173; *United States v. Jeffers*, Id. 704. Consuls are not entitled, by the law of nations, to the immunities and privileges of public ministers; they are only exempt from the jurisdiction of State courts. Sect. 687, note; *Gittings v. Crawford*, Taney, 1; *Com. v. Kosloff*, 2 Wheeler C. C. 622; *St. Luke's Hospital v. Barclay*, 3 Blatch. 265; *United States v. Ravara*, 2 Dall. 297; *Graham v. Stucken*, 4 Blatch. 50; *Bixby v. Jansen*, 6 Id. 315; *Re Dillon*, 7 Sawyer, 561; *Miller v. Von Loben Sels*, 66 Cal. 341. State courts may, however, take jurisdiction of suits by foreign consuls. *Sagory v. Wissman*, 2 Ben. 240. These provisions are equally obligatory on the State and Federal courts. *Ex parte Cabrera*, 1 Wash. 232. A certificate from the Department of State, under seal of office, showing that a person is recognized as a foreign minister, is sufficient evidence that he has been received as such by the President. This section applies to all public ministers. *United States v. Benner*, Bald. 234. If the minister first assaults, the defendant is excused for returning it. *United States v. Liddle*, 1 Wash. 205; *United States v. Ortega*, 4 Id. 531; 11 Wheat. 467. An assault by a foreign minister may be repelled in self-defence, but it does not justify an arrest on process. *United States v. Benner*, *supra*. An indictment against the servant of a foreign minister must be quashed for want of jurisdiction. *United States v. Lafontaine*, 4 Cranch C. C. 173. But a domestic servant of a public minister, committed under a warrant from the governor, or any judicial magistrate of a State, cannot be discharged by an order of a Federal court, the proper tribunal to declare the arrest void being the one in which the process is pending. *Ex parte Cabrera*, 1 Wash. C. C. 232. A foreign minister cannot waive his privileges or immunities, and an attaché to a foreign legation is a public minister within the act. *United States v. Benner*, Bald. 234; *Davis v. Packard*, 7 Pet. 276.

SECT. 4064. — Whoever executes a process on a foreign minister, under this section, is to be deemed an officer, and it is not necessary to support an indictment that the defendant should know the person arrested to be a foreign minister. *United States v. Benner*, Bald. 234.

SECTS. 4067, 4069. — A statute which merely declares war is not an act of confiscation of enemy's property. *Brown v. United States*, 8 Cranch, 110. For a statement of the reasons which led to the adoption of this law, see *Passenger Cases*, 7 How 282, 513. These sections necessarily confer on the President all the means for enforcing such orders as he may give in relation to alien enemies, and the marshals of the several districts are the proper officers to execute the orders. He need not call in aid the judiciary to enforce them. *Lockington v. Smith*, Pet. C. C. 466. The government may prescribe the conditions under which its executive officers are to deal with alien enemies. *C. & O. R. Co. v. United States*, 20 Ct. Cl. 49.

SECT. 4070. — Where the President has given orders to a marshal in relation to an alien enemy, he may act without calling in the aid of judicial authority. *Lockington v. Smith*, Pet. C. C. 466.



SECT. 4071. — See note, § 875; *Re Letters Rogatory*, 46 F. R. 306.

SECT. 4075. — See note, § 212. By 20 St. 40, ch. 74, this provision is suspended to the extent that the Secretary of State is thereby directed to issue passports, free of charges and fees therefor, to any colored citizens wishing to go to Brazil to engage in work upon the Madera and Mamore Railway.

SECT. 4079. — See note, § 728. The judicial power of consuls depends upon treaty stipulations. *Dainese v. Hale*, 91 U. S. 13; *Re Aubrey*, 26 F. R. 851; *The Elwine Krepplin*, 9 Blatch. 438; 2 A. G. Op. 378; *Dainese v. United States*, 15 Ct. Cl. 64; *The William Harris*, Ware, 372; *United States v. Craig*, 28 F. R. 801. Unless restricted by treaty, a United States district court may, in the exercise of its discretion, assume jurisdiction of a claim for wages against a foreign vessel, especially when there is no consul within the court's territorial jurisdiction. *The Amalia*, 3 F. R. 652; *The Salomoni*, 29 Id. 534.

SECT. 4080. — In the fifth line, the words "of a circuit court" are substituted for "appointed, under the laws of the United States, to take bail or affidavits, or for other judicial purposes whatsoever," in the cited act. 2 Com. D. 1961.

SECT. 4083. — See note, § 4127. St. March 23, 1874, ch. 62 (18 St. 23), provides —

"That whenever the President of the United States shall receive satisfactory information that the Ottoman government, or that of Egypt, has organized other tribunals on a basis likely to secure to citizens of the United States, in their dominions, the same impartial justice which they now enjoy there under the judicial functions exercised by the minister, consuls, and other functionaries of the United States, pursuant to Rev. Stats. §§ 4083-4091, 4098, 4121, 4125, he is hereby authorized to suspend the operations of said acts as to the dominions in which such tribunals may be organized, so far as the jurisdiction of said tribunals may embrace matters now cognizable by the minister, consuls, or other functionaries of the United States in said dominions, and to notify the government of the Sublime Porte, or that of Egypt, or either of them, that the United States, during such suspension will, *as aforesaid*, accept for their citizens the jurisdiction of the tribunals aforesaid over citizens of the United States which has heretofore been exercised by the minister, consuls, or other functionaries of the United States.

"SEC. 2. That the President is hereby authorized, for the benefit of American citizens residing in the Turkish dominions, to accept the recent law of the Ottoman Porte ceding the right of foreigners possessing immovable property in said dominions."

Under these provisions, the President issued his proclamation March 27, 1876, suspending the jurisdiction of consular courts (see 19 St. 662); and Oct. 29, 1874, accepting the law of the Ottoman Porte ceding the right of foreigners possessing immovable property in the Turkish dominions. 18 St. 850.

A United States consular court in Japan cannot, under the treaty with Japan and St. 1860, ch. 179, render a judgment against a foreigner not a United States citizen; and cannot, in a suit against an American merchant, by one not a United States citizen, entertain a plea of set-off beyond the plaintiff's claim. 11 A. G. Op. 474.

SECT. 4091. — See note, § 4083.

SECT. 4092. — See note, § 4107.

SECT. 4093. — The last three words of the section were added in the Revision. 2 Com. D. 1967. The record on appeal must show an allowance of the appeal. *Tazaymon v. Twombly*, 5 Sawyer, 79.

SECT. 4098. — See note, § 4083.

SECT. 4107. — Appeals to the minister are allowed as here indicated only in the cases over which appellate jurisdiction is given to that officer by § 4092; and in any case wherein the judgment exceeds \$2500, &c., an appeal lies to the circuit court for the district of California. *The Ping-On v. Blethen*, 11 F. R. 607; 7 Sawyer, 483; *The Spark v. Lee Choi Chum*, 1 Id. 713.

SECT. 4121. — See notes, §§ 1692, 4083. In the absence of a specific appropriation, the expense of transporting United States prisoners held for trial in China is a lawful



charge on the general appropriations for defraying the judicial expenses of the government. 6 A. G. Op. 59. It seems that, under §§ 4121–4125, the sentences of these courts, in the exercise of their criminal jurisdiction, are to be executed only in the country where the trial and conviction are had. 14 Id. 522.

SECT. 4127. — Amended by St. June 14, 1878, ch. 193 (20 St. 131), to read as follows:

“The provisions of this title, so far as the same are in conformity with the stipulations in the existing treaties between the United States and Tripoli, Tunis, Morocco, Muscat, and the Samoan or Navigator Islands, respectively, shall extend to those countries, and shall be executed in conformity with the provisions of the treaties and of the provisions of this title by the consuls appointed by the United States to reside therein, who are hereby *ex officio* invested with the powers herein delegated to the ministers and consuls of the United States appointed to reside in the countries named in § 4083, so far as the same can be exercised under the provisions of treaties between the United States and the several countries mentioned in this section, and in accordance with the usages of the countries in their intercourse with the Franks or other foreign Christian nations. And whenever the United States shall negotiate a treaty with any foreign government, in which the American Consul-General or consul shall be clothed with judicial authority, and securing the right of trial to American citizens residing therein before such Consul-General or consul and containing provisions similar to or like those contained in the treaties with the governments named in this act, then said title, so far as the same may be applicable, shall have full force in reference to said treaty, and shall extend to the country of the government negotiating the same.”

SECT. 4130. — The cited act of 1870 was treated as superseding St. July 28, 1866, ch. 296, § 11 (14 St. 322). 2 Com. D. 1973. 19 St. 2, ch. 6, inserts the words “vice Consul-General” after “Consul-General.”



## TITLE XLVIII.

## REGULATION OF COMMERCE AND NAVIGATION

## CHAPTER I.

## REGISTRY AND RECORDING.

St. July 5, 1884, ch. 221 (23 St. 118), establishes a Bureau of Navigation in the Treasury Department, and provides —

“That there shall be in the Department of the Treasury of the United States a Bureau of Navigation, under the immediate charge of a Commissioner of Navigation.

“SEC. 2. That the Commissioner of Navigation, under the direction of the Secretary of the Treasury, shall have general superintendence of the commercial marine and merchant seamen of the United States, so far as vessels and seamen are not, under existing laws, subject to the supervision of any other officer of the Government. He shall be specially charged with the decision of all questions relating to the issue of registers, enrolments, and licenses of vessels, and to the filing and preserving of those documents; and wherever in title forty-eight or fifty of the Revised Statutes any of the above-named documents are required to be surrendered or returned to the Register of the Treasury, such requirement is hereby repealed, and such documents shall be surrendered and returned to the Commissioner of Navigation. Said Commissioner shall have charge of all similar documents now in the keeping of the Register of the Treasury, and shall perform all the duties hitherto devolved upon said Register relating to navigation.

“SEC. 3. That the Commissioner of Navigation shall be charged with the supervision of the laws relating to the admeasurement of vessels, and the assigning of signal letters thereto, and of designating their official number; and on all questions of interpretation growing out of the execution of the laws relating to these subjects, and relating to the collection of tonnage tax, and to the refund of such tax when collected erroneously or illegally, his decision shall be final.

“SEC. 4. That the Commissioner of Navigation shall annually prepare and publish a list of vessels of the United States belonging to the commercial marine, specifying the official number, signal letters, names, rig, tonnage, home port, and place and date of building of every vessel, distinguishing in such list sailing-vessels from such as may be propelled by steam or other motive power. He shall also report annually to the Secretary of the Treasury the increase of vessels of the United States, by building or otherwise, specifying their number, rig, and motive power. He shall also investigate the operations of the laws relative to navigation, and annually report to the Secretary of the Treasury such particulars as may, in his judgment, admit of improvement or may require amendment.

“SEC. 5. That the Commissioner of Navigation shall, under the direction of the Secretary of the Treasury, be empowered to change the names of vessels of the United States, under such restrictions as may have been or shall be prescribed by act of Congress.

“SEC. 6. That the Commissioner of Navigation shall be appointed by the President of the United States, by and with the advice and consent of the Senate, and shall receive a salary of four thousand dollars per annum. And the Secretary of the Treasury shall have power to transfer from existing Bureaus or divisions of the Treasury one clerk, to be designated as deputy commissioner of navigation, to act with the full powers of said Commissioner during his temporary absence from his official duty for any cause, and such additional clerks as he may consider necessary to the successful operation of the Bureau of Navigation, without impairing the efficiency of the Bureaus or divisions whence such clerks may be transferred.”

“The purpose of a register is to declare the nationality of a vessel engaged in trade with foreign nations, and to enable her to assert that nationality wherever found. The



purpose of an enrolment is to evidence the national character of a vessel engaged in the coasting trade, or home traffic, and to enable such vessel to procure a coasting license." Miller, J., in *The Mohawk*, 3 Wall. 566, 571; *The Steamboat Forrester*, Newb. 92. The statutes require neither registry nor enrolment. These admit to certain duties and obligations. A vessel owned by a citizen of the United States, and not registered or enrolled, is American property, with all the general rights of any property of an American (6 A. G. Op. 649; *Fox v. The Lodemia*, Crabbe, 271); although it has been stated that such vessels are "of no more value, as American vessels, than the wood and iron out of which they are constructed." *White's Bank v. Smith*, 7 Wall. 655, 656. As to the meaning of the word "vessel," see notes, §§ 3, 4612. As to the provisions for enrolment being similar to those in the case of registering, see § 4312 and notes. The papers of a vessel not under seizure, in the hands of a collector, and not deposited with him for entry or clearance, cannot be detained without subjecting him to an action; and he is not justified by the fact that the vessel or its owner is subject to a statutory penalty for taking out improper papers. *Badger v. Gutierrez*, 111 U. S. 734. By 23 St. 59, ch. 121, § 26, provision is made as to the refunding or remission of fines, penalties, &c., in the case of vessels or seamen.

SECT. 4131. — The words "denominated and," preceding "deemed," in 3d line in the original act, are here omitted. 2 Com. D. 1983. By 23 St. 53, § 1, the last clause of this section is amended, to the effect that all officers shall be citizens of the United States, except that vacancy on foreign voyages, &c., in any grade below master, may be filled by an alien until return to home port. As to aliens as engineers and pilots on steam vessels, see 18 St. 30, ch. 107, cited under § 4441. An alien, under the provisions of this section of the Rev. Stats., can be master neither *de jure* nor *de facto*. *The Dubuque*, 2 Abb. U. S. 20; *The Virginus*, 14 A. G. Op. 340. It is immaterial if the master resides abroad, provided he is a native citizen of the United States. *United States v. Gillies*, Pet. C. C. 159; 3 Wheel. Cr. Cas. 308. A special act, authorizing registry and enrolment, may be found in 24 St. 71, ch. 391. A citizen of the United States may purchase a foreign ship of a belligerent, and she becomes entitled to bear the flag and receive the protection of the United States, although not entitled to registry. 6 A. G. Op. 648. See *Crapo v. Kelly*, 16 Wall. 610, 632, 633; *The Merritt*, 17 Id. 582; 2 Biss. 381. The registry acts have not changed the common law as to the manner of transferring title by bill of sale. *Weston v. Penniman*, 1 Mason, 317. See note, § 4196.

SECT. 4132. — 2 A. G. Op. 392. 21 St. 44, which exempts "any flat boat, barge, or like craft, for the carriage of freight, not propelled by sail, or by internal motive power of its own, on the rivers or lakes of the United States," from enrolment, registry or license, does not dispense with the requirement that it be built within the United States. 16 A. G. Op. 563.

"*Adjudged to be forfeited for a breach of the laws of the United States.*" — See 3 A. G. Op. 606. As to pleasure yachts, see note, § 4214.

SECT. 4133. — The words "in the capacity of," following "be" in 4th line of § 4133, and 6th line of § 4134, in the original acts, are here omitted. 2 Com. D. 1984. On the return of the owner to this country, the disability ceases; and it was held that the carrying by the vessel, during such residence of the owner, of a foreign flag, did not divest title or make disability perpetual. 1 A. G. Op. 523. The provisions of this section do not include enrolled vessels. *The Henry*, 1 Haskell, 100. A vessel whose owner, though a citizen of the United States, usually resides abroad, is not to be entitled to be registered. *United States v. Gillies*, *supra*.

SECT. 4134. — See notes, §§ 4133, 4214.

SECT. 4135. — The word "expressly," recommended by the revisers to be inserted in the last line, is here printed "especially." 2 Com. D. 1985.

SECT. 4136. — See note, § 4189. This section adds another class of vessels which



may be registered and enrolled, to those previously enumerated. *The Mohawk*, 3 Wall. 566. The vessel must be actually wrecked within the waters of the United States. *United States v. The Victoria Perez*, 8 Ben. 109. A vessel built in the United States, but transferred to a foreign owner, and afterwards wrecked in the waters of the United States, and purchased and repaired by an American citizen, comes within the spirit and general intent, although perhaps not within the strict letter, of the law. 2 A. G. Op. 424. In 15 A. G. Op. 402, which traces the history of this section and gives instances of special legislation for a similar purpose before the statute was passed, it was held that it was immaterial if the original plan of the vessel was departed from in putting her in repair; and also whether her disabled condition was "caused by the winds or the waves, by stranding, by fire, by explosion of boilers, or by any other casualty." See *The Hud and Frank*, 1 Haskell, 192.

SECT. 4137.—The changes made in the law relating to the registry and enrolment of vessels were deemed to supersede St. March 3, 1831, ch. 115 (4 St. 492). 2 Com. D. 1936. See *The Rapid Transit*, 11 F. R. 322, 329.

SECT. 4141.—The points under this section chiefly involve the question of supplies or taxation. "*Prima facie*, the home port is the place of enrolment, where or nearest to which the owner, or, if more than one, the managing owner, resides; and that continues to be the home port until another has been established by a change of the place of enrolment, or by a change of the owner's residence. But the authorities do not support the theory that a vessel can have more than one home port, or be a domestic vessel in more than one State, at the same time." *The Ellen Holgate*, 30 F. R. 126; *The Cumberland*, Id. 449; *Hays v. Pacific Mail S. S. Co.*, 17 How. 596; *Morgan v. Parham*, 16 Wall. 471; *The St. Lawrence*, 3 Ware, 211; *Tree v. The Indiana*, Crabbe, 479; *The Superior*, Newb. 176; *Hill v. The Golden Gate*, Id. 308; *The Albany*, 4 Dillon, 439; *The Jennie B. Gilkey*, 19 F. R. 127; *The E. A. Barnard*, 2 Id. 712; *The Mary Chilton*, 4 Id. 847; *The Charlotte Vanderbilt*, 19 Id. 219; *The Red Wing*, 14 Id. 869; *The Mary Morgan*, 28 Id. 196; *The Rapid Transit*, 11 Id. 322, 329; *The Mary Bell*, 1 Sawyer, 135; *Collins v. The Fort Wayne*, 1 Bond, 476, 491; *Blanchard v. The Martha Washington*, 1 Cliff. 463, 466. In most of the above cases the question was between material-men, seeking to maintain a lien, and the owner; and in some of them the question was one of taxation. Business men may have many residences and business places, "but I cannot see how, as a matter of fact, they can have more than one usual residence." *The Thomas Fletcher*, 24 F. R. 378; *Chadwick v. Baker*, 54 Maine, 9. But see *The St. Lawrence*, *supra*. The distinction between "port" in this section and in § 2767, is given in *The Lotus* No. 2, 26 F. R. 640.

SECT. 4142.—See note, §§ 2630, 4131. A ship may be owned by one American citizen, in trust for another. *Weston v. Penniman*, 1 Mason, 311; *Scudder v. The Calais Steamboat Co.*, 1 Cliff. 381. Equitable ownership, or ownership *pro hac vice*, need not be specified by the agent, even in his registry oath, unless aliens are interested. *Hall v. Hudson*, 2 Sprague, 65. A vessel built in the United States for aliens resident abroad may acquire a foreign bottom without being documented conformably to the laws of the United States, or of the domicile of her foreign owners. The property in a vessel, under our laws, is acquired and disposed of the same as any other chattel. *The Active Oil*, 286. See *The Fideliter*, 1 Sawyer, 153; 1 Abb. (U. S.) 577; *Deady*, 620. The oath may be administered by a deputy collector. *The Kate Heron*, 6 Sawyer, 106. The most that an omission in the registry and enrolment of an American vessel can do, is to deprive her of her American privileges. *Fox v. The Lodemia*, Crabbe, 271.

"That there is no subject or citizen of any foreign prince or state, directly or indirectly, by way of trust, confidence, or otherwise, interested in such vessel, or in the profits or issues thereof."—*The Virginus*, 14 A. G. Op. 340.



SECTS. 4143, 4144. — See note, § 4189. These sections were framed in general terms to avoid the repetition of the cited provision. 2 Com. D. 1988. The following notes are under § 4143. It is no excuse that the oath was innocently made under a misconception of the real character of foreign domicile. *The Venus*, 8 Cranch, 253, 276. See *The Mohawk*, 3 Wall. 566.

*"There shall be a forfeiture of the vessel, &c., or of the value thereof."* — The government has the right of election, and until exercised has no vested right in either the vessel or its value. *United States v. Hamilton*, 8 Repr. 166; *United States v. Grundy*, 3 Cranch, 337; *Six Hundred Tons of Iron Ore*, 9 F. R. 595, 600, and cases cited.

The penalty is equal in amount to the value of the vessel at the time of the commission of the illegal act causing the forfeiture, and the amount is not affected by any subsequent change in the value of the vessel, or its loss or destruction. *United States v. Hamilton*, *supra*. See *United States v. The Anthony Margin*, 2 Pet. Adm. 452, 468; *The Kate Heron*, 6 Sawyer, 106; 2 A. G. Op. 392.

SECTS. 4145, 4146. — Money recovered on a bond is a penalty only, and this character is not taken away by the fact that security is taken before the offence is committed, in order to secure the payment of the fine, if the law should be violated. *United States v. Montell*, Taney, 47.

SECT. 4148. — See 23 St. 118, ch. 221, § 3, cited at beginning of this chapter.

SECT. 4153. — Amended by St. Aug. 5, 1882, ch. 398 (22 St. 300), by inserting before the last paragraph the following: —

*"That from the gross tonnage of every vessel of the United States there shall be deducted the tonnage of the spaces or compartments occupied by or appropriated to the use of the crew of the vessel, but the deduction for crew-space shall not, in any case, exceed 5% of the gross tonnage. And in every such vessel propelled by steam or other power requiring engine-room, there shall also be deducted from the gross tonnage of the vessel the tonnage of the space or spaces actually occupied by or required to be inclosed for the proper working of the boilers and machinery, including the shaft-trunk or alley in screw-steamers, with the addition in the case of vessels propelled with paddle-wheels of 50%, and in the case of vessels propelled by screws of 75% of the tonnage of such space, but in no case shall the deductions from the gross tonnage exceed 50% of such tonnage: and the proper deductions from the gross tonnage having been made, the remainder shall be deemed the net, or register, tonnage of such vessels. That the register or other official certificate of the tonnage or nationality of a vessel of the United States, in addition to what is now required by law to be expressed therein, shall state separately the deductions made from the gross tonnage, and shall also state the net or register tonnage of the vessel. But the outstanding registers or enrolments of vessels of the United States shall not be rendered void by the addition of such new statement of her tonnage, unless voluntarily surrendered, but the same may be added to the outstanding document, or by an appendix thereto, with a certificate of a collector of customs that the original estimate of tonnage is amended."*

Section 3 of this act authorizes and directs the Secretary of the Treasury to make provisions for carrying this act into effect, and to establish and promulgate a scale of fees for the readmeasurement of the spaces to be deducted from the gross tonnage of a vessel, on the basis of the last sentence of § 4186. See 24 St. 79, ch. 421. Section 4153 is further amended by 24 St. 81, ch. 421, § 5, by striking out the last sentence of the last paragraph, and inserting instead the following: —

*"In every vessel documented as a vessel of the United States, the number denoting her net tonnage shall be deeply carved, or otherwise permanently marked on her main beam, and shall be so continued; and if the number at any time cease to be continued, such vessel shall be subject to a fine of \$30 on every arrival in a port of the United States if she have not her tonnage number legally carved or permanently marked."*

Sect. 9 of the same act provides —

*"SEC. 9. That the fines imposed by §§ 5, 6, 7, 8 of this act shall be subject to remission or mitigation by the Secretary of the Treasury when the offence was not wilfully committed, under such regulations and methods of ascertaining the facts as may seem to him advisable."*



In *Inman Steamship Co. v. Tinker*, 94 U. S. 238, a State law requiring vessels entering the port of New York, &c., to pay a percentage per ton, to be computed on the tonnage expressed in the registers of enrolment, was held unconstitutional.

SECT. 4154. — See note, § 4153. Repealed by 22 St. 300, ch. 398, § 2, and the following substituted : —

"SEC. 4154. Whenever it is made to appear to the Secretary of the Treasury that the rules concerning the measurement for tonnage of vessels of the United States have been substantially adopted by the government of any foreign country, he may direct that the vessels of such foreign country be deemed to be of the tonnage denoted in their certificates of register or other national papers, and thereupon it shall not be necessary for such vessels to be remeasured at any port in the United States, and when it shall be necessary to ascertain the tonnage of any vessel not a vessel of the United States, the said tonnage shall be ascertained in the manner provided by law for the measurement of vessels of the United States."

SECT. 4159. — See note, § 4141 ; *United States v. The F. W. Johnson*, 18 Leg. Int. 334 ; *Chadwick v. Baker*, 54 Maine, 9 ; *The Rapid Transit*, 11 F. R. 322, 329 ; *White's Bank v. Smith*, 7 Wall. 646.

SECT. 4160. — In this section and also in §§ 4162, 4168, 4169, 4171, 4178, 4197, 4307, 4310, 4323, 4325, 4334, 4335, 4336, 4350, 4352, 4354, 4356, 4360, 4363, 4366–4369, 4370–4376, the words "be liable to a penalty" are substituted for "forfeit," "pay," or "forfeit and pay," in the original acts. 2 Com. D. 1998, *et seq.*

SECT. 4163. — S. T. D. 8453.

SECT. 4165. — A registered or enrolled American vessel is, after sale to a foreigner, equally with a foreign-built ship, incapable of receiving a new register or enrolment, though afterwards purchased and wholly owned by a citizen of the United States. 6 A. G. Op. 383.

SECT. 4166. — See *United States v. Willings*, 4 Cranch, 48 ; 4 Dall. 374 ; 1 Wash. 125.

SECT. 4170. — See notes, §§ 4142, 4166. The requiring a new register when a vessel has been altered clearly contemplates that the change does not make a new vessel. *Homer v. Lady of the Ocean*, 70 Maine, 350. And such provision as to a new register in case of a sale is imperative. *Johnson v. Merrill*, 122 Mass. 153. A bill of sale is indispensable to pass the title to a ship so as to preserve her *American* character. *Ohl v. Eagle Ins. Co.*, 4 Mason, 172. A bill of sale of a ship is valid though it does not recite the certificate prescribed by the registry act ; but the American character of the ship is forfeited. *D'Wolf v. Harris*, 4 Mason, 515. And the omission to execute a bill of sale renders the vessel incapable of being registered anew. *United States v. Willings*, *supra*. An insurance policy on a vessel which has violated the provisions of this section is not void on that ground. A contract of insurance is lawful in itself, and may not have been intended to aid an unlawful purpose. *Ocean Ins. Co. v. Polleys*, 13 Pet. 157 ; 14 Maine, 151. See S. T. D. 8099.

SECT. 4171. — The collector cannot make any inquiry into the legality or sufficiency of the master's authority. *The Boston*, Blatch. & H. 309, 319, 320. S. T. D. 8067.

SECT. 4172. — See notes, §§ 4165, 4189. The cited act, after "vessel," in first line, contained the words "heretofore registered, or which shall hereafter be." 2 Com. D. 2063.

A mere colorable transfer of an American schooner to a Spanish subject to evade the Spanish revenue laws comes within the meaning of the words "by way of trust and confidence," and forfeits the vessel, even though the ownership was not *bona fide* changed, and though an American court might decree a reconveyance, upon such a transaction with a foreign subject. *The Margaret*, 9 Wheat. 421. Where the sale is upon credit and upon the condition that the purchaser shall not use the vessel until the purchase-money is all paid, and that if default is made the seller may retake the vessel, it is a sale within this section. *The Maria*, Deady, 89. Where a vessel has been forfeited by a sale to an alien, her subsequent *bona fide* purchase by an American citizen does not save her from forfeiture. *The Florenzo*, Blatch. & H. 52. A judgment of forfeiture relates back to the moment of sale or



transfer, for the forfeiture then takes place, and the title of the alien purchaser, if he acquires any, is, by the statute, divested *eo instanti*. *Id.* The forfeiture will not be prevented by a levy on the forfeited property, under an execution against the alien previous to the prosecution for the forfeiture. *Id.* The sale to a corporation organized and existing under the laws of a foreign country, irrespective of the nationality or citizenship of the shareholders, without notice of such transfer, is a violation of this section. *The Maria, supra.* But if such corporation is not a subject within this section, then such sale would be in part a sale to a subject or citizen of a foreign prince or state, provided any of the shareholders were such subjects. *Id.* Two things are necessary to protect a claimant under the proviso of this section: he must be a part owner, and that at the time of the commission of the act which produces the forfeiture. *The Florenzo, supra.* The proviso is an exception to the enacting clause and need not be taken notice of in a libel to enforce the forfeiture. It is a matter of defence to be set up by the party in his claim. *The Margaret, supra.* It applies only to the part and not to the sole owner, and, in seizures on waters navigable from the sea by vessels of ten tons burden and upwards, the trial is to be by the court and not by the jury. *The Margaret, supra.* See further on this section, *United States v. The Sciota*, 5 West. Law Mo. 29; *United States v. Gordon*, 5 Blatch. 18.

SECT. 4174. — A duly authenticated copy of a cancelled register is competent evidence, for the register is a document required by law to be kept. *Catlett v. Pacific Ins. Co.*, 1 Paue, 613.

SECT. 4177. — See note, § 4153. By act of June 19, 1886, ch. 421, § 6 (24 St. 81), this section is amended by striking out the last words, "such vessel shall be no longer recognized," &c., and in lieu thereof inserting —

"Such vessel shall be liable to a fine of thirty dollars on every arrival in a port of the United States if she have not her proper official number legally carved or permanently marked."

SECT. 4178. — See note, § 4160. "Recoverable" in the sixth line is here added. 2 Com. D. 2004. This section is amended by act of June 23, 1884 (18 St. 252, ch. 467), allowing the name of any vessel to be painted upon her stern in yellow or gilt letters; by act of March 2, 1881 (21 St. 377, ch. 107), authorizing the Secretary of the Treasury to change the name of vessels according to rules and regulations; by act of June 26, 1884, ch. 121, § 21 (23 St. 58), providing that "port" "shall be construed to mean either the port where the vessel is registered, enrolled, or the place in the same district where the vessel was built, or where one or more of the owners reside" (*The Lotus No. 2*, 26 F. R. 640; *Stearns v. Doe*, 12 Gray, 482); by act of July 5, 1884, cited *supra* at the beginning of this chapter, providing that the Commissioner of Navigation may change the names of vessels under certain restrictions.

SECT. 4179. — See note, § 4178. Where no piece of the timber of an old vessel is used without being first dislocated and then replaced, where no set of timbers are left intact in their original positions, but all timbers are taken out, refitted, and then reset, the vessel is built anew, and her identity is distinct from that of the old vessel, and she may bear a new name though she has the model of the old vessel. *United States v. The Grace Meade*, 2 Hughes, 83. But, without regard to the particular parts reused, if any considerable portion of the hull and skeleton in its intact condition, without being broken up, is built upon, it is the old vessel rebuilt, and not a new vessel. *Id.*

SECT. 4185. — See note, § 4153. Provision for abolishing fees is made by 24 St. 80, ch. 421, § 1.

SECT. 4186. — See notes, §§ 2568, 4153, 4154, 4185.

SECT. 4187. — The words "be punishable by a fine" are substituted for "upon conviction of any such neglect or offense forfeit the sum," in the original act. 2 Com. D. 2008; *Re Leszynsky*, 16 Blatch. 9, 18, 19.



SECT. 4188. — The words "be punishable by a fine" are substituted for "forfeit the sum" in the original act. 2 Com. D. 2008; *Re Leszynsky, supra*.

SECT. 4189. — The clause from "be liable" to "incapable" is here substituted for "forfeit and pay a sum not exceeding \$5000, to be recovered by action of debt, in the name of the United States, in any court of competent jurisdiction; and if an officer of the United States, he shall forever thereafter be rendered," in the original act. 2 Com. D. 2009. The infractions of the law must be established beyond a reasonable doubt. *United States v. The Burdett*, 9 Pet. 682. Proceedings for forfeiture are governed by the admiralty rules. *The Mary N. Hogan*, 17 F. R. 813. This section "does not work a present forfeiture of the vessel, but only makes it liable to forfeiture by due process of law. But until a seizure is made for the purpose of enforcing this liability the title to the vessel is in the owner, and a purchaser from him in good faith acquires the same, and may hold the property against the government, which by neglecting to assert its right has lost it." *The Kate Heron*, 6 Sawyer, 112. The word "liable" in this section is touched upon in *The Mary Celeste*, 2 Lowell, 354. The method of distribution to the informer, &c., is given in *The Monte Christo*, 6 Ben. 327; see note, § 3090. A policy of insurance on a vessel is not invalid because she is sailing under circumstances making her liable to forfeiture under this section. *Ocean Ins. Co. v. Polleys*, 13 Pet. 163. It is not necessary to prove the signature to each paper by which registry is obtained, if the papers are identified and come from the possession of the government. *The Mary Celeste, supra*. Cases which treat of this section in its original form are *The Mohawk*, 3 Wall 591; *The Florenzo, Blatch. & H.* 52; 2 A. G. Op. 392.

It was held that there was no forfeiture, where no oath was necessary, as in the case of a special act directing the Secretary of the Treasury to issue enrolment and license to certain vessels (*The Acorn*, 2 Abb. (U. S.) 434); where though the evidence created a strong suspicion of violation of a revenue law, it was not conclusive (*United States v. The Brig Burdett, supra*); where one purchased from the owner in good faith before seizure. *The Kate Heron, supra*. But see *The Brig Monte Christo, supra*; *The Mary Celeste, supra*; *The Florenzo, supra*.

Forfeiture was decreed in the following cases: For falsely swearing that a British vessel had been wrecked, and that repairs to an amount exceeding her previous value had been put on her, the owner remaining silent as to forged papers produced by the government as those upon which a register was granted, though not identified by it (*The Brig Monte Christo*, 6 Ben. 148; *United States v. The Brig Victoria*, 8 Id. 109; *The Mary Celeste, supra*); for violation of § 4172 (*The Maria Deady*, 89; *The Margaret*, 9 Wheat. 421), although in *The Luminary* (8 Wheat. 407) it was held that condemnation followed from the defect of the claimant's testimony, Johnson, J., dissenting; for fraudulent use of a certificate of registry (*The Neptune*, 3 Wheat. 601); for obtaining a register by a sale of a British vessel by an American to a Greek, at Alaska, after the ratification of the treaty and before the country was formally turned over to this country, in order to make her an American bottom under Art. 3 of the treaty (*The Fideliter, Deady*, 620); for rebuilding and so disguising a foreign vessel wrecked and purchased that an enrolment was obtained for her as a new domestic vessel. *The Hud and Frank*, 1 Haskell, 192.

SECT. 4190. — S. T. D. 8508.

SECT. 4192. — This section is constitutional. *Blanchard v. The Martha Washington*, 1 Cliff. 463; *White's Bank v. Smith*, 7 Wall. 646. A canal-boat or scow is not within its meaning (*Hicks v. Williams*, 17 Barb. 523); nor is a charter-party a conveyance within its provisions. *Mott v. Ruckman*, 3 Blatch. 71; 6 Law Repr. N. S. 397; *The Golden Gate, Newb.* 314. This section does not apply to vessels never enrolled or registered. *Thurber v. The Fannie*, 8 Ben. 429. It prescribes, as to all vessels of the United States, a rule as obligatory upon the State tribunals as upon those of the United States; but it does



not supersede or abolish statutory regulations of a State upon the same subject not inconsistent with it. *Thompson v. Van Vechten*, 5 Abb. Pr. 458. When the provision making the record notice to third parties is in conflict with a State statute, the latter must yield. *Mitchell v. Steelman*, 8 Cal. 363. It has been held that constructive notice merely is not sufficient. *Secrist v. German Ins. Co.*, 19 Ohio St. 476; *The Parker Mills v. Jacot*, 8 Bosw. 161. As to a bill of sale accompanied by possession being *prima facie* evidence of right, see *Hozey v. Buchanan*, 16 Pet. 220. It has been held that equitable ownership need not be shown by a bill of sale or registry. *Hall v. Hudson*, 2 Sprague, 65. The recording or non-recording does not affect the personal liability of the owner. *Mott v. Ruckman*, 3 Blatch. 71. The record must be made in the district in which is the home port of the vessel. *Johnson v. Merrill*, 122 Mass. 153; *Blanchard v. The Martha Washington*, *supra*; *White's Bank v. Smith*, 7 Wall. 654, overruling *Potter v. Irish*, 10 Gray, 416; *Chadwick v. Baker*, 54 Maine, 9, 17. See *Hayes v. Pacific Mail Co.*, 17 How. 596. Maritime liens for supplies furnished in a State other than that of the owner's residence, take precedence of the prior mortgage when the mortgage provides that the mortgagor may have possession and use of the vessel for purposes of navigation, without restriction. *The Charlotte Vanderbilt*, 19 F. R. 219; *The E. M. McChesney*, 8 Ben. 159; *The Lulu*, 10 Wall. 192; *The Granite State*, 1 Sprague, 277. So the lien of the seamen extends to a boiler, though furnished under an agreement that it should remain the property of those who furnished it until paid for. *The Steamer May Queen*, 1 Sprague, 588, 591. In *The Favorite*, 3 Sawyer, 405, the claims of the material-men were prior in point of time to the mortgage. In *Pratt v. Reed*, 19 How. 359, it was held that there must be a necessity for the supplies, and that they could be obtained only by a credit upon the vessel. But the mortgage is entitled to priority over subsequent domestic liens under the State law. *The Josephine Spangler*, 11 F. R. 440; 9 Id. 773. In *The De Smet*, 10 F. R. 483, criticizing *The John T. Moore*, 3 Woods, 61, it is stated that domestic liens under the maritime or State law ought to have priority; but the decision follows *The Josephine Spangler*, *supra*. In the above result concur *Baldwin v. The Bradish Johnson*, 3 Woods, 582; *Scott's Case*, 1 Abb. (U. S.) 336; *The Kate Hinchman*, 7 Biss. 238; 6 Id. 367; *The Grace Greenwood*, 2 Id. 131 and n. p. 135; *The Skylark*, 2 Id. 251; *The Propeller Hilton v. Miller*, 62 Ill. 230. See *White's Bank v. Smith*, 7 Wall. 646; *Aldrich v. Ætna*, 8 Id. 491. *Contra*, *The William T. Graves*, 14 Blatch. 189; 8 Ben. 568; *The St. Joseph*, Brown Adm. 202; *Goble v. The Schooner Delos*, 3 F. R. 236; *The John Farron*, 14 Blatch. 24; *The Hiawatha*, 5 Sawyer, 160; *The Island City*, 1 Lowell, 375; *Donnell v. The Starlight*, 103 Mass. 227, 232; *The Canada*, 7 Sawyer, 173; 7 F. R. 730; *Jones v. Keen*, 115 Mass. 181; *The Alice Getty*, 2 Flippin, 18; *Strodes v. The Collier*, 2 Pittsb. 304; 3 West. Law Mo. 521; *Francis v. The Harrison*, 1 Sawyer, 353; 2 Abb. (U. S.) 74; *Thomas v. The Kosciusko*, 11 N. Y. Leg. Obs. 38. *The Lottawanna*, 21 Wall. 558, is often cited as sustaining this view, but it appears that the lien had not been perfected as required by the State law. In *The Guiding Star*, 18 F. R. 263; 9 Id. 521, the lien for materials and labor existed when the mortgage was given.

"*The lien by bottomry*," &c. — The language of this last sentence is not to be construed to mean that a bottomry lien only is out of the purview of the statute, and that all other liens are postponed to that of a mortgagee. *The William T. Graves*, 14 Blatch. 195; *The Favorite*, 3 Sawyer, 410. A bottomry bond is left where it would be if the act had not been passed. *Marsh v. The Minnie*, 6 Am. Law Reg. 328, 338.

SECT. 4193 — See note, § 4192. By 24 St. 80, ch. 421, § 1, no fees are to be paid for recording, &c. By §§ 4192 and 4193 Congress only intended to require that a mortgage on a vessel should be acknowledged for the purpose of authenticating it for record, and that as between the parties, and as against persons having actual notice thereof, it was valid without acknowledgment or record. *Moore v. Simonds*, 100 U. S. 145. See *The John T. Moore*, 3 Woods, 61; *The Augustine Kobbe*, 37 F. R. 699, 701.



SECT. 4194. — See note, § 4193 ; S. T. D. 8292.

SECT. 4196. — See note, § 4142. This section changes the previous registry acts only so far as to require the particular proportions owned by each person to be specified. *Scudder v. Calais Steamboat Co.*, 1 Cliff. 70.

## CHAPTER II.

### CLEARANCE AND ENTRY.

SECT. 4197. — By 24 St. 80 no fees shall be charged or collected by collectors or other officers of customs for "certifying and receiving manifest, including master's oath and permit." See note, § 4160 ; see also *The Ariel*, 1 Haskell, 65. Unless a manifest of the cargo on board a vessel about to depart from a port in the United States for a foreign port be sworn to, and delivered or tendered to the collector by the master, or person having command of the vessel, the collector is not bound to grant her a clearance. And it seems an action for damages may be maintained against the collector of customs, when on insufficient grounds of suspicion he refuses a clearance to a neutral vessel which has obtained the license of a blockading squadron to depart with a cargo bound to a neutral port. *Bas v. Steele*, Pet. C. C. 406 ; 3 Wash. 381.

SECT. 4202. — This section does not require the collector to interfere unless it appears that he is called on so to do by some State law. *Bas v. Steele*, 3 Wash. 381. The word "out" in the original act following "cleared" in the fourth line is here omitted 2 Com. D. 2014.

SECT. 4203. — Repealed by St. June 26, 1884, ch. 121, § 23 (23 St. 58).

SECT. 4206. — The mere right to refuse a clearance cannot be intended as the sole remedy for tonnage duties, for it is inadequate and incomplete. The master may, perhaps, refuse to enter as well as to clear a vessel, and the United States may perhaps have an action for duties against the owner if they can find him ; perhaps against the master and also against the ship. *The George T. Kemp*, 2 Lowell, 485.

SECT. 4207. — Section 17 of St. Aug. 18, 1856, provides for the giving of receipts by consular officers.

SECT. 4208. — In the third line "Quebec" is here substituted for "Lower Canada" in the original act. 2 Com. D. 2016.

SECT. 4209. — In the last sentence of the section the words "be punishable by fine of" are substituted for "upon conviction thereof in any court of competent jurisdiction, be fined in a sum," in the original act. 2 Com. D. 2017. By 24 St. 81, § 8, foreign vessels transporting passengers taken on board here, between United States ports, shall be liable to fine. Masters of foreign vessels, for failure to deposit papers under this section, are liable to a criminal prosecution ; but American masters failing to deposit papers with United States consuls abroad, pursuant to 2 St. 203, are only liable to a forfeiture recoverable on civil process. 7 A. G. Op. 395. It seems that for receiving these papers and recording the time of their reception consuls may charge a fee. *Lorway v. Lousada*, 1 Lowell, 77.

SECT. 4210. — The word "vessels" at the end of the third line of the section presumably means vessels belonging to citizens of the United States. See 3 St. 362 and 2 St. 203, § 2.

SECT. 4211. — In the last sentence the words "be fined" are substituted for "upon conviction thereof before the Supreme Court of the United States be fined at the discretion of the Court in the sum of." 2 Com. D. 2017.

SECT. 4213. — Amended by St. June 26, 1884, ch. 121 (23 St. 56), as follows : —



"SEC. 4213. It shall be the duty of all masters of vessels for whom any official services shall be performed by any consular officer, without the payment of a fee, to require a written statement of such services from such consular officer, and, after certifying as to whether such statement is correct, to furnish it to the collector of the district in which such vessels shall first arrive on their return to the United States; and if any such master of a vessel shall fail to furnish such statement, he shall be liable to a fine of not exceeding \$50, unless such master shall state under oath that no such statement was furnished him by said consular officer. And it shall be the duty of every collector to forward to the Secretary of the Treasury all such statements as shall have been furnished to him, and also a statement of all certified invoices which shall have come to his office, giving the dates of the certificates, and the names of the persons for whom and of the consular officer by whom the same were certified."

SECT. 4214. — Is repealed by St. March 3, 1883, ch. 133 (22 St. 566), and the following substituted:—

"SEC. 4214. The Secretary of the Treasury may cause yachts used and employed exclusively as pleasure-vessels or designed as models of naval architecture, if built and owned in compliance with the provisions of §§ 4133-4135, to be licensed on terms which will authorize them to proceed from port to port of the United States, and by sea to foreign ports, without entering or clearing at the custom-house, such license shall be in such form as the Secretary of the Treasury may prescribe. The owner of any such vessel, before taking out such license, shall give a bond in such form and for such amount as the Secretary of the Treasury shall prescribe, conditioned that the vessel shall not engage in any trade, nor in any way violate the revenue laws of the United States, and shall comply with the laws in all other respects. Such vessels, so enrolled and licensed, shall not be allowed to transport merchandise, or carry passengers, for pay. Such vessels shall have their name and port placed on some conspicuous portion of their hulls. Such vessels shall, in all respects, except as above, be subject to the laws of the United States, and shall be liable to seizure and forfeiture for any violation of the provisions of this title: *Provided*, That all charges for license and inspection fees for any pleasure vessel or yacht shall not exceed \$5, and for admeasurement shall not exceed 10 cents per ton."

A steam yacht used as a pleasure vessel and designed as a model of naval architecture licensed under this section "to proceed from port to port of the United States, and by sea to foreign ports without entering or clearing at the custom-house," is still a coasting-vessel, and while navigating the Hudson is in fault if not carrying the lights prescribed for coasting-vessels by Rev. Stats. § 4233, rule 7. *Chase v. Belden*, 104 N. Y. 86; reversing 34 Hun, 571. In view of the provisions of this section as amended by the above act, properly documented yachts are not required to comply with the provisions of Rev. Stats. § 4344, further than is mentioned in said act. S. T. D. 8447.

## CHAPTER III.

### TONNAGE DUTIES.

THE duties of the Commissioner of Navigation are stated on p. 773, *ante*.

SECT. 4219. — See note, § 4371. By 19 St. 250 ample provisions were substituted for this section. See also 20 St. 171, cited under § 2931. This section and Rev. Stats. §§ 4223 and 4224, so far as they conflicted with 23 St. 57, were thereby repealed; and 23 St. 57 was afterward, by St. June 19, 1886, ch. 421, § 11 (24 St. 81), amended to read as follows:—

"SEC. 14. That in lieu of the tax on tonnage of 30 cents per ton per annum, imposed prior to July 1, 1884, a duty of 3 cents per ton, not to exceed in the aggregate 15 cents per ton in any one year, is hereby imposed at each entry on all vessels which shall be entered in any port of the United States from any foreign port or place in North America, Central America, the West India Islands, the Bahama Islands, the Bermuda Islands, or the coast of South America bordering on the Caribbean Sea, or the Sandwich Islands, or Newfoundland; and a duty of 6 cents per ton, not to exceed 30 cents per ton per annum, is hereby imposed at each entry upon all vessels which shall be entered in the United States from



any other foreign ports, not, however, to include vessels in distress or not engaged in trade: *Provided*, That the President of the United States shall suspend the collection of so much of the duty herein imposed, on vessels entered from any foreign port, as may be in excess of the tonnage and light-house dues, or other equivalent tax or taxes, imposed on American vessels by the government of the foreign country in which such port is situated, and shall, upon the passage of this act, and from time to time thereafter as often as it may become necessary by reason of changes in the laws of the foreign countries above mentioned, indicate by proclamation the ports to which such suspension shall apply, and the rate or rates of tonnage-duty, if any, to be collected under such suspension: *Provided, further*, That such proclamation shall exclude from the benefits of the suspension herein authorized the vessels of any foreign country, in whose ports the fees or dues of any kind or nature imposed on vessels of the United States, or the import or export duties on their cargoes, are in excess of the fees, dues, or duties imposed on the vessels of the country in which such port is situated, or on the cargoes of such vessels; and §§ 4223, 4224, and so much of § 4219 of the Revised Statutes as conflicts with this section, are hereby repealed."

And by § 12 of the same act it was provided —

"That the President be, and hereby is, directed to cause the Governments of foreign countries which, at any of their ports, impose on American vessels a tonnage-tax or light-house dues, or other equivalent tax or taxes, or any other fees, charges, or dues, to be informed of the provisions of the preceding section, and invited to co-operate with the Government of the United States in abolishing all light-house dues, tonnage-taxes, or other equivalent tax or taxes on, and also all other fees for official services to, the vessels of the respective nations employed in the trade between the ports of such foreign country and the ports of the United States."

St. April 4, 1888, ch. 61, § 1 (25 St. 80), amends the above § 11 of St. 1886, —

"by striking out of the sub-proviso of said section the words 'of the country in which such port is situated, or on the cargoes of such vessels,' and substituting in lieu thereof the words 'of such country, or on the cargoes of such vessels; but this proviso shall not be held to be inconsistent with the special regulation by foreign countries of duties and other charges on their own vessels, and the cargoes thereof, engaged in their coasting trade, or with the existence between such countries and other States of reciprocal stipulations founded on special conditions and equivalents, and thus not within the treatment of American vessels under the most-favored nation clause in treaties between the United States and such countries.'"

Fees for "granting certificate of payment of tonnage dues" are abolished by 24 St. 80, § 1. The provisions of this section and Rev. Stats. § 4226 apply to the case of barges of foreign build, not documented, carrying cargoes between Charleston and Wilmington, or Savannah. S. T. D. 8437; *Ripley v. Gelston*, 9 Johns. (N. Y.) 201. Where, by fraud, mistake, or accident, tonnage and light duties (see Rev. Stats. § 4225) remain unpaid by the ship-owner, an action of debt lies to recover them. But a mere consignee, having no interest or special property in the vessel, is not liable. It is a charge on the vessel itself. *United States v. Hathaway*, 3 Mason, 324. As to payment of tonnage and light duties by British vessels from ports in British colonies entering American ports, see the same case. It is the policy of the United States to exclude foreign bottoms from the coasting trade. *Petrel Guano Co. v. Jarnette*, 25 F. R. 675. As to vessels belonging to a nation which has not abolished the discriminating duties which operate disadvantageously to the United States, see 15 A. G. Op. 35. Rev. Stats. §§ 4219 and 4223, copy exactly the language of acts of July 14, 1862, and March 2, 1867, so far as bears on this subject, and should be given the same construction. By the former act, tonnage was to be paid by vessels upon their entry at any custom-house, and with certain exceptions, as often as they entered. But by the later act vessels engaged in foreign commerce are obliged to pay the tonnage duty but once within one year. And if a second entry does not occur for two, three, or more years, the tonnage duty of only one year is then collectible. 14 A. G. Op. 450. British colonial rafts, flatboats, or vessels entering, otherwise than by sea, at any ports of the United States, on the rivers and lakes on our northern, northeastern, and northwestern frontiers, are not liable to the tonnage duty imposed by § 15, act July 14, 1862, if that duty is in



excess of the tonnage duty on vessels entering otherwise than by sea at any of the ports of the British possessions on the same frontiers. But *semble* vessels entering by sea are not entitled to the exemption of said act. 10 A. G. Op. 481. The United States may have an action against the vessel or her owner, and perhaps against the master for tonnage. The *George T. Kemp*, 2 Lowell, 485. See 14 A. G. Op. 310.

SECT. 4220. — By 18 St. 31, ch. 110 (Suppl. Rev. Stats. 15), canal boats, or boats employed on the internal waters or canals of any State, and all boats, except such as are provided with sails or propelling machinery of their own, adapted to lake or coastwise navigation, and except such as are employed in trade with the Canadas, shall be exempt from the payment of all customs and other fees under any act of Congress. In the absence of Congressional legislation, the control of wharves belongs to the States wherein they are situated, and a charge against a vessel or its owner may be made by the owner of a wharf, even though exorbitant, and a suit for relief cannot be maintained under the laws of the United States, although it be alleged that the wharfage was intended as a duty on tonnage. *Transportation Co. v. Parkersburg*, 107 U. S. 691. See S. T. D. 9014. The cited act was deemed to supersede St. March 1, 1817, ch. 31, § 5 (3 St. 351), and St. July 20, 1790, ch. 30, § 2 (1 St. 135). 2 Com. D. 2020.

SECTS. 4223, 4224. — As to repeal, see notes to § 4219. The act cited in § 4224 and that of 1867, cited just above, were deemed to supersede the similar provisions in St. March 2, 1799, ch. 22, § 63 (1 St. 675), and in St. March 2, 1803, ch. 18, § 3 (2 St. 210). 2 Com. D. 2022.

SECT. 4225. — Dues accrue under this section on undocumented foreign-built vessels owned by citizens of the United States, and on undocumented domestic-built vessels similarly owned, whether used for purposes of trade or pleasure, on their entering the ports of the United States, and whether furnished with such certificate or otherwise, and should be collected in the same manner, and under the same regulations as tonnage dues; that is, by the customs officers, who will give receipts. S. T. D. 8508.

SECT. 4226. — See note, § 4219.

SECT. 4227. — See note, § 4219.

## CHAPTER IV.

### DISCRIMINATING DUTIES.

THE policy of the United States, respecting commercial relations with other nations, has always been to offer to all nations, and to ask from them, entire reciprocity; and Congress has never laid discriminating duties, except as an inducement to other nations to modify or repeal their restrictions upon commerce and navigation. 2 Com. D. 2024.

SECT. 4228. — The text was deemed to give effect to the cited provisions, and to St. Jan. 7, 1824, ch. 4, § 4 (4 St. 3). 2 Com. D. 2025. The discriminating duties on merchandise imported in French vessels are discontinued. 18 St. 844.

SECT. 4231. — The words "at the time may be" substituted for "is or shall be" in the cited act, which was deemed to supersede St. May 31, 1848, ch. 55, §§ 1, 2. 2 Com. D. 2038.

SECT. 4232. — The words "if, and so long as" substituted for "Provided that" in the cited act. 2 Com. D. 2038.



## CHAPTER V.

## NAVIGATION.

By 21 St. 197, ch. 211, it is provided that in the case of navigation obstructed by sunken vessels or water-craft the Secretary of War shall give all persons interested notice to remove the same. If not removed as soon as practicable the same is to be regarded as abandoned and derelict, and the said Secretary shall remove the same. Such vessel and cargo shall be sold, and proceeds deposited in the Treasury to the credit of a fund for the removal of such obstructions, and the provisions of this act are to apply to all such wrecks whether removed under this or any other act of Congress. The provision as to Bureau of Navigation will be found, *ante*, p. 773. By 25 St. 151, ch. 257, the Secretary is to define and establish an anchorage ground in the bay and harbor of New York, and in the Hudson and East rivers and to adopt rules; and a penalty is provided for their violation. St. July 9, 1888, ch. 593 (25 St. 243), provides for an international marine conference to secure greater safety for life and property at sea. By act of June 20, 1874, ch. 344, §§ 10-13 (18 St. 127), owners, agents, or masters of vessels are to report to collectors accidents thereto or thereon, giving details, with penalty for neglect; and the managing owner or agent is to report probable loss of vessels, also with penalty for neglect. The collector is to transmit such reports to the Secretary of the Treasury, and to report neglect, &c., and the latter may remit penalties. It is provided by act of June 19, 1886, ch. 421, § 17 (24 St. 82), that whenever any foreign country whose vessels have been placed on the same footing in the ports of the United States as American vessels (the coastwise trade excepted) shall deny to any vessels of the United States commercial privileges in their harbors, &c., the President may suspend commercial privileges to vessels of such foreign country; violation to be followed by forfeiture of vessels, &c., and the guilty party to be fined and imprisoned.

"Many years before the rule of the road at sea was regulated by Act of Parliament, the practice of seamen had established rules to enable approaching ships to keep clear of each other. These rules, which are the foundation of those now in force, were well established by custom, and formed part of the general maritime law administered by the admiralty court." Marsden's Law of Collisions (2d ed.), 296. Rules were laid down in England by Orders in Council in 1863 and in 1868. Those of 1863 were substantially re-enacted by the United States by act of April 29, 1864, ch. 69 (13 St. 58); Rev. Sta. § 4233. These rules were adopted by more than thirty of the principal states of the world, and were at once regarded as entitled to judicial notice. The *Scotia*, 14 Wall. 170; 3 Blatch. 308. The *Sylvester Hale*, 6 Ben. 523. The Revised Code was adopted by Great Britain in 1884, and this and the Regulations of 1863 are set out in parallel columns in Marsden's Law of Collision (2d ed.), 471-485. This Revised Code has been adopted by the leading nations, and is the act of March 3, 1885, ch. 354 (23 St. 438). Safe guides in cases outside the scope and operation of legislative enactments "are often found in the decisions of the courts, or in the views of standard text writers; but it is competent for the court, in such a case, to admit evidence of usage; and, if it be proved that the matter is regulated by a general usage, such evidence may furnish a safe guide as the proper rule of decision." The *City of Washington*, 92 U. S. 31, 32, 39. In *St. John v. Paine*, 10 How. 557, there is a discussion of the old rules governing sailing and steam vessels in cases of collisions. A vessel which violates the rules of navigation cannot justify herself by the fact that if the other vessel had not also violated the rules, no harm would have been done. The *Santiago de Cuba*, 10 Blatch. 444. Mistakes committed in the moments of peril and



excitement produced by an impending collision, when caused by the mismanagement of those in charge of the other vessel, are not of a character to relieve the vessel causing the collision from the payment of full damages to the injured vessel. *The Nichols*, 7 Wall. 656. It has been held that the provisions in §§ 4233, 4234, were intended to embrace all kinds of vessels, including rafts (*One Raft*, 13 F. R. 796), but it has been also held that a car-float is not required to carry lights. *The Manhasset*, 34 F. R. 408. Where one vessel does not obey the rules of navigation and a collision ensues the burden of proof rests upon her to show the reason of her conduct. *The Corsica*, 9 Wall. 630. A decree made by the District Court and affirmed by the Circuit Court will not, where the evidence is conflicting, be readily reversed by the Supreme Court in cases of collision. *The Hypodame*, 6 Wall. 216. An arctic whaleship, twice refitted at San Francisco since the statute of April 29, 1864, was passed, was held in fault for not having the required lights, though her master never heard of the statute. *The Ontario*, 2 Lowell, 40. Decisions of the English courts will be found in English decisions, and especially Law Reports, Probate Division.

The decisions on the above statute (23 St. 438), and on the provisions of § 4233 chiefly deal with facts and have but little bearing on the text. The act of 1885, 23 St. 438, is given below with notes showing the differences between it and § 4233:—

The preamble of 23 St. 438, contains the words "Upon the high seas and in all coast waters of the United States, except such as are otherwise provided for, namely." *The Garden City*, 26 F. R. 766, 773; *The Aurania*, 29 Id. 98, 101; *The Greenpoint*, 31 Id. 231.

Art. 1 is practically unchanged.

Art. 2 differs a little in phraseology, but is practically the same.

Art. 3 is more definite (see S. T. D. 8168), and is as follows:—

"A sea-going steamship, when under way, shall carry—

"(a) On or in front of the foremast, at a height above the hull of not less than twenty feet, and if the breadth of the ship exceeds twenty feet, then at a height above the hull not less than such breadth, a bright white light, so constructed as to show a uniform and unbroken light over an arc of the horizon of twenty points of the compass, so fixed as to throw the light ten points on each side of the ship, namely, from right ahead to two points abaft the beam on either side, and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least five miles. [*The Scotia*, 14 Wall. 183; *The Vesper*, 9 F. R. 574; *Hoben v. Westover*, 2 Id. 91; *Marshall v. Conroy*, Id. 785; *The Glaucus*, 1 Lowell, 366.]

"(b) On the starboard side a green light, so constructed as to show a uniform and unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side, and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles. [*The Narragansett*, 11 F. R. 918; *Carlton v. United States*, 10 Ct. Cl. 492; *Briggs v. Day*, 21 F. R. 729; *Clendinin v. The Alhambra*, 4 Id. 86; *The Drew*, 25 Id. 457, 461; *The Howard*, 30 Id. 280; *The Seacaucus*, 34 Id. 68; *The Manhasset*, Id. 408.]

"(c) On the port side a red light, so constructed as to show a uniform and unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the port side, and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles. [See cases cited under (b).]

"(d) The said green and red side-lights shall be fitted with inboard screens projecting at least three feet forward from the light, so as to prevent these lights from being seen across the bow." [*The Santiago de Cuba*, 10 Blatch. 453.]

Art. 4 is more definite:—

"A steamship when towing another ship, shall, in addition to her side-lights, carry two bright white lights in a vertical line, one over the other, not less than three feet apart, so as to distinguish her from other steamships. Each of these lights shall be of the same construction and character, and shall be carried in the same position, as the white light which other steamships are required to carry." [*The City of Troy*, 9 Ben. 469; *The Favorite*, 9 F. R. 709; *The Ant*, 10 Id. 300; *United States v. Miller*, 26 Id. 96; S. T. D. 8168.]



Art. 5 is new, and is as follows: —

“(a) A ship, whether a steamship or a sailing-ship, which from any accident is not under command, shall at night carry, in the same position as the white light which steamships are required to carry, and if a steamship, in place of that light, three red lights in globular lanterns, each not less than ten inches in diameter, in a vertical line, one over the other, not less than three feet apart, and of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least two miles, and shall by day carry in a vertical line, one over the other, not less than three feet apart, in front of but not lower than her foremast head, three black balls or shapes, each two feet in diameter.

“(b) A ship, whether a steamship or a sailing-ship, employed in laying or in picking up a telegraph cable, shall at night carry, in the same position as the white light which steamships are required to carry, and if a steamship, in place of that light, three lights in globular lanterns, each not less than ten inches in diameter, in a vertical line, one over another, not less than six feet apart. The highest and lowest of these lights shall be red, and the middle light shall be white, and they shall be of such a character that the red lights shall be visible at the same distance as the white light. By day she shall carry, in a vertical line, one over the other, not less than six feet apart, in front of but not lower than her foremast head, three shapes not less than two feet in diameter, of which the top and the bottom shall be globular in shape, and red in color, and the middle one diamond in shape and white.

“(c) The ships referred to in this article when not making any way through the water shall not carry the side-lights, but when making way shall carry them.

“(d) The lights and shapes required to be shown by this article are to be taken by other ships as signals that the ship showing them is not under command, and cannot therefore get out of the way. The signals to be made by ships in distress and requiring assistance are contained in article twenty-seven.”

Rule 5 of § 4233 is not referred to in the new rules. *Briggs v. Day*, 21 F. R. 729. So also rule 6. In rule 7 “rivers” was added. 2 Com. D. 2040; *The Concho*, 24 F. R. 760; *The Glaucus*, 1 Lowell, 366; *The City of Troy*, 9 Ben. 470; S. T. D. 8168; *Chase v. Belden*, 9 N. East. Repr. 852; 9 East. Repr. 154, reversing 34 Hun, 571; *The Continental*, 14 Wall. 345. See, as to these rules, saving clause in § 2 of 23 St. 438.

Art. 6 (formerly rule 8) is practically unchanged. *The Ontario*, 2 Lowell, 44; *The Vesper*, 9 F. R. 574; *The Narragansett*, 11 Id. 919; *United States v. Miller*, 26 Id. 95; *The Scotia*, 14 Wall. 170; *The Wanata*, 95 U. S. 600; *The Huntsville*, 8 Blatch. 228.

Art. 7 (formerly rule 9) is substantially the same.

Art. 8 (formerly rule 10) is changed so as to apply to all ships “when at anchor.” *The Oliver*, 22 F. R. 851; *The Ant*, 10 Id. 294, 300; *The Erastus Corning*, 25 Id. 572; *The Isaac Bell*, 9 Id. 842.

Art. 9 (formerly rule 11) is changed so as to read as follows: —

“A pilot vessel, when engaged on her station on pilotage duty, shall not carry the lights required for other vessels, but shall carry a white light at the masthead, visible all round the horizon, and shall also exhibit a flare-up light or a flare-up lights at short intervals, which shall never exceed fifteen minutes. A pilot vessel, when not engaged on her station on pilotage duty, shall carry lights similar to those of other ships.” [*The New Orleans*, 9 Ben. 303; *The Ullock*, 9 Sawyer, 634; 19 F. R. 216.]

Rule 12 of § 4233 is not referred to in the new act. *The Alabama*, 26 F. R. 806; *Williams v. The Whisper*, 37 Id. 495; *Harris v. Uebelhoer*, 75 N. Y. 169, 178. See Art. 25 of new rules, also § 2 of the new act. By 24 St. 82, ch. 421, § 16, row-boats and skiffs upon the river St. Lawrence are not to carry lights under this rule 12.

Art. 10 (partly formerly rule 13) has been greatly extended, although the first part has been only slightly changed: —

“Open boats and fishing-vessels of less than twenty tons net registered tonnage, when under way and when not having their nets, trawls, dredges, or lines in the water, shall not be obliged to carry the colored side-lights; but every such boat and vessel shall in lieu thereof have ready at hand a lantern, with a green glass on the one side and a red glass on the other side, and on approaching to or being approached by another vessel such lantern shall be exhibited in sufficient time to prevent collision, so that the green light shall not be seen on the port side nor the red light on the starboard side.” [*United States v. Miller*, 26 F. R. 95.]



The following portion of this article applies only to fishing-vessels and boats when in the sea off the coast of Europe lying north of Cape Finisterre :—

“(a) All fishing-vessels and fishing-boats of twenty tons net registered tonnage or upward, when under way and when not having their nets, trawls, dredges, or lines in the water, shall carry and show the same lights as other vessels under way.

“(b) All vessels when engaged in fishing with drift-nets shall exhibit two white lights from any part of the vessel where they can be best seen. Such lights shall be placed so that the vertical distance between them shall be not less than six feet and not more than ten feet, and so that the horizontal distance between them, measured in a line with the keel of the vessel, shall be not less than five feet and not more than ten feet. The lower of these two lights shall be the more forward, and both of them shall be of such a character and contained in lanterns of such construction as to show all round the horizon, on a dark night, with a clear atmosphere, for a distance of not less than three miles.

“(c) All vessels when trawling, dredging, or fishing with any kind of drag-nets shall exhibit, from some part of the vessel where they can be best seen, two lights. One of these lights shall be red and the other shall be white. The red light shall be above the white light, and shall be at a vertical distance from it of not less than six feet and not more than twelve feet; and the horizontal distance between them, if any, shall not be more than ten feet. These two lights shall be of such a character and contained in lanterns of such construction as to be visible all round the horizon, on a dark night, with a clear atmosphere, the white light to a distance of not less than three miles and the red light of not less than two miles.

“(d) A vessel employed in line-fishing, with her lines out, shall carry the same lights as a vessel when engaged in fishing with drift-nets.

“(e) If a vessel, when fishing with a trawl, dredge, or any kind of drag-net, becomes stationary in consequence of her gear getting fast to a rock or other obstruction, she shall show the light and make the fog-signal for a vessel at anchor.

“(f) Fishing-vessels and open boats may at any time use a flare-up in addition to the lights which they are by this article required to carry and show. All flare-up lights exhibited by a vessel when trawling, dredging, or fishing with any kind of drag-net shall be shown at the after-part of the vessel, excepting that if the vessel is hanging by the stern to her trawl, dredge, or drag-net they shall be exhibited from the bow.

“(g) Every fishing-vessel and every open boat when at anchor between sunset and sunrise shall exhibit a white light, visible all round the horizon at a distance of at least one mile.

“(h) In a fog a drift-net vessel attached to her nets, and a vessel when trawling, dredging, or fishing with any kind of drag-net, and a vessel employed in line-fishing with her lines out, shall, at intervals of not more than two minutes, make a blast with her fog-horn and ring her bell alternately.”

Rule 14 of § 4233 is not referred to in the new act, but so far as applicable to vessels on the high seas and coast waters, is probably repealed by § 2 of that act.

Art. 11 appears to be new, and is as follows :—

“A ship which is being overtaken by another shall show from her stern to such last-mentioned ship a white light or a flare-up light.” [See note, § 4234.]

Art. 12 enlarges rule 15 as follows :—

“A steamship shall be provided with a steam-whistle or other efficient steam sound signals, so placed that the sound may not be intercepted by any obstructions, and with an efficient fog-horn, to be sounded by a bellows or other mechanical means, and also with an efficient bell. (In all cases where the regulations require a bell to be used, a drum will be substituted on board Turkish vessels.) A sailing-ship shall be provided with a similar fog-horn and bell.”

“In fog, mist, or falling snow, whether by day or night, the signals described in this article shall be used as follows, that is to say :—

“(a) A steamship under way shall make with her steam-whistle or other steam sound signal, at intervals of not more than two minutes, a prolonged blast. [The *Perkiomen*, 27 F. R. 573; The *Leland*, 19 Id. 773.]

“(b) A sailing-ship under way shall make with her fog-horn, at intervals of not more than two minutes, when on the starboard tack one blast, when on the port tack two blasts in succession, and when with the wind abaft the beam three blasts in succession. [The *Hannonia*, 4 Ben. 517; 11 Blatch. 414;



The *Leo*, Id. 225, 229; The *Pennsylvania*, 19 Wall. 135; The *Negaunee*, 20 F. R. 921; The *Perkio-men*, *supra*; The *Monticello*, 1 Lowell, 184.]

“(c) A steamship and a sailing-ship when not under way shall, at intervals of not more than two minutes, ring the bell.”

Rule 15 (D) of § 4233 is not referred to in the new act. The *Porter*, 2 Dillon, 146, and n. p. 153.

Art. 13 (formerly part of rule 21, and applying only to steam vessels in a fog) is as follows:—

“Every ship, whether a sailing-ship or a steamship, shall in a fog, mist, or falling snow go at a moderate speed.”

In *Clare v. Providence S. S. Co.*, 22 Blatch. 195; 20 F. R. 536, reversed by 127 U. S. 45, it is said that there is no case which holds under this rule that twelve and a half or thirteen miles an hour is moderate speed for a steam-vessel in a fog, and that the decisions are unanimous the other way. The *Pennsylvania*, 19 Wall. 125 (seven knots); The *Colorado*, 91 U. S. 692 (five or six miles); The *Blackstone*, 1 Lowell, 485 (eight knots); The *Rhode Island*, 17 F. R. 554 (15 miles); The *State of Alabama*, Id. 847 (eight or eight and a half knots); The *City of New York*, 15 Id. 624 (ten knots); The *Eleanora*, 17 Blatch. 88 (between five and six miles); The *Leland*, 19 F. R. 771 (eight miles); The *Bristol*, 4 Ben. 397 (sixteen miles); The *Hansa*, 5 Id. 502 (seven knots); The *Manistee*, 7 Biss. 35 (seven miles). See also *Sampson's Case*, 12 Ct. Cl. 480; *McCabe v. Old Dominion Steamship Co.*, 31 F. R. 238; *Bunge v. The Utopia*, 1 Id. 892; The *D. S. Gregory*, 16 Blatch. 542; *Hoffman v. The Union Ferry Co.*, 68 N. Y. 385; The *Martello*, 34 F. R. 71; The *Pennsylvania*, 15 Id. 624; The *Bristol*, 10 Blatch. 537; The *Hammonia*, *supra*; The *Santiago de Cuba*, 10 Id. 444; *Kennedy v. The Sarmatian*, 2 F. R. 911.

Rule 16 is probably repealed by § 2 of the new act, although it does not appear to be superseded by any provisions of that act. This rule is discussed at length in *The Sylvester Hale*, 6 Ben. 528. See *The Maggie J. Smith*, 123 U. S. 353; *The Elizabeth Jones*, 112 Id. 514; *The Annie Lindsley*, 104 Id. 185; *The Dexter*, 23 Wall. 69; *The Nichols*, 7 Id. 656, 664; *The Farnley*, 8 F. R. 633; *The Adolph*, 4 Id. 730; *The Ping-on v. Blathen*, 11 Id. 607; *The James Bowen*, 10 Ben. 430.

Art. 14 (formerly rule 17) is somewhat changed, and is as follows:—

“When two sailing ships are approaching one another so as to involve risk of collision, one of them shall keep out of the way of the other as follows, namely:—

“(a) A ship which is running free shall keep out of the way of a ship which is close hauled. [*The Elizabeth Jones*, 112 U. S. 514; *The Aurania*, 29 F. R. 98; *The Maria & Elizabeth*, 7 F. R. 254. *The Osseo*, 16 Blatch. 537; 8 Ben. 518.]

“(b) A ship which is close hauled on the port tack shall keep out of the way of a ship which is close hauled on the starboard tack. [*The Maria & Elizabeth*, *supra*; *The Pangussett*, 9 F. R. 109; *The F. W. Gifford*, 7 Biss. 249.]

“(c) When both are running free, with the wind on different sides, the ship which has the wind on the port side shall keep out of the way of the other.

“(d) When both are running free, with the wind on the same side, the ship which is to windward shall keep out of the way of the ship which is to leeward. [*The Nahor*, 9 F. R. 213; *The David Dows*, 16 Id. 154; *The Commodore Jones*, 25 Id. 506.]

“(e) A ship which has the wind aft shall keep out of the way of the other ship.”

Art. 15 (formerly rule 18) is greatly enlarged as follows:—

“If two ships under steam are meeting end on, or nearly end on, so as to involve risk of collision, each shall alter her course to starboard, so that each may pass on the port side of the other. [*The Clifton*, 14 F. R. 587; *The Manitoba*, 122 U. S. 97; *The America*, 92 Id. 432; *Holland v. Brown*, 55 F. R. 43.] This article only applies to cases where ships are meeting end on, or nearly end on, in such a manner as to involve risk of collision, and does not apply to two ships which must, if both keep on their respective



courses, pass clear of each other. The only cases to which it does apply are when each of the two ships is end on, or nearly end on, to the other; in other words, to cases in which by day each ship sees the masts of the other in a line, or nearly in a line, with her own, and by night to cases in which each ship is in such a position as to see both the side-lights of the other. It does not apply by day to cases in which a ship sees another ahead crossing her own course, or by night to cases where the red light of one ship is opposed to the red light of the other, or where the green light of one ship is opposed to the green light of the other, or where a red light without a green light, or a green light without a red light, is seen ahead, or where both green and red lights are seen anywhere but ahead."

Art. 16 is identical with rule 19. The *Commodore Jones*, 25 F. R. 506; The *Aurania* 29 Id. 98; The *Cayuga*, 14 Wall. 275; The *L. P. Dayton*, 120 U. S. 337, 352; 18 Blatch. 411; 10 Ben. 430; The *Bristol*, 11 F. R. 156; The *Farnley*, 8 Id. 633; *Greenman v. The Narragansett*, 4 Id. 244; The *Chesapeake*, 5 Blatch. 411; The *Galileo*, 24 Id. 111; 29 F. R. 538; 28 Id. 469; 24 Id. 386; The *Corsica*, 9 Wall. 630; The *Manhasset*, 34 F. R. 408, 423; The *St. Johns*, Id. 763. See note, § 4412.

Art. 17 is identical with rule 20. The *Monticello*, 1 Lowell, 184; The *Leo*, 11 Blatch. 225. As to a steamer with a tow, see The *Favorite*, 9 F. R. 709; *Millbank v. The A. P. Cranmer*, 8 Id. 523; 1 Id. 255; The *Civilta*, 103 U. S. 699. The sailing vessel shall observe all statutory rules and other general obligations of prudence and caution in navigation which the special circumstances demand. The *Rhode Island*, 17 F. R. 559. Variations in the course of the sailing vessel to avoid immediate danger arising from natural obstructions to navigation, are permissible. The *John L. Hasbrouck*, 93 U. S. 405. The collision in the above case took place on a river, and the rule probably applies strictly in cases arising in an open sea. The *I. C. Harris*, 29 F. R. 926. See The *Benefactor*, 102 U. S. 214; The *Belgenland*, 114 Id. 355; The *Illinois*, 103 Id. 298; The *Adriatic*, 107 Id. 512; *McWilliams v. The Vim*, 12 F. R. 906; The *Hypodame*, 6 Wall. 216; The *Carroll*, 8 Id. 302; The *Fairbanks*, 9 Id. 420; also Art. 23.

Art. 18 is identical with rule 21, except that portion of the latter which is now part of Art. 13 above. See note, § 4412. As to approaching a tug with a tow, see The *Fred. W. Chase*, 31 F. R. 94; The *Alleghany*, 9 Wall. 522; The *Galileo*, 24 F. R. 391; The *Jay Gould*, 19 Id. 765; The *Favorite*, 9 Id. 709; The *Syracuse*, 9 Wall. 672. The meaning of this section is explained in The *Free State*, 91 U. S. 200; The *City of Paris*, 9 Wall. 634; The *Corsica*, Id. 630; The *Huntsville*, 8 Blatch. 231; The *Baltimore*, 34 F. R. 660; The *Britannia*, Id. 551; The *Frisia*, 24 Blatch. 40; 28 F. R. 249, 255; 24 Id. 495; The *Vancouver*, 2 Sawyer, 381; *Miller v. The W. G. Hawes*, 1 Woods, 363.

Art. 19 is new, and is as follows:—

"In taking any course authorized or required by these regulations, a steamship under way may indicate that course to any other ship which she has in sight by the following signals on her steamwhistle, namely: One short blast to mean, 'I am directing my course to starboard.' Two short blasts to mean, 'I am directing my course to port.' Three short blasts to mean, 'I am going full speed astern.' The use of these signals is optional, but if they are used the course of the ship must be in accordance with the signal made. This is not applicable to harbors in merely local navigation." [The *Greenpoint*, 31 F. R. 231.]

Art. 20 (formerly rule 22) is as follows:—

"Notwithstanding anything contained in any preceding article, every ship, whether a sailing-ship or a steamship, overtaking any other shall keep out of the way of the overtaken ship." [The *Aurania*, 29 F. R. 104; The *Commodore Jones*, 25 Id. 509; The *Narragansett*, 10 Blatch. 477; *Kennedy v. The American Steamboat Co.*, 12 R. I. 23; The *Seaton*, 9 Prob. Div. 1; The *W. H. Clark*, 5 Biss. 295.]

Art. 21 is new, and is as follows:—

"In narrow channels every steamship shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such ship."



Art. 22 (similar to rule 23) is as follows:—

"Where by the above rules one of two ships is to keep out of the way, the other shall keep her course." [The *I. C. Harris*, 29 F. R. 926; The *Nacoochee*, 22 Id. 855; The *Columbia*, 25 Id. 844; The *Britannia*, 34 Id. 552; The *Scots Greys v. The Santiago*, 5 Id. 369; *McWilliams v. The Vin*, 17 Id. 906; The *John L. Hasbrouck*, 93 U. S. 405; The *Carlton Case*, 10 Ct. Cl. 485.]

Art. 23 (similar to rule 24) is as follows:—

"In obeying and construing these rules due regard shall be had to all dangers of navigation, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger."

This was treated as superseding § 5 of St. March 3, 1849, ch. 105 (9 St. 382). 2 Com. D. 2083. This section applies only where there is some special cause rendering a departure necessary to avoid immediate danger, such as the nearness of shallow water, or a concealed rock, the approach of a third vessel, or something of that kind. The *Maggie J. Smith*, 123 U. S. 354. Special circumstances cannot be anticipated, and therefore cannot be provided for by any fixed regulation. *St. John v. Paine*, 10 How. 532; *New York Mailship Co. v. Rumball*, 21 Id. 385; The *Golden Grove*, 13 F. R. 688; The *Negaunee*, 20 Id. 918. See The *Sunnyside*, 91 U. S. 208, 213; The *Maria Martin*, 12 Wall 31; The *Lucille*, 15 Id. 679.

The following are new:—

"ART. 24. Nothing in these rules shall exonerate any ship, or the owner, or master, or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen or by the special circumstances of the case. [The *Elizabeth Jones*, 112 U. S. 514. See 13 St. 58, art. 20.]

"ART. 25. Nothing in these rules shall interfere with the operation of a special rule, duly made by local authority, relative to the navigation of any harbor, river, or inland navigation. [The *Aurania*, 29 F. R. 102.]

"ART. 26. Nothing in these rules shall interfere with the operation of any special rules made by the government of any nation with respect to additional station and signal lights for two or more ships of war or for ships sailing under convoy.

"ART. 27. When a ship is in distress and requires assistance from other ships or from the shore, the following shall be the signals to be used, or displayed by her, either together or separately, that is to say:

"In the daytime—

"First. A gun fired at intervals of about a minute.

"Second. The international code signal of distress indicated by N. C.

"Third. The distant signal, consisting of a square flag, having either above or below it a ball, or anything resembling a ball.

"At night—

"First. A gun fired at intervals of about a minute.

"Second. Flames on the ship (as from a burning tar-barrel, oil-barrel, and so forth).

"Third. Rockets or shells, throwing stars of any color or description, fired one at a time, at short intervals."

The act concludes with—

"SEC. 2. That all laws and parts of laws inconsistent with the foregoing 'Revised International Rules and Regulations' for the navigation of all public and private vessels of the United States upon the high seas, and in all coast waters of the United States, are hereby repealed, except as to the navigation of such vessels within the harbors, lakes, and inland waters of the United States; and that this act shall take effect and be in force from and after the first day of September, anno Domini eighteen hundred and eighty-four."

This act presents the contrast between the "coast waters," which are associated with the high seas and subject to the same rules of navigation as the high seas, and the "inland waters," which are excluded from the rules. The *Garden City*, 26 F. R. 773. The difficulty of applying the two sets of rules to vessels in foreign commerce and upon the same



voyage, on passing the indefinite line where a "harbor" might be supposed to begin, is set forth in *The Aurania*, 29 Id. 102, 103. See also *The Greenpoint*, 31 Id. 231.

SECT. 4234. — The words "be liable to a penalty" substituted for "forfeit and pay the sum in the cited act." 2 Com. D. 2044. "It is only where it clearly appears that the exhibition of a torch-light could not have served any useful purpose, or given any additional information as to the position or course of a sailing vessel, that the omission to comply with this section can be held to be immaterial." *The Oregon*, 27 F. R. 757; *The Leopard*, 2 Lowell, 241; *Farwell v. The J. H. Starin*, 2 F. R. 100; *The Oder*, 8 Id. 172; *The Excelsior*, 12 Id. 203. See *The Algiers*, 21 Id. 345; *The Pennland*, 23 Id. 556; *The Hercules*, 17 Id. 606; 20 Id. 205; *Schooner Margaret v. Steamer*, 3 Id. 870; *The Buckeye*, 11 Biss. 92; 9 F. R. 666; *The Tonawanda*, 11 Phila. 516; *The Tonawanda*, 3 F. R. 588. The origin of the rule is stated in *Kennedy v. The Sarmatian*, 2 F. R. 916. The duty of showing the lighted torch is touched upon in *The Golden Grove*, 13 Id. 686. The signal must be given if the approach is from any quarter. *Kennedy v. The Sarmatian*, *supra*; *The Samuel H. Crawford*, 6 F. R. 906; *The Narragansett*, 11 Id. 921; 3 Id. 256. If the knowledge is furnished in any other way, the office of the torch is performed and its exhibition is immaterial. *The Margaret*, 3 Id. 870. This section applies to a vessel at anchor where other vessels are likely to pass and in thick weather. *The Erastus Corning*, 25 Id. 574; *The Isaac Bell*, 9 Id. 842; *contra*, *The Lizzie Henderson*, 20 Id. 527; *The Oscar Townsend*, 17 Id. 93. If the situation is such that one lookout is not enough, there must be more. *The Sarmatian*, 2 Id. 917. Nothing but absolute certainty that the exhibition of the torch would do no good will justify an omission to obey the rule. *The Eleanora*, 17 Blatch. 102; *The Pennsylvania*, 12 F. R. 916. The design is to furnish additional safeguards, not to dispense with any of the previous obligations. *The City of Merida*, 24 Id. 233. This section is as applicable to navigation on the sea as to inland navigation. *The Golden Grove*, 13 Id. 700; Id. 674. As to the duties of pilot-boats, see *The New Orleans*, 9 Ben. 303; also 23 St. 438, art. 9, *ante*. As to how far the obligation applies to foreign vessels, see *The A. M. Hathaway*, 25 F. R. 926; *The State of Alabama*, 17 Id. 847, 854, 855; *Leonard v. Whitwill*, 10 Ben. 638. The penalty imposed by this section applies to rafts. *United States v. One Raft of Timber*, 5 Hughes, 404; 13 F. R. 796; *The Saratoga*, 37 F. R. 119. See S. T. D. 8198. A libel under this section must aver the seizure and the place of the seizure. *United States v. One Raft of Timber*, *supra*. It makes no possible difference in the construction of statutes that they are broken up into sections or subdivisions. When a clause in one section, which in its import and language is equally applicable to the other sections of the same act, it would be against all rules of interpretation to confine the language to the section in which it is found. *The Schooner Harriett*, 1 Story, 256; *United States v. One Raft of Timber*, *supra*.

SECT. 4235. — The States have concurrent power with Congress to pass pilotage laws until Congress shall take exclusive control of the subject by the enactment of a general and uniform law, and such acts as Congress shall make are of paramount authority, and all State laws in collision must yield. *The South Cambria*, 27 F. R. 526; *Cooley v. Board of Wardens*, 12 How. 299; *Ex parte McNiel*, 13 Wall. 236, 241. See *The William Law*, 14 F. R. 794; *The Chase*, Id. 856; *The Glenearne*, 7 Sawyer, 200; 7 F. R. 606; *License Cases*, 5 How. 580; *Gibbons v. Ogden*, 9 Wheat. 207; *Henderson v. Spofford*, 59 N. Y. 131; *Ogden v. Saunders*, 12 Wheat. 213. The origin of this statute is given in *The Olymene*, 9 F. R. 164; 12 Id. 346. The right of a pilot to salvage is stated in *Hobart v. Drogan*, 10 Pet. 108.

SECT. 4236. — The origin of this statute and the rule that each State has authority (though not exclusive) over the subject of pilotage on the navigable waters within its limits are laid down in *The Olymene*, 12 F. R. 346; 9 Id. 164; *Flanigen v. Insurance Co.*, 7 Pa. St. 306. See also *The Alcalde*, 12 Sawyer, 268; 30 F. R. 136; *The Belle Hooper*,



28 Id. 928. This act applies to the pilotage laws of coterminous States situated upon the same navigable waters, but which are not the separating boundary between them. *The Clymene*, *supra*; *The Alzena*, 14 F. R. 174, and note; *The South Cambria*, 27 Id. 525. A river which is a boundary between a State and an organized Territory presents a case within the statute. *The Ullosk*, 19 Id. 211; *The Abercoon*, 11 Sawyer, 530, 26 Id. 877; 28 Id. 384; *Brown v. Elwell*, 60 N. Y. 249.

SECT. 4237. — Cases of such discrimination will be found in *The Alameda*, 12 Sawyer, 497; 32 F. R. 331; 31 Id. 366; *Sprague v. Thompson*, 118 U. S. 90; *Freeman v. The Undaunted*, 37 F. R. 662.

SECT. 4240. — The cited act contained the word "wholly" before "forfeited," and, after "forfeited," the words "and may be seized and condemned in any court of the United States or territories thereof, having competent jurisdiction." 2 Com. D. 2045. By act of June 19, 1878, ch. 324 (20 St. 175), Canadian vessels may aid wrecked vessels, &c., in our waters contiguous to the Dominion after issue of proclamation of reciprocity, but not after reciprocity has ceased.

SECT. 4242. — See note, § 4251. The cited act contained the word "additional" after "such" in first line. 2 Com. D. 2046. By 18 St. 125, the Secretary of the Treasury is authorized to establish life-saving stations, life-boat stations, and houses of refuge at various points named on the sea and lake coasts of the United States, and to this end ample powers are conferred upon him as to appointing superintendents, employing crews of surfmen and volunteer crews, preparing medals of honor, disposing of condemned articles, &c. Owners are to report to collectors of customs all accidents and probable losses, who are to report to the Secretary of the Treasury, and the latter has a discretion in the remission of penalties. By 19 St. 107, the person in charge of the life-saving service shall annually report to the Secretary of the Treasury all expenditures and the operations.

SECTS. 4243, 4246. — See note, § 4242.

SECT. 4250. — Amended by 18 St. 320, by striking out in line seven "nineteenth," and inserting "ninth." Under this section the majority in interest of the owners have the power to remove the master, whether he be part-owner or not, and only a written agreement entitling a master who is part-owner to possession can defeat the right. *The Eliza B. Emory*, 4 F. R. 345; reversing 3 F. R. 241. See *Dennis v. Maxfield*, 10 Allen, 138; *Parsons v. Terry*, 1 Lowell, 60. A valid written agreement is considered in *The Eclipse*, 30 N. W. Repr. 159, 166. See *Rogers v. The Osseo*, 3 F. R. 670; *The Lizzie Merry*, 10 Ben. 140.

SECT. 4251. — This statute (which is a re-enactment of that of July 20, 1846), excludes the inference that any future modification of the enrolment act should affect the exemption; and the language is broad enough to comprehend all canal-boats which could properly be libelled. *The J. S. Woodward*, 6 F. R. 636. To charge a steamer with a lien for labor performed on canal-boats, the latter must be shown to be a part of the former. *The Ida Meyer*, 31 F. R. 89. Freight is not included within the exemption of this act. *The Monadnock*, 5 Ben. 357, 364. "Wages of any person" refers to the wages of the crew and not to the wages of a corporation, and "navigating" does not mean "towing;" and hence a steam-tug is not deprived of her right to libel for towage. *Ryan v. Hook*, 34 Hun, 190, 191.

St. June 18, 1878, ch. 265 (20 St. 163), provides, —

"SEC. 1. That the Secretary of the Treasury is hereby authorized to establish additional life-saving and life-boat stations at or near the following-named points upon the sea and lake coasts of the United States, namely: One complete life-saving station at Cranberry Isles, Maine; one complete life-saving station at or near Scituate, Massachusetts; one complete life-saving station at or near Watch Hill, Rhode Island; one complete life-saving station on the coast of Delaware, between Cape Henlopen and Indian Island; two complete life-saving stations on the coast of Maryland, to be located, one between Indian



River and Green Run, and one between Green Run and Chincoteague; fifteen complete life-saving stations on the coasts of Virginia and North Carolina, ten of them to be located at intermediate points between the existing stations, three between the southernmost existing station and Hatteras Inlet, one at or near Cape Lookout, and one at or near Cape Fear Point; five complete life-saving stations on the coast of Texas, to be located, one at or near Sabine Pass, one on Galveston Island, near west end, one at or near Pass Cavallo, one at or near Aranzas Pass, and one at Brazos Santiago, and one life-boat station on Galveston Island, near east end; two complete life-saving stations on the coast of Lake Michigan, to be located, one at or near Sleeping Bear Point, and one at or near Bayley's Harbor, and four life-boat stations, to be located, one at or near Manistee, one at Ludington, one at or near Muskegan, and one at Kenosha; one life-boat station on the coast of Lake Superior, at or near the mouth of Portage Lake and Lake Superior Ship Canal; two complete life-saving stations on the coast of Lake Huron, one at or near Port Austin and one on Middle Island, and a life-boat station at or near Sand Beach Harbor of Refuge; and on the coast of California, a life-boat station at Bolinas Bay, in place of that authorized to be established at Point Reyes by the act of June 20, 1874, entitled 'An act to provide for the establishment of life-saving stations and houses of refuge upon the sea and lake coasts of the United States, and to promote the efficiency of the Life-Saving Service.' And the Secretary of the Treasury is hereby authorized, whenever, in his opinion, it may become necessary for the proper administration of the Life-Saving Service and the protection of the public property at the stations, to appoint a district superintendent for the coast of the United States bordering on the Gulf of Mexico, whose compensation shall be at the rate of \$1000 per annum; and also a keeper for each of the stations hereby authorized to be established.

"SEC. 2. That the unexpended balances of appropriations heretofore made for the establishment of life-saving and life-boat stations are hereby made available for the payment of the expenses of the establishment of the stations herein authorized.

"SEC. 3. That all moneys received from the sale of old stations and equipments, and other material condemned by a Board of Survey as unserviceable, may be expended in rebuilding or improving and equipping stations.

"SEC. 4. That hereafter the compensation of the keepers of life-saving and life-boat stations and houses of refuge shall be at the rate of \$400 per annum; and they shall have the powers of inspectors of customs, but shall receive no additional compensation for duties performed as such: *Provided*, That said keepers shall have authority and be required to take charge of and protect all property saved from shipwreck at which they may be present, until it is claimed by parties legally authorized to receive it, or until otherwise instructed to dispose of it by the Secretary of the Treasury; and keepers of life-saving stations shall be required to reside continually at or in the immediate vicinity of their respective stations.

"SEC. 5. That hereafter the life-saving stations upon the sea and gulf coasts at which crews are employed shall be manned and the stations opened for active service on the first day of September in each year, and so continue until the first day of May succeeding, and upon the lake coasts from the opening to the close of navigation, except such stations as, in the discretion of the Secretary of the Treasury, are not necessary to be manned during the full period specified; and the crews shall reside at the stations during said periods.

"SEC. 6. That the President of the United States may, by and with the consent of the Senate, appoint a suitable person, who shall be familiar with the various means employed in the Life-Saving Service for the saving of life and property from shipwrecked vessels, as general superintendent of the Life-Saving Service, who shall, under the immediate direction of the Secretary of the Treasury, have general charge of the service and of all administrative matters connected therewith, and whose compensation shall be at the rate of \$4000 per annum; and the Secretary of the Treasury is authorized to appoint an assistant to the general superintendent, whose compensation shall be \$2500 per annum.

"SEC. 7. That it shall be the duty of the general superintendent to supervise the organization and government of the employees of the service; to prepare and revise regulations therefor as may be necessary; to fix the number and compensation of surfmen to be employed at the several stations within the provisions of law; to supervise the expenditure of all appropriations made for the support and maintenance of the Life-Saving Service; to examine the accounts of disbursements of the district superintendents, and to certify the same to the accounting-officers of the Treasury Department; to examine the property returns of the keepers of the several stations, and see that all public property thereto belonging is properly accounted for; to acquaint himself, as far as practicable, with all means employed in foreign countries which may seem to advantageously affect the interests of the service, and to cause to be properly investigated all plans, devices and inventions for the improvement of life-saving apparatus for use at the stations, which may appear to be meritorious and available; to exercise supervision over the selection of sites for new stations the establishment of which may be authorized by law, or for old ones, the removal of which may be made necessary by the encroachment of the sea or by other causes; to prepare and submit to the Secretary of the Treasury estimates for the support of the service; to collect and com-



pile the statistics of marine disasters contemplated by the act of June 20, 1874; and to submit to the Secretary of the Treasury, for transmission to Congress, an annual report of the expenditures of the moneys appropriated for the maintenance of the Life-Saving Service, and of the operations of said service during the year.

"SEC. 8. That the Secretary of the Treasury may detail such officer or officers of the Revenue Marine Service as may be necessary, to act as inspector and assistant inspectors of stations, who shall perform such duties in connection with the conduct of the service as may be required of them by the general superintendent.

"SEC. 9. That upon the occurrence of any shipwreck within the scope of the operations of the Life-Saving Service, attended with loss of life, the general superintendent shall cause an investigation of all the circumstances connected with said disaster and loss of life to be made, with a view of ascertaining the cause of the disaster, and whether any of the officers or employees of the service have been guilty of neglect or misconduct in the premises; and any officer or clerk in the employment of the Treasury Department who may be detailed to conduct such investigation, or to examine into any alleged incompetency or misconduct of any of the officers or employees of the Life-Saving Service, shall have authority to administer an oath to any witness attending to testify or depose in the course of such investigation.

"SEC. 10. That § 6 of said act of June 20, 1874, is so amended as to extend the compensation of the enrolled members of volunteer crews of life-boat stations therein named to occasions of actual and deserving service at any shipwreck, or in the relief of any vessel in distress, and that such persons as may volunteer to take the place of any absent or disabled enrolled members of a crew, and who shall be accepted by the keeper, may be paid therefor, in the discretion of the Secretary of the Treasury, a sum not to exceed \$3 each on every such occasion: *Provided*, That all crews and volunteers employed under authority of this act, who may be present at a wreck, shall be required to use their utmost endeavors to save life and properly care for the bodies of such as may perish, and, when such efforts are no longer necessary, to save property and protect the same, under the direction of the senior keeper present or of the superintendent of the district, until the arrival of persons legally authorized to take charge; and for the time employed in so saving and protecting property, volunteers shall be entitled to compensation not to exceed \$3 per day each, in the discretion of the Secretary of the Treasury.

"SEC. 11. That the enrolled members of the crews of life-boat stations may be called out for drill and exercise in the life-boat and life-saving apparatus as often as the general superintendent may determine, not to exceed twice a month, for each day's attendance at which they shall be entitled to the sum of \$3 each.

"SEC. 12. That the Secretary of the Treasury is hereby authorized to bestow the life-saving medal of the second class upon persons making such signal exertions in rescuing and succoring the shipwrecked, and saving persons from drowning, as, in his opinion, shall merit such recognition."

As to how far the Commissioners of Wrecks under the laws of North Carolina come within the provisions of § 4 of the above act, see 16 A. G. Op. 645. Life-saving stations are established at various places by the following acts: 21 St. 379, ch. 111; 24 St. 84, ch. 424; 25 St. 500, ch. 1060; Id. 557, ch. 1113; Id. 560, ch. 1195. 22 St. 55 is an act to promote the efficiency of the Life-Saving Service, and to encourage the saving of life from shipwreck. 23 St. 217, ch. 332 (see also 23 St. 504; 24 St. 246), appropriates —

"For continuing the connections of stations at life-saving stations and light-houses, including services of operators, repair-men, materials, and general service connected therewith, . . . : *Provided*, That such connections, in the opinion of the superintendent of the Life-Saving Service and the Light-house Board, shall be deemed necessary, . . . : *Provided*, That the work of no other Department, Bureau, or Commission authorized by law shall be duplicated by this Bureau."

## CHAPTER VI.

### TRANSPORTATION OF PASSENGERS AND MERCHANDISE

St. Aug. 2, 1882, ch. 374 (22 St. 186), entitled "An act to regulate the carriage of passengers by sea," provides —

"That it shall not be lawful for the master of a steamship or other vessel whereon emigrant passengers, or passengers other than cabin passengers, have been taken at any port or place in a foreign



country or dominion (ports and places in foreign territory contiguous to the United States excepted) to bring such vessel and passengers to any port or place in the United States unless the compartments, spaces, and accommodations hereinafter mentioned have been provided, allotted, maintained, and used for and by such passengers during the entire voyage; that is to say, in a steamship, the compartments or spaces, unobstructed by cargo, stores, or goods, shall be of sufficient dimensions to allow for each and every passenger carried or brought therein 100 cubic feet, if the compartment or space is located on the main deck or on the first deck next below the main deck of the vessel, and 120 cubic feet for each passenger carried or brought therein if the compartment or space is located on the second deck below the main deck of the vessel; and it shall not be lawful to carry or bring passengers on any deck other than the decks above mentioned. And in sailing-vessels such passengers shall be carried or brought only on the deck (not being an orlop deck) that is next below the main deck of the vessel, or in a poop or deck-house constructed on the main deck; and the compartment or space, unobstructed by cargo, stores, or goods, shall be of sufficient dimensions to allow 110 cubic feet for each and every passenger brought therein. And such passengers shall not be carried or brought in any between-decks, nor in any compartment, space, poop, or deck-house, the height of which from deck to deck is less than six feet. In computing the number of such passengers carried or brought in any vessel, children under one year of age shall not be included, and two children between one and eight years of age shall be counted as one passenger; and any person brought in such vessel who shall have been, during the voyage, taken from any other vessel wrecked or in distress on the high seas, or have been picked up at sea from any boat, raft, or otherwise, shall not be included in such computation. The master of a vessel coming to a port or place in the United States in violation of either of the provisions of this section shall be deemed guilty of a misdemeanor; and if the number of passengers other than cabin passengers carried or brought in the vessel, or in any compartment, space, poop, or deck-house thereof, is greater than the number allowed to be carried or brought therein, respectively, as hereinbefore prescribed, the said master shall be fined \$50 dollars for each and every passenger in excess of the proper number, and may also be imprisoned not exceeding six months.

"SEC. 2. That in every such steamship or other vessel there shall be a sufficient number of berths for the proper accommodation as hereinafter provided, of all such passengers. There shall not be on any deck nor in any compartment or space occupied by such passengers more than two tiers of berths. The berths shall be properly constructed, and be separated from each other by partitions, as berths ordinarily are separated, and each berth shall be at least two feet in width and six feet in length; and the interval between the floor or lowest part of the lower tier of berths and the deck beneath them shall not be less than six inches, nor the interval between each tier of berths, and the interval between the uppermost tier and the deck above it, less than two feet six inches; and each berth shall be occupied by not more than one passenger over eight years of age; but double berths of twice the above-mentioned width may be provided, each double berth to be occupied by no more and by none other than two women, or by one woman and two children under the age of eight years, or by husband and wife, or by a man and two of his own children under the age of eight years, or by two men personally acquainted with each other. All the male passengers upwards of fourteen years of age who do not occupy berths with their wives shall be berthed in the fore part of the vessel, in a compartment divided off from the space or spaces appropriated to the other passengers by a substantial and well-secured bulk-head; and unmarried female passengers shall be berthed in a compartment separated from the spaces occupied by other passengers by a substantial and well-constructed bulkhead, the opening or communication from which to an adjoining passenger space shall be so constructed that it can be closed and secured. Families, however, shall not be separated except with their consent. Each berth shall be numbered serially, on the outside berth-board, according to the number of passengers that may lawfully occupy the berth; and the berths occupied by such passengers shall not be removed or taken down until the expiration of twelve hours from the time of entry, unless previously inspected within a shorter period. For any violation of either of the provisions of this section the master of the vessel shall be liable to a fine of five dollars for each passenger carried or brought on the vessel.

"SEC. 3. That every such steamship or other vessel shall have adequate provision for affording light and air to the passenger-decks and to the compartments and spaces occupied by such passengers, and with adequate means and appliances for ventilating the said compartments and spaces. To compartments having sufficient space for fifty or more of such passengers at least two ventilators, each not less than twelve inches in diameter, shall be provided, one of which ventilators shall be inserted in the forward part of the compartment, and the other in the after part thereof, and shall be so constructed as to ventilate the compartment; and additional ventilators shall be provided for each compartment in the proportion of two ventilators for each additional fifty of such passengers carried or brought in the compartment. All ventilators shall be carried at least six feet above the uppermost deck of the vessel, and shall be of the most approved form and construction. In any steamship the ventilating apparatus provided, or any method of



ventilation adopted thereon, which has been approved by the proper emigration officers at the port or place from which said vessel was cleared, shall be deemed a compliance with the foregoing provisions; and in all vessels carrying or bringing such passengers there shall be properly-constructed hatchways over the compartments or spaces occupied by such passengers, which hatchway shall be properly covered with houses or booby hatches, and the combings or sills of which shall rise at least six inches above the deck; and there shall be proper companion-ways or ladders from each hatchway leading to the compartments or spaces occupied by such passengers; and the said companion-ways or ladders shall be securely constructed, and be provided with hand-rails or strong rope, and, when the weather will permit, such passengers shall have the use of each hatchway situated over the compartments or spaces appropriated to their use; and every vessel carrying or bringing such passengers shall have a properly located and constructed caboose and cooking-range, or other cooking-apparatus, the dimensions and capacity of which shall be sufficient to provide for properly cooking and preparing the food of all such passengers. In every vessel carrying or bringing such passengers there shall be at least two water-closets or privies, and an additional water-closet or privy for every one hundred male passengers on board, for the exclusive use of such male passengers, and an additional water-closet or privy for every fifty female passengers on board, for the exclusive use of the female passengers and young children on board. The aforesaid water-closets and privies shall be properly enclosed and located on each side of the vessel, and shall be separated from passengers' spaces by substantial and properly-constructed partitions or bulkheads; and the water-closets and privies shall be kept and maintained in a serviceable and cleanly condition throughout the voyage. For any violation of either of the provisions of this section, or for any neglect to conform to the requirements thereof, the master of the vessel shall be liable to a penalty not exceeding \$250.

"SEC. 4. An allowance of good, wholesome, and proper food, with a reasonable quantity of fresh provisions, which food shall be equal in value to one and a half navy rations of the United States, and of fresh water, not less than four quarts per day, shall be furnished each of such passengers. Three meals shall be served daily, at regular and stated hours, of which hours sufficient notice shall be given. If any such passengers shall at any time during the voyage be put on short allowance for food and water, the master of the vessel shall pay to each passenger three dollars for each and every day the passenger may have been put on short allowance, except in case of accidents, where the captain is obliged to put the passengers on short allowance. Mothers with infants and young children shall be furnished the necessary quantity of wholesome milk or condensed milk for the sustenance of the latter. Tables and seats shall be provided for the use of passengers at regular meals. And for every willful violation of any of the provisions of this section the master of the vessel shall be deemed guilty of a misdemeanor and shall be fined not more than \$500, and be imprisoned for a term not exceeding six months. The enforcement of this penalty, however, shall not affect the civil responsibility of the master and owners of the vessel to such passengers as may have suffered from any negligence, breach of contract, or default on the part of such master and owners.

"SEC. 5. That in every such steamship or other vessel there shall be properly built and secured, or divided off from other spaces, two compartments or spaces to be used exclusively as hospitals for such passengers, one for men and the other for women. The hospitals shall be located in a space not below the deck next below the main deck of the vessel. The hospital spaces shall in no case be less than in the proportion of eighteen clear superficial feet for every fifty such passengers who are carried or brought on the vessel, and such hospitals shall be supplied with proper beds, bedding, and utensils, and be kept so supplied throughout the voyage. And every steamship or other vessel carrying or bringing emigrant passengers, or passengers other than cabin passengers, exceeding fifty in number, shall carry a duly qualified and competent surgeon or medical practitioner, who shall be rated as such in the ship's articles, and who shall be provided with surgical instruments, medical comforts, and medicines proper and necessary for diseases and accidents incident to sea-voyages, and for the proper medical treatment of such passengers during the voyage, and with such articles of food and nourishment as may be proper and necessary for preserving the health of infants and young children: and the services of such surgeon or medical practitioner shall be promptly given, in any case of sickness or disease, to any of the passengers, or to any infant or young child of any such passengers, who may need his services. For a violation of either of the provisions of this section the master of the vessel shall be liable to a penalty not exceeding \$250.

"SEC. 6. That the master of every such steamship or other vessel is authorized to maintain good discipline and such habits of cleanliness among such passengers as will tend to the preservation and promotion of health, and to that end he shall cause such regulations as he may adopt for such purpose to be posted up on board the vessel, in a place or places accessible to such passengers, and shall keep the same so posted up during the voyage. The said master shall cause the compartments and spaces provided for, or occupied by, such passengers to be kept at all times in a clean and healthy condition, and to be, as often as may be necessary, disinfected with chloride of lime, or by some other equally efficient disinfectant. Whenever the state of the weather will permit, such passengers and their bedding shall be mustered on



deck, and a clear and sufficient space on the main or any upper deck of the vessel shall be set apart, and so kept, for the use and exercise of such passengers during the voyage. For each neglect or violation of any of the provisions of this section the master of the vessel shall be liable to a penalty not exceeding \$250.

"SEC. 7. That neither the officers, seamen, nor other persons employed on any such steamship or other vessel shall visit or frequent any part of the vessel provided or assigned to the use of such passengers, except by the direction or permission of the master of such vessel first made or given for such purpose; and every officer, seaman, or other person employed on board of such vessel who shall violate the provisions of this section shall be deemed guilty of a misdemeanor, and may be fined not exceeding one hundred dollars, and be imprisoned not exceeding twenty days, for each violation; and the master of such vessel who directs or permits any officer, seaman, or other person employed on board the vessel to visit or frequent any part of the vessel provided for or assigned to the use of such passengers, or the compartments or spaces occupied by such passengers, except for the purpose of doing or performing some necessary act or duty as an officer, seaman, or other person employed on board of the vessel, shall be deemed guilty of a misdemeanor, and may be fined not more than \$100 for each time he directs or permits the provisions of this section to be violated. A copy of this section, written or printed in the language or principal languages of the passengers on board, shall, by or under the direction of the master of the vessel, be posted in a conspicuous place on the fore-castle and in the several parts of the vessel provided and assigned for the use of such passengers, and in each compartment or space occupied by such passengers, and the same shall be kept so posted during the voyage; and if the said master neglects so to do, he shall be deemed guilty of a misdemeanor, and shall be fined not more than \$100.

"SEC. 8. That it shall not be lawful to take, carry, or have on board of any such steamship or other vessel any nitro-glycerine, dynamite, or any other explosive article or compound, nor any vitriol or like acids, nor gunpowder, except for the ship's use, nor any article or number of articles, whether as a cargo or ballast, which, by reason of the nature or quantity or mode of storage thereof, shall, either singly or collectively, be likely to endanger the health or lives of the passengers or the safety of the vessel, and horses, cattle, or other animals taken on board of or brought in any such vessel shall not be carried on any deck below the deck on which passengers are berthed, nor in any compartment in which passengers are berthed, nor in any adjoining compartment except in a vessel built of iron, and of which the compartments are divided off by water-tight bulkheads extending to the upper deck. For every violation of any of the provisions of this section the master of the vessel shall be deemed guilty of a misdemeanor, and shall be fined not exceeding \$1000, and be imprisoned for a period not exceeding one year.

"SEC. 9. That it shall not be lawful for the master of any such steamship or other vessel, not in distress, after the arrival of the vessel within any collection district of the United States, to allow any person or persons, except a pilot, officer of the customs, or health officer, agents of the vessel, and consuls, to come on board of the vessel, or to leave the vessel, until the vessel has been taken in charge by an officer of the customs, nor, after charge so taken, without leave of such officer, until all the passengers, with their baggage, have been duly landed from the vessel; and on the arrival of any such steamship or other vessel within any collection district of the United States, the master thereof shall deliver to the officer of customs who first comes on board the vessel and makes demand therefor a correct list, signed by the master, of all the passengers taken on board the vessel at any foreign port or place, specifying separately the names of the cabin passengers, their age, sex, calling, and the country of which they are citizens, and the number of pieces of baggage belonging to each passenger, and also the name, age, sex, calling, and native country of each emigrant passenger, or passengers other than cabin passengers, and their intended destination or location, and the number of pieces of baggage belonging to each passenger, and also the location of the compartment or space occupied by each of such passengers during the voyage; and if any of such passengers died on the voyage, the said list shall specify the name, age, and cause of death of each deceased passenger; and a duplicate of the aforesaid list of passengers, verified by the oath of the master, shall, with the manifest of the cargo, be delivered by the master to the collector of customs on the entry of the vessel. For a violation of either of the provisions of this section, or for permitting or neglecting to prevent a violation thereof, the master of the vessel shall be liable to a fine not exceeding \$1000.

"SEC. 10. That in case there shall have occurred on board any such steamship or other vessel any death among such passengers during the voyage, the master or consignees of the vessel shall, within forty-eight hours after the arrival of the vessel within a collection district of the United States, or within twenty-four hours after the entry of the vessel, pay to the collector of customs of such district the sum of ten dollars for each and every such passenger above the age of eight years who shall have died on the voyage by natural disease; and the master or consignees of any vessel who neglect or refuse to pay such collector, within the times hereinbefore prescribed, the sums of money aforesaid, shall be liable to a penalty of \$50 in addition to the sum required to be paid as aforesaid for each passenger whose death occurred on the voyage. All sums of money paid to any collector under the provisions of this section shall be by



him paid into the Treasury of the United States in such manner and under such regulations as shall be prescribed by the Secretary of the Treasury.

"SEC. 11. That the collector of customs of the collection district within which, or the surveyor of the port at which, any such steamship or other vessel arrives, shall direct an inspector or other officer of the customs to make an examination of the vessel, and to admeasure the compartments or spaces occupied by the emigrant passengers, or passengers other than cabin passengers, during the voyage; and such measurement shall be made in the manner provided by law for admeasuring vessels for tonnage; and to compare the number of such passengers found on board with the list of such passengers furnished by the master to the customs officer; and the said inspector or other officer shall make a report to the aforesaid collector or surveyor, stating the port of departure, the time of sailing, the length of the voyage, the ventilation, the number of such passengers on board the vessel, and their native country, respectively; the cubic quantity of each compartment or space, and the number of berths and passengers in each space, the kind and quantity of the food furnished to such passengers on the voyage; the number of deaths, and the age and sex of those who died during the voyage, and of what disease; and in case there was any unusual sickness or mortality during the voyage, to report whether the same was caused by any neglect or violation of the provisions of this act, or by the want of proper care against disease by the master or owners of the vessel; and the said reports shall be forwarded to the Secretary of the Treasury at such times and in such manner as he shall direct.

"SEC. 12. That the provisions of this act shall apply to every steamship or other vessel whenever emigrant passengers, or passengers other than cabin passengers, are taken on board at a port or place in the United States for conveyance to any port or place in a foreign country except foreign territory contiguous to the United States, and shall also apply to any vessel whereon such passengers are taken on board at any port or place of the United States on the Atlantic Ocean or its tributaries for conveyance to a port or place on the Pacific Ocean or its tributaries, or vice versa; and whether the voyage of said vessel is to be continuous from port to port or such passengers are to be conveyed from port to port in part by the way of any overland route through Mexico or Central America; and the said collector of customs may direct an examination of the vessel to be made by an inspector or other officer of the customs, who shall make the examination and report whether the provisions of this act have been complied with in respect to such vessel, and the said collector is authorized to withhold the clearance of such vessel until the coming in of such report; and if the said report shall show that any of the provisions of this act have not been complied with, the collector is authorized and directed to withhold the clearance of such vessel until the said provisions are complied with; and if any such vessel leaves the aforesaid port or place without having been duly cleared by the collector of customs, the master shall be deemed guilty of a misdemeanor, and may be fined not exceeding \$1000, and be imprisoned not exceeding one year, and the vessel shall be liable to seizure and forfeiture.

"SEC. 13. That the amount of the several fines and penalties imposed by any section of this act upon the master of any steamship or other vessel carrying or bringing emigrant passengers, or passengers other than cabin passengers, for any violation of the provisions of this act, shall be liens upon such vessel, and such vessel may be libelled therefor in any circuit or district court of the United States where such vessel shall arrive or depart.

"SEC. 14. That this act shall come into operation and take effect ninety days after the passage of this act; and §§ 4252 to 4277 inclusive, of the Revised Statutes of the United States are, from and after said date, repealed; and this act may be cited for all purposes as 'The passenger act, eighteen hundred and eighty-two.'

But by St. July 9, 1886, ch. 755 (24 St. 129),—

"Any steam-vessel engaged in the business of towing vessels, rafts, or water craft of any kind, and not carrying passengers, may be authorized and licensed by the supervising inspector of the district in which said steamer shall be employed, to carry on board such number of persons, in addition to its crew, as the supervising inspector in his judgment, shall deem necessary to carry on the legitimate business of such towing steamers, not exceeding, however, one person to every net ton of measurement of said steamer: *Provided, however,* That the person so allowed to be carried shall not be carried for hire. SEC. 2. That every steam-vessel licensed under the foregoing section shall carry and have on board, in accessible places, one life-preserver for every person allowed to be carried, in addition to those provided for the crew of such vessel."

22 St. 214, regulating immigration, as amended by 23 St. 58, is stated in full in notes *ante*, p. 510.

St. June 19, 1878, ch. 327 (20 St. 177), provides—



"That the acts of every State and municipal officer or corporation of the several States of the United States in the collection of head-moneys prior to the first day of January, 1877, from the master, consignee, or owner of any vessel bringing passengers to the United States from a foreign port, pursuant to the then existing laws of the several States, shall be valid, and no action shall be maintained against any such State or municipal officer or corporation for the recovery of any moneys so paid or collected prior to said date."

See *City of New York v. Miln*, 11 Pet. 102; *Passenger Cases*, 7 How. 283; *Oceanic Steam Navigation Co. v. Tappan*, 16 Blatch. 296; *Henderson v. Mayor of New York*, 92 U. S. 259.

The responsibilities and duties devolving upon vessels and their masters under 22 St. 186 cannot be evaded by a contract of charter. *The Prinz Georg*, 23 F. R. 906. It is provided by 24 St. 81, § 8, "that foreign vessels found transporting passengers between places or ports in the United States, when such passengers have been taken on board in the United States, shall be liable to a fine of two dollars for every passenger landed." See note, § 4153.

SECT. 4252. — *The Devonshire*, 8 Sawyer, 209; 13 F. R. 39; *Bowman v. Chicago & N. R. R.*, 125 U. S. 465, 484. St. May 17, 1848, which is repealed by 10 St. 721, is construed in *United States v. The Anna*, 2 Am. L. Reg. 421; affirmed, Taney, 549. A mate who is appointed master at a foreign port and brings thence a number of passengers greater than is allowed by this section, is liable to the fine imposed upon masters, even though he did not make the agreement with the passengers, provided he had knowledge of the facts, and had opportunity, before leaving the foreign port, to annul the illegal contract. *United States v. Morton*, 1 Lowell, 179. In estimating the number of passengers in a vessel under the act of March 2, 1819, no deduction is to be made for children or persons not paying. But those employed in navigating the vessel are to be excluded. In estimating the tonnage of such vessel the measurement of the custom house in such port of the United States as the vessel arrives at is to be taken. *United States v. The Louisa Barbara*, Gilpin, 332. Passengers who go on board a vessel openly and in the usual way are presumed to be taken on board by the master, and it is his duty to take measures before leaving the port to ascertain how many passengers he has on board. The omission of this duty is such negligence on his part as to make him guilty of a violation of this and the succeeding section. *United States v. Thomson*, 8 Sawyer, 122; 12 F. R. 245. Under this section space is not appropriated to passengers unless given up to their exclusive use. Putting the names of passengers on the ship's articles as interpreters, stewards, doctors, and cooks is immaterial so long as they occupy the space allotted to passengers. Boys whose ages range from nine to thirteen years are not children within the meaning of the act. *United States v. Nicholson*, 8 Sawyer, 162; 12 F. R. 522.

SECT. 4253. — See notes, § 4252. It is sufficient if a libel praying condemnation of a vessel for a violation of the United States passenger laws states the offence in the words of the statute. *United States v. The Neurea*, 19 How. 92. The fine imposed upon the master of a vessel by this section for a violation thereof and for a violation of Rev. Stats. § 4252 is, by Rev. Stats. § 4270, made a lien upon the vessel itself, which may be recovered by a proceeding *in rem*, but it is the same penalty which is to be adjudged against the master himself in the criminal prosecution for misdemeanor, and payment by either is a satisfaction or the whole liability. *The Strathairly*, 124 U. S. 558. *Contra*, *United States v. The Candace*, 1 Lowell, 126; *United States v. The Ethan Allen*, 3 Am. L. Rev. 372.

SECT. 4255. — The words "be liable to a penalty" are substituted for "forfeit and pay" in the cited act. 2 Com. D. 2050. *The Candace*, 1 Lowell, 126; *United States v. The Ethan Allen*, 3 Am. L. Rev. 372. The language of Rev. Stats. § 4264, as amended by 19 St. 240, 250, applies directly so as to subject vessels propelled in whole or in part by steam, and navigating from and to and between the ports therein named, to the provisions,



requisitions, penalties, and liens included within this section. *The Strathairly*, 124 U. S. 558. *Contra*, *The Manhattan*, 2 Ben. 88.

SECT. 4258. — The eleven words following "passengers" in the first line are here added. 2 Com. D. 2051.

SECT. 4261. — *United States v. The Ethan Allen*, 3 Am. L. Rev. 372; *The Candace*, 1 Lowell, 126.

SECT. 4262. — The ten words following "vessel" in the first line are here added; after the first "and" in the eleventh line the original act contained the clause "upon conviction thereof before any circuit or district court of the United States." 2 Com. D. 2053.

SECT. 4263. — In the first line "captain" is here changed to "master." 2 Com. D. 2053.

SECT. 4264. — St. Feb. 27, 1877, ch. 69 (19 St. 240), enacts that —

"The provisions, requisitions, penalties, and liens enumerated in the several sections of this chapter relating to the space in vessels appropriated to the use of passengers are hereby extended and made applicable to all spaces appropriated to the use of steerage passengers in vessels propelled in whole or in part by steam, and navigating from, to, and between the ports and in manner as herein named, and to such vessels and to the masters thereof; and the space appropriated to the use of steerage-passengers in vessels as above propelled and navigated is hereby made subject to the supervision and inspection of the collector of the customs in any port in the United States at which any such vessel shall arrive, or from which she shall be about to depart; and the same shall be examined and reported in the same manner and by the same officers directed in the preceding section to examine and report."

*United States v. Nicholson*, 8 Sawyer, 162; 12 F. R. 522; *The Devonshire*, 8 Sawyer, 209; 13 F. R. 39. See *The Strathairly*, *supra*.

SECT. 4266. — See note, § 4267. *United States v. Thomson*, 8 Sawyer, 122, 128; 12 F. R. 245, 250. The penalty imposed for a violation of this section cannot be charged as a lien on the vessel by the operation of Rev. Stat. § 4264, as amended by 19 St. 240, 250. *The Strathairly*, 124 U. S. 558. Collectors of customs are required by act of May 7, 1874 (18 St. 42), to make a return of lists of passengers to the Secretary of the Treasury.

SECT. 4267. — St. May 7, 1874, ch. 149 (18 St. 42), enacts —

"That the 13th section (1) of the act entitled "An act to regulate the carriage of passengers on steamships and other vessels," approved March 3rd, 1855, be, and the same is hereby, repealed; and that hereafter each and every collector of customs to whom shall be delivered the manifests or lists of passengers prescribed by the 12th section of the act aforesaid, approved March 3rd, 1855, shall make returns from such manifests or lists of passengers to the Secretary of the Treasury of the United States, in such manner as shall be prescribed by that officer, under whose direction statements of the same shall be prepared and published."

SECT. 4269. — In the third line the words "be liable to a penalty of" substituted in place of "forfeit and pay the sum of" in the original act. 2 Com. D. 2056.

SECT. 4270. — See note, § 4253; *The Candace*, 1 Lowell, 126; *The Devonshire*, 8 Sawyer, 209; 13 F. R. 39; *United States v. The Ethan Allen*, 3 Am. L. Rev. 372; *The Manhattan*, 2 Ben. 88.

SECT. 4272. — See Rev. Stats. § 2163. 18 St. 477, ch. 141, § 5 (see p. 502 *ante*), provides for the inspection of vessels when obnoxious immigrants are supposed to be on board.

SECTS. 4276, 4277. — The words "shall be punishable" are substituted for "shall on conviction thereof be punished" in the cited act. 2 Com. D. 2058.

SECTS. 4278, 4279, 4280. — *Bowman v. Chicago, &c. R. R.*, 125 U. S. 465, 484.

SECT. 4281. — The cited act was deemed to supersede St. March 3, 1851, ch. 43, § 2 (9 St. 635). 2 Com. D. 2060. This section has reference alone to the liability of carriers by water who transport goods and merchandise of the kind designated, and not to carriers by land. *Railroad Co. v. Fraloff*, 100 U. S. 24. A female passenger who simply carries as a part of her ordinary baggage such small articles of jewelry and silverware as would, under any circumstances, be considered as a proper and legitimate part thereof, is not a



shipper of such articles within the meaning of this section. *Carlson v. Oceanic Steam Navigation Company*, 109 N. Y. 359. Reasonable stipulations by a carrier for exemption from responsibility for certain merchandise, unless notified, are sanctioned and authorized by this section. *The Bermuda*, 29 F. R. 399. As to where a written statement is unnecessary, see *Watson v. Marks*, 2 Am. L. Reg. 157.

SECT. 4282.—The City of Hartford and The Unit, 11 Blatch. 290. This section and the seven following sections, so far as they apply to marine torts or to other subjects of maritime jurisdiction, are valid whether or not the vessel is engaged in domestic commerce. *The Garden City*, 26 F. R. 766, 769. The proviso in 9 St. 635, § 1, that parties may make such contracts as they please, is repealed by force of Rev. Stats. § 5596. *The Montana*, 22 Blatch. 372; 22 F. R. 715, 729. The limited liability act, Rev. Stats. §§ 4282–4289, leaves ship-owners liable without limit for their own negligence, and liable to the extent of the ship and freight for the negligence or misconduct of the master and crew. *Liverpool & G. W. Steamship Co. v. Phenix Ins. Co.*, 129 U. S. 397, 440. Owners are exempt from loss by fire occasioned by their officers or agents. *Walker v. The Transportation Co.*, 3 Wall. 150. In a proceeding *in rem* against the vessel to recover damages suffered by a fire occasioned by the negligence of the master, part-owners are not responsible for losses occasioned by the negligence of other part-owners. *The Whistler*, 2 Sawyer, 348. The rule of limited liability embraces all damages done by a vessel without the privity of the owner, whether consummated on land or water, and, this being a maritime rule or regulation, courts of admiralty have authority to enforce it, and to enforce claims on the fund representing the value of the vessel. *Re Goodrich Transportation Co.*, 26 F. R. 713. A horse taken aboard a ferry-boat by his driver is not merchandise within the meaning of this section. *The Garden City*, *supra*. Nor is the baggage of passengers merchandise, for the loss of which by fire ship-owners are exempt. *The Marine City*, 6 F. R. 413. *Contra*, *Chamberlain v. The Western Transportation Co.*, 44 N. Y. 305. The language of this act limits its operation to fire happening to or on board a vessel, and not to a fire happening on the wharf. *Manuf. Co. v. The Tangier*, 6 Am. L. Reg. 504; 21 L. R. N. S. 6; *The Egypt*, 25 F. R. 323. Damages to the person or loss of baggage are not taken out of the operation of the limited liability act by Rev. Stats. § 4493. *Re Long Island, N. S. P. & F. Transp. Co.*, 5 F. R. 599. A claim for unearned freight paid in advance is not within the class of claims limited by this section, and Rev. Stats. §§ 4283, 4284. *Re Liverpool, &c. Co.*, 3 F. R. 168. The district court as a court of admiralty and maritime jurisdiction has no jurisdiction of proceedings to limit the liability of ship-owners under the limited liability act. *Ex parte Phenix Ins. Co.*, 118 U. S. 610. See, however, *The Mary Lord*, 31 F. R. 416; *Norwich Co. v. Wright*, 13 Wall. 104; *Steamship Co. v. Manuf. Co.*, 109 U. S. 578; *Elwell v. Geibei*, 33 F. R. 71; *The Epsilon*, 6 Ben. 378. But in *The Benefactor*, 103 U. S. 239, the Supreme Court promulgated a rule that a petition for the limitation of liability shall be filed in the circuit court, if a suit as to the vessel is there pending. In a cause of a limitation of liability, which is a proceeding *sui generis* partaking of the nature of a suit *in personam* and not a proceeding *in rem*, possession of the vessel or her proceeds is not essential to the jurisdiction. *The City of Norwich*, 6 Ben. 330. Neither the provisions of 16 St. 440, for the better protection of the lives of passengers on board steam-vessels (*Carroll v. Staten Island R. R. Co.*, 58 N. Y. 126), nor the jurisdiction over marine contracts and torts saved to the State courts by the Judiciary act, are limited or affected by St. March 3, 1851, unless proceedings are taken under the latter act by a party to limit his liability. *Baird v. Daly*, 57 N. Y. 236. This act applies to owners of foreign as well as domestic shipping. *The Scotland*, 105 U. S. 24; *Re Leonard*, 14 F. R. 53.

SECT. 4283.—The Amos D. Carver, 35 F. R. 665. See § 4282. St. June 26, 1884, ch. 121, § 18 (23 St. 57) enacts,—



"That the individual liability of a ship-owner, shall be limited to the proportion of any or all debts and liabilities that his individual share of the vessel bears to the whole; and the aggregate liabilities of all the owners of a vessel on account of the same shall not exceed the value of such vessel and freight pending: *Provided*, That this provision shall not affect the liability of any owner incurred previous to the passage of this act, nor prevent any claimant from joining all the owners in one action; nor shall the same apply to wages due to persons employed by said ship-owners."

This amendment does not apply to fishing vessels. *Simpson v. Story*, 145 Mass. 497. This section, as limited in its application by Rev. Stats. § 4289, is constitutional. *Lord v. Steamship Co.*, 102 U. S. 541. Ship-owners are entitled to a limitation of liability where damage is caused to other vessels and their cargoes by collision. *Norwich Co. v. Wright*, 13 Wall. 104; 8 Blatch. 14; *Wright v. Norwich Co.*, 1 Ben. 156. Where two vessels collided and both were injured, and the vessel in fault subsequently on the same voyage was wrecked and sunk by negligence of the master, the liability of the owners was limited to her value after she had sunk; the rule laid down in *The City of Norwich*, 118 U. S. 468, being here applied. *The Great Western*, 118 U. S. 520; *Thomassen v. Whitwell*, 9 Ben. 403; 21 Blatch. 45; 12 F. R. 891. But the owner is not exempt from liability when, by reason of the collision, his vessel instantly founders. *Barnes v. Steamship Co.*, 25 Leg. Int. 196. Where two vessels, both in fault, collide, and one is totally lost, and the owners of cargo on board the latter proceed against the surviving vessel, it is held that such sum as the surviving vessel is bound to pay to the owners of the sunken vessel must also be applied to the payment of the damages sustained by the owners of cargo on board said sunken vessel. *The C. H. Foster*, 1 F. R. 733; *Norwich Co. v. Wright*, 13 Wall. 104. Ship-owners are entitled to the benefit of this section though fire on board a vessel was caused by their negligence (*Re Providence & N. Y. S. S. Co.*, 6 Ben. 124); and though she be in a wrecked condition, incapable of self-propulsion or of carrying a cargo. *Craig v. Continental Ins. Co.*, 26 F. R. 798. The limitation of liability extends to personal injuries sustained by passengers, as well as loss of life (*The City of Columbus*, 22 F. R. 460; *Butler v. Boston & Savannah Steamship Co.*, 9 Sup. Ct. Rep. 612; *The Amsterdam*, 23 F. R. 112; *The Alpena*, 10 Biss. 436; 8 F. R. 280; *Rounds v. Steamship Co.*, 14 R. I. 344; *The Epsilon*, 6 Ben. 378); as well by collision as otherwise. *Briggs v. Day*, 21 F. R. 727. The word "privity" of the owner means some fault or neglect in which the owner of the vessel personally participates; and "knowledge," as used, means some personal cognizance, or means of knowledge of which he is bound to avail himself of a contemplated loss, or of a condition of things, likely to produce or contribute to a loss, without adopting appropriate means to prevent it. *Lord v. Goodall, &c. Steamship Co.*, 4 Sawyer, 292. The "knowledge and privity" of the wrecking-master of an insurance company is not the knowledge and privity of the corporation so far as to charge it with responsibility for his negligence beyond the value of the vessel. *Craig v. Continental Ins. Co.*, 26 F. R. 798. "In no case" applies to all cases of loss and damage happening during the entire voyage. *The City of Norwich*, 118 U. S. 468, 491.

"Freight then pending" includes the freight accruing and earned up to the time of the loss. *Sumner v. Caswell*, 20 F. R. 249. Freight is here spoken of, not with any purpose of imposing a new responsibility upon the other parties, owners of the freight, but only as one of the items to be taken into estimation in ascertaining the extent of the liability of the party who is already responsible. *Walker v. Boston Ins. Co.*, 14 Gray, 288. But no freight except such as is earned is to be estimated in fixing the amount of the owner's liability. *The City of Norwich*, *supra*. The Supreme Court of the United States adopts the maritime rule of graduating the liability by the value of the ship after the injury, as she comes back into port and the freight actually earned, and enables the owners to avoid all responsibility by giving up ship and freight, if still in existence, in whatever condition the ship may be; and, without such surrender, subjects them only to a responsi-



bility equivalent to the value of the ship and freight as rescued from the disaster. The *Scotland*, 105 U. S. 24. If the vessel is lost the liability of the owner ceases (*Watson v. Marks*, *supra*), and "freight then pending" includes freight earned at the end of the voyage for cargo on board at the time of the collision. There can be no apportionment of freight. The *Abbie C. Stubbs*, 28 F. R. 719. Where the same person owns both vessel and cargo, "freight then pending" is to be taken to mean the earnings of the vessel in transporting the goods of the owner. *Allen v. McKay*, 1 Sprague, 219. The value of a vessel which has been sunk is to be ascertained by taking what she is found to be worth after she has been raised, and the expenses of raising her deducted; and the expense of raising and repairing her should not be added to the aforesaid value, nor is the insurance on said vessel to be accounted for by the owners. *Re Norwich, &c. Transportation Co.*, 8 Ben. 312; *The City of Norwich*, 118 U. S. 468. The court is not bound to allow interest on the value of the vessel. The *Scotland*, 118 U. S. 507. The liability of owners is limited by the value of the vessel after collision, but not after repairs have been made. *Re Wright*, 10 Ben. 14. All owners of vessels are not entitled to the privileges of the limitation of liability, but only such as fall within the description named in the act, to wit; those who had no privity or knowledge of the damage incurred. And where the owners may invoke the provisions of the section, the court cannot know without appropriate proceeding the value of the offending vessel and the pending freight. The *Maria & Elizabeth*, 11 F. R. 520; 12 Id. 627. The liability of the owner is not limited by the terms of the statute to his interest in the ship, but the "amount, and value" of that interest. *Walker v. Boston, &c. Ins. Co.*, 14 Gray, 305. This section does not impose any liability on the owner of the freight, who does not man, victual, and navigate the ship. Id. A tug engaged in towing into the waters of other States vessels engaged in interstate commerce is as much engaged in such commerce as the vessels themselves, and is within the provisions of this statute. *Re Vessel Owners' Towing Co.*, 26 F. R. 169. The protection of this statute may be invoked notwithstanding the fact that the thing injured is situated on land, if the damage in question be occasioned by the vessel without fault or privity on the part of her owner. Id. 172. But in *Goodrich Transportation Co. v. Gagnon*, 36 F. R. 123, it was held that the words "for any act, matter, or thing, loss, damage, or forfeiture done, occasioned or incurred," refer only to such acts, things, losses, and damages as to which relief can be had in a court of admiralty, and do not include liability for the destruction of buildings and goods on the land occasioned by fire which has been communicated by a vessel.

Proceedings to limit the liability of ship-owners may be instituted in a district where a fund or claim equitably representing the lost vessel is in litigation, though the petitioners reside in another district. *Re Leonard*, 14 F. R. 53. Ship-owners are entitled to the benefit of the statute, though no action has been begun against them (*The John Bramall*, 10 Ben. 495); and though the ship has been surrendered to the underwriters (*The City of Norwich*, *supra*); and though the ship-owner on the trial as to the cause of the collision contests all liability whatever. The *Benefactor*, 103 U. S. 239. It is not necessary to aver and prove that the claims against the vessel are in excess of her value, as a condition of the jurisdiction of the district court in this proceeding. The *Garden City*, 26 F. R. 766, 770. The fact that a claimant against a vessel has recovered in a State court less than her stipulated value does not oust the jurisdiction of the district court of proceedings to limit her liability where his original claim was greater than its value. *Briggs v. Day*, 21 F. R. 727. See further as to the jurisdiction of the district court, *Ex parte Phoenix Ins. Co.*, 118 U. S. 610.

Where rules are already established regulating proceedings to obtain the benefit of a limited liability until the determination of such proceedings, proceedings for the condemnation of the vessel in fault in a case of collision ought to be stayed. *Steamship Co.*



*v. Mount*, 11 F. R. 928. In *The Mamie and Parcher v. Cuddy*, 110 U. S. 742, an injunction to stay proceedings in the State courts during the pendency of an appeal to the Supreme Court was refused on the ground that it appeared that both the circuit and district courts had decided against the petitioner's right to the benefit of the act, and that no cause for granting the petition was shown except the expense attendant upon trials in the State court pending the appeal. For the mode of applying a limitation of liability where both vessels are in fault and the damages are divided, see *The Manitoba*, 122 U. S. 97. For the method of offsetting damages, see *The Bristol*, 29 F. R. 867, 871. Where costs were imposed upon the owners for delaying for an unseasonable period to institute proceedings for a limitation of liability, see *The Garden City*, 27 F. R. 234. See further *Miller v. O'Brien*, 35 F. R. 779. Proceedings for a limitation of liability, if not instituted until after a party has obtained satisfaction of his demand, are ineffectual as to him, and a return of the money should not be compelled. *The Benefactor*, 103 U. S. 239. See the same case as to the terms upon which relief should be granted.

SECT. 4284. — Amended by St. Feb. 27, 1877, ch. 69 (19 St. 251), by striking out in the seventh line the word "owner" and inserting the word "owners." The whole value of the vessel means her value at the close of the voyage, and where she is lost no one shall recover compensation for his whole loss. *Re Providence & N. Y. Steamship Co.*, 6 Ben. 124; *Thomassen v. Whitwell*, 9 Id. 403; 21 Blatch. 45; 12 F. R. 901; *The Alpena*, 10 Biss. 436; 8 F. R. 280; *The City of Norwich*, 118 U. S. 468. A contrary view was taken in *Walker v. Boston, &c. Ins. Co.*, 14 Gray, 288, 309, and *Barnes v. Steamship Co.*, 25 Leg. Int. 196, where it was held that the limitation of liability is to be ascertained by an estimation of the value of the ship at the point of time immediately preceding that when the wrong was done and the injury inflicted. The language of this section is broad enough to cover damage by collision as well as other damages. *Norwich Co. v. Wright*, 13 Wall. 104; *Walker v. Boston, &c. Ins. Co.*, *supra*; see also *Barnes v. Steamship Co.*, 25 Leg. Int. 196.

The liability of owners is limited to the loss or damage occurring on the last voyage, or the voyage in which the ship is lost. Where, therefore, a steamer making daily trips between certain ports was lost, it was held that her liability for damages caused by a collision two months before her loss was not limited by this act. *The Alpena*, 8 F. R. 280. This court has jurisdiction to entertain proceedings instituted by the owner for limitation of liability even though no suit has been brought at the instance of any of the losers, but it seems that if any such proceedings are begun after suit brought, they must be in the same district court as that in which the suit is pending. *The Alpena*, *supra*; *The Luckenbach*, 26 F. R. 870. Proceedings may be taken under this section, although the petition denies the owner's liability. *The John Bramall*, 10 Ben. 495. But where on a libel for collision the vessel has been decreed liable for damages, the owner cannot on a petition for a limitation of liability retry the question of liability, that being *res adjudicata*. *The Maria and Elizabeth*, 12 F. R. 627. The *pro rata* distribution of the fund when the amount is not sufficient to pay all the claimants in full, relates to a distribution among those whose losses arise from the collision, and has no reference to other liens of an inferior grade and quality upon the wrong-doing vessel. *Id.* The right to proceed for a limited liability is not waived or lost by a surrender of the vessel to the underwriters. *The City of Norwich*, *supra*. The "appropriate proceedings" must be proceedings *in personam* where the parties to be affected are duly brought before the court, and such proceedings are not within the jurisdiction of an admiralty court. *The City of Norwich*, 1 Ben. 89. The words "in any court" refer to a competent Federal court and not to a State court. *Re Providence & N. Y. Steamship Co.*, 6 Ben. 124. In proceedings under this section an injunction may issue to restrain the prosecution of suits in a State court. *The Amsterdam*, 23 F. R. 112.



SECT. 4285. — The district court may, notwithstanding Rev. Stats. § 720, restrain parties who have commenced action in the State court from proceeding further therein. *Re Long Island, &c. Transportation Co.*, 5 F. R. 599; *The Oceanus*, 6 Ben. 258. *Contra*, *Hill Manuf. Co. v. Providence, &c. Steamship Co.*, 113 Mass. 495, 502. The 55th Admiralty rule, restraining on application by the owners the further prosecution of all suits against them, is within the power of the Supreme Court, notwithstanding Rev. Stats. § 720. *Re Providence & N. Y. Steamship Co.*, 6 Ben. 124. The interest to be transferred is such as the owner has at the time of the transfer. *Thomassen v. Whitwell*, 12 F. R. 902. Insurance is not such "an interest in such vessel and freight" as the ship-owners are bound to surrender for the benefit of claimants. *The City of Columbus*, 22 F. R. 460. The privilege of exonerating himself from his individual liability, and of causing all legal proceedings against himself to cease by the surrender and transfer of the ship and freight, is not given to a party who is responsible for damages resulting from collision, but he is strictly confined to cases of loss in consequence of embezzlement or destruction by the master, mariners, or passengers on board ship. *Walker v. Boston, &c. Ins. Co.*, 14 Gray, 288. Failure to adopt the provisions of this section does not deprive ship-owners of the benefits of Rev. Stats. § 4284. *The Scotland*, 105 U. S. 24. The institution of proceedings under this section, followed by a decree, is a bar to an action elsewhere for damages. *Rounds v. Steamship Co.*, 14 R. I. 344.

SECT. 4286. — *Somes v. White*, 65 Maine, 542. Where one of the owners of a vessel commands and sails on shares, and exclusively manages the vessel and hires the crew, whereby he in effect becomes charterer thereof, he is responsible for her tortious acts. As to whether the owners also are responsible, *quaere*. *Thorp v. Hammond*, 12 Wall. 408.

SECT. 4288. — "Be liable" is substituted for "forfeit" in the fifth line. 2 Com. D. 2062; *Liverpool & G. W. Steam. Co. v. Phenix Ins. Co.*, 129 U. S. 397.

SECT. 4289. — Amended by St. Feb. 18, 1875, ch. 80 (18 St. 320), by striking out in the first line the words "this Title" and inserting the words "the seven preceding sections," and further amended by St. June 19, 1886, ch. 421, § 4 (24 St. 80), so as to read:—

"SEC. 4289. The provisions of the seven preceding sections and of § 18 of an act entitled 'An act to remove certain burdens on the American merchant marine and encourage the American foreign carrying trade and for other purposes,' approved June 26, 1884, relating to the limitations of the liability of the owners of vessels, shall apply to all sea-going vessels, and also to all vessels used on lakes or rivers or in inland navigation, including canal-boats, barges, and lighters."

*Propeller Niagara v. Cordes*, 21 How. 7, 26; *King v. American Transportation Co.*, 1 Flippin, 1; *Goodrich Transportation Co. v. Gagnon*, 36 F. R. 123. Before the above cited act the exception did not extend to vessels used on the Great Lakes. *Moore v. American Transportation Co.*, 5 Mich. 368; 24 How. 1; *Cuddy v. Horn*, 46 Mich. 596. Owners of vessels whose routes are partly by land and partly by water are not excepted from the operation of the act. *Wallace v. Providence, &c. Steamship Co.*, 14 F. R. 56. Vessels passing through the waters of Long Island Sound, or trading between ports of the same State, if in their voyages they pass beyond the territorial limits of the State, are not within the exception. *Re Long Island, &c. Transportation Company*, 5 F. R. 599. Pleasure-boats engaged in purely local navigation are within the exception. *The Mamie*, 5 F. R. 820; 8 Id. 367. In *The War Eagle*, 6 Biss. 364, this section was held to apply to a steamer used on the upper Mississippi. But in *The Tug Sears*, 8 F. R. 365, a tug employed in navigation upon the Hudson River and not elsewhere, was held not within the class excepted by this section. 24 St. 80 is not retroactive, and 9 St. 635, excepting lighters from the limitation of liability, is not repealed by 23 St. 57. *Chappell v. Bradshaw*, 35 F. R. 923.



## CHAPTER VII.

## LOG BOOKS.

SECT. 4290. — See notes, §§ 1624, 4538, 4547, 4596, 4597. See also Rev. Stat. §§ 4550, 4565. Amended by 19 St. 251 by striking out, in the second sub-division, the last word "thirty," and inserting therefor the words "ninety-seven." The entries in the log are evidence so far only as provided by statute. *United States v. Gibert*, 2 Sumner, 19; *Jones v. The Phoenix*, 1 Pet. Adm. 201; *Malone v. Bell*, Id. 139; *Herron v. The Peggy*, Bee Adm. 57. Written entries by the captain in a memorandum book, made a month after the occurrence from alleged contemporaneous entries in pencil, erased, are not entitled as evidence to the weight of a log-book properly kept, or of written contemporaneous entries. *Brink v. Lyons*, 18 F. R. 605. Parol evidence as to the time of sailing, the course and termination of the voyage, has been held admissible without proving that the log-book was missing or lost. *United States v. Gibert*, *supra*, 78. Entries in an almanac of the letters R. and S. and dots placed against particular days are inadmissible as the days of sailing and returning. *The Harriet*, 1 Story, 251; 1 Ware, 343. The log-book should be identified. Proving the handwriting of the mate as to some of the entries is not sufficient. *United States v. Mitchell*, 2 Wash. 478. But a book was admitted upon the testimony of the witness that he was sure it was that kept on the voyage, although he did not recollect seeing the mate make regular entries; it being impossible to obtain the testimony of the mate. *United States v. Mitchell*, 3 Wash. 95. Facts stated in an official log by those having knowledge thereof must, in the absence of mistake, be taken as true, as against the ship. *Bunge v. The Utopia*, 1 F. R. 892. The entry in the log-book is presumptive but not conclusive evidence of its truth. It may be disproved. *Jones v. The Phoenix*, *supra*; *Douglass v. Eyre*, Gilpin, 147; *The Hercules*, 1 Sprague, 534.

## CHAPTER VIII.

## REGULATIONS FOR THE SUPPRESSION OF PIRACY.

"ACTUAL robbery on the high seas is piracy under the law of nations by all the authorities, and so also is the act of cruising upon the high seas without a commission and with the intent to rob, especially if the charge be accompanied by proof of unsuccessful attempts about the same time to commit the primary offence. Such robbery is piracy, because the criminal act is committed against all nations, and therefore is punishable by all. Undoubtedly a statute may declare any offence piracy committed within the jurisdiction of the nation passing the statute, and such offence will be punishable by that nation as an offence against the municipal authority." Clifford, J., in *Dole v. New England Ins. Co.*, 2 CME 394, 417. See *The Bello Corunnes*, 6 Wheat. 152; *The Ambrose Light*, *infra*; *Talbot v. Janson*, 3 Dall. 133, 160; *United States v. Chapels*, 1 Brun. Col. Cas. 444; 2 Wheel. Cr. Cas. 205. As a violation of the common right of nations, piracy is punishable by the seizure and condemnation of the vessel in a prize court; as a crime it is punishable by the municipal law of the place where the offenders are tried. *The Ambrose Light*, 25 F. R. 408, 415, 416. The question as to whether piracy can be committed on the waters of the Great Lakes is touched upon in 11 A. G. Op. 114. A state of war must exist to sustain a libel in prize. A vessel captured for piratical aggression becomes a prize on account of the universal war presumed to have been declared by the pirate against commerce and



human kind. There must be some overt act ; intent is not sufficient. The City of Mexico, 28 F. R. 148.

SECT. 4294. — See notes, §§ 4295, 4296, 5372, 5383. Where an armed vessel attacks a vessel of the United States upon the mistaken idea that she was a piratical cruiser, and without a piratical or felonious intent, and with no purpose of wanton plunder or malicious destruction of property, it does not constitute a piratical aggression within this section. The Mariana Flora, 11 Wheat. 1 ; 3 Mason, 116. The provisions of this act extend to foreign vessels, and no matter what liability the United States may incur to foreign States, the courts are bound to carry them into effect. *Id.* Pirates may be lawfully captured by public or private ships of any nation, in peace or war. *Id.* American vessels offending against our laws may be seized upon the ocean, and any foreign ship offending within our territorial jurisdiction may be pursued and seized upon the ocean, and brought in for adjudication. *Id.* Where a vessel receives a commission *bona fide* and the crew acts under it *bona fide*, it ought, at all events in the courts of neutral nations, to be held a protection against the imputation of general piracy, though there may be irregularities in its granting. The Palmyra, 12 Wheat. 1. But if the insubordination and predatory spirit of the crew, in connection with the defects of the commission, be such as to excite justly founded suspicions, the captors are justified for bringing in the vessel for adjudication, and are exempted from damages and costs. *Id.* ; The Ambrose Light, 25 F. R. 408, 417.

SECT. 4295. — See notes, § 4294. Whether the vessel is armed for offence or defence is immaterial provided she commits the unlawful acts specified. Nor is it necessary, to bring the vessel within the act, that there should be either actual plunder or an intent to plunder. It is sufficient that the act be committed from hatred, or an abuse of power, or from mischief. United States v. Brig Malek Adhel, 2 How. 210. The word "*piratical*" is not to be limited to such acts only as by the laws of nations are denominated piracy, but includes such as pirates are in the habit of committing. *Id.*

SECT. 4296. — See notes, §§ 4294, 4295. In the seventh line the words "or captured in" were here added. 2 Com. D. 2064. The strict rules of the common law as to criminal prosecutions have never been supposed by this court to be required in informations of seizures in the admiralty for forfeitures, which are deemed to be civil proceedings *in rem*. The Palmyra, 12 Wheat. 1. A proceeding *in rem* stands wholly independent of, and unaffected by, any criminal proceeding *in personam*, and it is not necessary to show a conviction in the latter action in order to proceed against the vessel for the forfeiture. *Id.* The fact that the owner is innocent, or ignorant of these prohibited acts, will not exempt the vessel from condemnation. United States v. Brig Malek Adhel, *supra*. Where the owners are innocent and the cargo is liberated, it is proper to throw the costs on the condemned vessel. *Id.*

"As defined by the law of nations." — See United States v. Smith, 5 Wheat. 153.

SECT. 4297. — See notes, § 4296.

## CHAPTER IX.

### SUMMARY TRIALS FOR CERTAIN OFFENCES AGAINST NAVIGATION LAWS.

By act of Feb. 29, 1888, ch. 17, § 11 (25 St. 42), the provisions of this chapter are to apply to the trial of offences against the provisions of §§ 4 and 5 of said act of Feb. 29, as to the observance of signals in laying and repairing submarine cables, and as to the duties of fishing vessels in keeping their implements or nets out of the way.

SECT. 4300. — See note, § 4301 ; United States v. Harriman, 1 Hughes, 525.

SECT. 4301. — "The law which dispenses with an indictment for petty offences on the



high seas has been found very useful, both to the government and the accused. The district judges who have sat here since this law was first passed, in June, 1864, have had very grave doubts of the constitutionality of that part of § 4301 which provides for a trial by the court; and it has been usual to try all contested cases by jury." *Re Smith*, 13 F. R. 25. See note, § 1032. These summary proceedings are put by the statute substantially on the footing of civil cases, and the want of due verification of the complaint is waived by the voluntary appearance of the accused. At any rate the error is amendable, and cannot be urged for the first time in arrest of judgment. *United States v. Smith*, 17 F. R. 510.

SECT. 4302.— See note, § 4301.

SECT. 4305.— Substituted for the cited act. St. 1790, ch. 35 (1 St. 145), was repealed by St. 1799, ch. 22, § 112 (Id. 704). 2 Com. D. 2067. See *United States v. Harriman*, 1 Hughes, 525.



## TITLE XLIX.

## REGULATION OF VESSELS IN FOREIGN COMMERCE.

SECT. 4306. — See Rev. Stats. § 5423. As to suspending commercial privileges to vessels of a country denying the same to United States vessels, see note under "Navigation," *ante*, p. 785.

SECT. 4307. — See note, § 4160.

SECT. 4308. — The clauses of St. 1803, imposing fees for passports and clearances, are here omitted, being regarded as within the spirit of St. Feb. 12, 1831, ch. 20 (4 St. 441), expressly repealing St. June 1, 1796, ch. 45 (1 St. 489), which imposed fees and charges for passports. 2 Com. D. 2074.

SECT. 4309. — See notes, §§ 1046, 1718, 1720. "Arrival" means an arrival for purposes of business, requiring an entry and clearance and stay at the port so long as to require some of the acts connected with business. *Harrison v. Vose*, 9 How. 372, 384; *Toler v. White*, 1 Ware, 277; 4 A. G. Op. 390; 5 Id. 161; 6 Id. 163; 9 Id. 256; *contra*, *Parsons v. Hunter*, 2 Sumner, 419. An arrival at a foreign port from another foreign port is within this section. *Gould v. Staples*, 9 F. R. 159. Its provisions apply to American vessels arriving at ports in Canada and in the other British provinces in America. 11 A. G. Op. 72, 237.

SECT. 4310. — See notes, §§ 1718, 4160. The consul is the party to bring suit, not the judge to decide it. 9 A. G. Op. 386; *Parsons v. Hunter*, *supra*. The master is subject to prosecution, not to indictment. 7 A. G. Op. 395.



## TITLE L.

## REGULATION OF VESSELS IN DOMESTIC COMMERCE

THE act creating a bureau of navigation and many notes applicable to vessels under this title will be found on pages 773-781, *ante*.

SECT. 4311. — See notes, §§ 4131, 4220. In *The Forrester*, Newb. 92, the differences between registry and enrolment are set forth. See *Fox v. The Lodema*, Crabbe, 271, and page 773, *ante*. This section implies an authority to licensed vessels to carry on the coasting trade. *Gibbons v. Ogden*, 9 Wheat. 1, 212. But State laws interfering with the navigation of inland waters by vessels regularly licensed by the United States are unconstitutional and void. *Id.*; *Sinnot v. Davenport*, 22 How. 227, 241 *et seq.*; *Foster v. Davenport*, *Id.* 244; *Gilman v. Philadelphia*, 3 Wall. 738; see *Pennsylvania v. Wheeling Bridge Co.*, 13 How. 518, 585, 586. But State laws will be held valid so long as they do not conflict with the laws of Congress upon the same subject. *License Cases*, 5 *Id.* 564, 583; *Willson v. Blackbird Creek Co.*, 2 Pet. 245. The certificate of enrolment is of itself not even *prima facie* evidence of ownership. *The Nancy Dell*, 14 F. R. 744. But see *The Superior*, Newb. 181; *United States v. The F. W. Johnson*, 18 Leg. Int. 334. A license under the laws of the United States to carry on the coasting trade will not exempt the owners from the municipal regulations of towns, within whose limits they moor the vessel to give theatrical exhibitions. *Spalding v. Baton Rouge*, 10 West L. J. 461. By 18 St. 31, ch. 110, this act is not to extend to canal-boats or boats on the internal waters or canals of any State, and such boats, except those with sails or propelling machinery for lake or coast navigation and those employed in trade with Canada, shall be exempt from its provisions, and from payment of customs or other fees under any act of Congress. This act does not exempt from the license required by § 4371 a vessel of more than five tons, answering to the description of a canal-boat, engaged in trade between different ports on navigable waters of the United States, never having been or intended to be used on a canal. 16 A. G. Op. 247, in part overruling 15 *Id.* 52. By 21 St. 44, ch. 54, the provisions of Title L. are not to require the payment of any fee for enrolling or licensing of vessels built in the United States and owned by its citizens, not propelled by sail or by internal motive power of their own, and not in any case carrying passengers, whether navigating internal waters of a State or navigable waters of the United States, and not engaged in trade with contiguous foreign territory. And nothing shall require the enrolling, &c., of any flat-boat, barge, or like craft, for the carriage of freight, not propelled by sail or by internal motive power of its own, on the rivers or lakes of the United States. See note, § 4132. Cases on canal-boats before the passage of the above statutes are *United States v. The Penn. Canal Boat*, 18 Int. Rev. Rec. 56; *United States v. The Ohio*, 9 Phila. 448. See also *Buckley v. Brown*, 3 Wall. Jr. 199.

SECT. 4312. — See pp. 773-781, *ante*; notes, §§ 4320, 4377. This act nowhere declares that the penalties and forfeitures are the same as in the case of registered vessels. *The Two Friends*, 1 Gall. 118; *The Mohawk*, 3 Wall. 566; *United States v. The Sciota*, 5 West. L. Mo. 29; *The Forrester*, Newb. 81. See Rev. Sts. § 4375. The oath of the owner is essential to enrolment. *United States v. Bartlett*, 2 Ware, 17; *Daveis*, 2. A case arising under a special act is stated in *The Acorn*, 2 Abb. U. S. 434. As to the effect



of a part owner, a citizen of the United States, residing in a foreign country, see *The Henry*, 1 Haskell, 100. See *The Hud and Frank*, Id. 192; notes, § 4189. For an opinion of the Attorney-General relating to the redocumenting of a steamship to be changed in burden abroad, see S. T. D. 8099.

SECT. 4315. — By 19 St. 251, this section is amended by inserting in the second line, before the word "vessel," the words "steamboat or."

SECT. 4318. — By 19 St. 251, this section is amended by striking out in the sixth line "register" and inserting "registry." This "act makes the enrolment equivalent to both register and enrolment. In giving to the enrolment the effect of a register, it very properly subjects the vessel to all the rules, regulations, and penalties relating to registered vessels." *The Mohawk*, 3 Wall. 566, 572, 573; *United States v. The Sciota*, 5 West. L. Mo., 31; *United States v. Sweeney*, 1 Biss. 309. But see *The Forrester*, Newb. 81.

SECT. 4319. — See note, § 4312. By 19 St. 251, this section is amended by inserting in the third line after "following" the word "form," and by striking out, in the thirty-first line, "act" and inserting "title." *Fox v. The Lodemia*, Crabbe, 271; *United States v. The F. W. Johnson*, 18 Leg. Int. 334; *The Albany*, 4 Dillon, 439.

SECT. 4320. — See notes, § 4311. By 19 St. 251, this section is amended by striking out in the last line "the duty of six cents per ton being first paid." A license duly executed, sealed, signed, dated, and numbered, is valid from its date though not delivered, delivery not being essential to validity in the case of an enrolment and license. *United States v. The Planter*, Newb. 262. See *The Harriet*, 1 Story, 251, 262.

SECT. 4321. — See note, § 4320. By 24 St. 434, ch. 288, § 1, for five years from March 1, 1888, importing or landing mackerel, other than Spanish mackerel, caught between March 1st and June 1st of each year, is forbidden; the act not to apply to mackerel caught with hook and line from boats, and landed in said boats, or in traps and weirs connected with the shore. By § 2 of this act § 4321 is amended, for five years aforesaid, so as to read before the last sentence, "This license does not grant the right to fish for mackerel, other than for what is known as Spanish mackerel, between the first day of March and the first day of June, inclusive, of this year." Or in lieu thereof there shall be inserted so much of said period as is unexpired under this act. By § 3 the penalty is forfeiture of the license of the vessel, if of this country, and forfeiture of mackerel to the United States. By § 4 all laws in conflict are repealed. Except as bait or provision for the crew a fishing vessel licensed to catch codfish cannot catch mackerel, and good faith should be exercised in taking advantage of this incidental privilege. *United States v. The Parynthia Davis*, 1 Cliff. 532; *The Nymph*, 1 Sumner, 516.

SECT. 4322. — See *United States v. Rogers*, 3 Sumner, 342.

SECT. 4323. — See note, § 4160. In order to render the master of a vessel liable to the penalty prescribed in this section it must be shown that the "arrival" is not by accident, or from necessity, but intentionally, as one of the termini of the voyage. *United States v. Shackford*, 5 Mason, 445; *Ware*, 171.

SECT. 4324. — See note, § 4377. "The intent of this section was that the license should be considered in force no longer than while the ship was held by the same owners; and that a subsequent transfer, even to a citizen of the United States, should not entitle the vessel to the further benefit of it, although such transfer would not work any forfeiture whatsoever." *The Two Friends*, 1 Gall. 122. See *Schwerin v. North Pacific R. Co.*, 36 F. R. 712.

SECT. 4325. — See note, § 4160; S. T. D. 8128.

SECT. 4328. — By 18 St. 30, ch. 106, the provisions of this section are extended to include all vessels of the United States navigating its waters.

SECT. 4334. — See notes, §§ 4160, 4178. By 23 St. 58, ch. 121, § 21, the word "port" in this section shall "mean either the port where the vessel is registered and enrolled, or



the place in the same district where the vessel was built or where one or more of the owners reside." The *Lotus*, No. 2, 26 F. R. 640.

SECT. 4335. — See note, § 4160.

SECT. 4336. — See notes, §§ 4160, 4377. See *The John J. Wiltsie*, 3 Ben. 251.

SECT. 4337. — A "foreign voyage" is intended when the vessel departs from the United States for a foreign port with an intent there to engage in trade; and not merely a voyage to a foreign port within the usual voyage of vessels licensed for the fisheries. *The Three Brothers*, 1 Gall. 142; *The Two Friends*, Id. 118, 122; *The Ocean Spray*, 4 Sawyer, 105, 109; *Taber v. United States*, 1 Story, 1. It must be to some place within the jurisdiction of a foreign country, or at least without the territorial waters of the United States. *The Lark*, 1 Gall. 55. The object of this act is "to prevent vessels engaged in the coasting trade and fisheries from becoming the medium of the introduction of smuggled goods, under the security and cover of their license." *The Friendship*, Id. 45, 50; *The Ocean Spray*, *supra*. The vessel must break "ground with an indisputable intention thereby to commence such voyage." *The Julia*, 1 Gall. 43; *The Friendship*, *supra*. As to reconciling the provisions of this section and §§ 4364, 4377, see *The Three Brothers*, 1 Gall. 144. See further *The Active*, 7 Cranch, 100; *United States v. The Hawke*, Bee, 34.

SECT. 4339. — See *United States v. Rogers*, 3 Sumner, 342, decided before the passage of this statute.

SECT. 4347. — See note, § 2767. By 18 St. 320, this section is amended by striking out at the end of the thirty-third line "no" and inserting "on," and, by 19 St. 251, is amended by striking out in first line "imported" and inserting "transported."

SECT. 4348. — In the third and fifth lines, "districts" was here changed to "collection districts." 2 Com. D. 2090.

SECT. 4349. — By 19 St. 90, the provisions of § 4349 to 4356 "shall not be held to include vessels engaged in the navigation of the Mississippi River or tributaries, above the port of New Orleans."

SECT. 4350. — See notes, §§ 4160, 4349.

SECT. 4351. — See § 4349. Under the original laws for the collection of duties a bond was taken for the payment. The change made by the acts establishing warehouses, by which all duties were to be paid in cash, was deemed to supersede St. Feb. 18, 1793, ch. 8, § 23. 2 Com. D. 2093. A coasting vessel which arrives from one district at another district in the same State, having on board foreign goods exceeding \$800 in value, without being provided with or exhibiting a manifest of such cargo, cannot be *forfeited*. *The Schooner America*, 1 Gall. 231.

SECT. 4352. — See notes, §§ 4160, 4349.

SECT. 4353. — See note, § 4349. The words "or certificates" were here added after "manifests," in the second and third sentences. 2 Com. D. 2094. See *United States v. Carr*, 8 How. 1.

SECT. 4354. — See notes, §§ 4160, 4349.

SECT. 4355. — See note, § 4349.

SECT. 4356. — See notes, §§ 4160, 4349. See *United States v. Carr*, 8 How. 1.

SECT. 4359. — After "pounds" in the twelfth line, St. 1793 contained the additional words "tea in chests or boxes not more than 500 pounds, coffee in casks or bags not more than 1000 pounds," which are here omitted. 2 Com. D. 2096. See S. T. D. 8085.

SECT. 4360. — See note, § 4160. By 18 St. 320 this section is amended by inserting after "manifest" in the third line "and." See S. T. D. 8223.

SECT. 4361. — In the last clause the original act contained the words "or secured" after "paid." 2 Com. D. 2097. See S. T. D. 8085.

SECT. 4362. — "Philadelphia" was here twice substituted for "Pennsylvania" in the cited act. 2 Com. D. 2098.



SECT. 4363. — See *Priestman v. United States*, 4 Dall. 28.

SECT. 4364. — See notes, §§ 4160, 4367, 4377. By 24 St. 80 no fees shall be charged or collected under this section. See notes, § 4337.

SECT. 4366. — See note, § 4160.

SECT. 4367. — See 2 A. G. Op. 393.

SECT. 4368. — See S. T. D. 8073.

SECT. 4369. — See note, § 4160; S. T. D. 8073, 8183.

SECT. 4370. — See note, § 4160; *Gloucester Co. v. Pennsylvania*, 114 U. S. 196, 216; S. T. D. 8246.

SECT. 4371. — See notes, §§ 4219, 4311, 4371. By act of June 19, 1886, ch. 421, § 7, (24 St. 81), it is provided that "Every vessel of twenty tons or upwards, entitled to be documented as a vessel of the United States, other than registered vessels found trading between district and district, or between different places in the same district, or carrying on the fishery, without being enrolled and licensed, and every vessel of less than twenty tons and not less than five tons burden found trading or carrying on the fishery as aforesaid, without a license obtained as provided by this title, shall be liable to a fine of thirty dollars at every port of arrival without such enrolment or license. But if the license shall have expired while the vessel was at sea, and there shall have been no opportunity to renew such license, then said fine of thirty dollars shall not be incurred. And so much of § 4371 as relates to vessels entitled to be documented as vessels of the United States is hereby repealed." And by § 9 of the same act it is provided that the fines under § 7 may be remitted or mitigated "by the Secretary of the Treasury when the offence was not wilfully committed, under such regulations and methods of ascertaining the facts as may seem to him advisable." See *The Eliza*, 2 Gall. 4; 15 A. G. Op. 35, 52; 16 Id. 247, 563.

SECT. 4373. — This section is not within the inhibition of the Fifth Amendment to the Constitution of the United States, that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." *Re Leszynsky*, 16 Blatch. 9, 19. See note, § 4160.

SECT. 4374. — See note, § 4160.

SECT. 4375. — See notes, §§ 4160, 4312, 4337, 4377; *The Two Friends*, 1 Gall. 118, 120.

SECT. 4376. — See note, § 4160.

SECT. 4377. — See notes, 4337, 4364. A vessel in the coast fisheries is not engaged in a trade within this section if she takes a few articles at one place and drops them at another without being diverted from her course or occupation, and without any contract of hire or compensation, or expectation of compensation. *The Willie G.*, 1 Haskell, 253; 11 Int. Rev. Rec. 117. But otherwise if there is a single act of trading, not authorized by the license. *The Swallow*, 1 Ware, 21; *The Three Brothers*, 1 Gall. 142; *The Julia*, Id. 233; *The Mars*, Id. 237; *The Active*, 7 Cranch, 100; *The Eliza*, 2 Gall. 4, 9; *The Sloop Active*, 1 Paine, 247. "The cargo found on board at the time of the seizure is forfeited. The object of the Legislature was, to punish any illegal trade carried on by persons who either knew, or ought to know, that the vessel is not entitled to such a privilege, but is sailing with false colors." *The Two Friends*, 1 Gall. 118, 123. A traffic in smuggled goods is within the section. *The Resolution*, 2 Gall. 47. "Trade" is equivalent to occupation, employment, or business for gain or profit; and a fishing vessel licensed to catch cod-fish cannot catch mackerel, except as bait or provisions for the crew (*The Parynthia Davis*, 1 Cliff. 532); in which case questions of pleading and evidence are considered. *The Nymph*, 1 Sumner, 516; 1 Ware, 259. A more liberal doctrine is asserted in *The Reindeer*, 4 L. Repr. n. s. 235, 250; but the previous decisions are not overruled. See further *United States v. The Hawke*, Bee, 34.

SECT. 4378. — See Rev. Stats. §§ 4361, 4377. "This is only an exemption in the particular case from the operation of the preceding section, which takes in the whole cargo, and



is no proof that no other than foreign trade was intended." *The Active*, 1 Paine, 247, 251.

SECT. 4380. — Substituted for the cited provision of 1793. St. 1790, ch. 35 (1 St. 145), was repealed by St. 1799, ch. 22, § 112 (Id. 704). 2 Com. D. 2103. The trial is to be had in the judicial district in which the seizure was made. *Keene v. United States*, 5 Cranch, 304.

SECT. 4381. — See note, § 4311. Amended by 19 St. 251, by inserting in the second line of the sixth sub-division, after "cents," a comma, and in the third line, after "less than fifty tons," a semicolon; and by adding at the end of the section the provision as to the distribution of fees among the collector, naval officer, and surveyor, which provision was omitted from the Revised Statutes. See 15 A. G. Op. 44. Also amended by 23 St. 132, ch. 228, by changing paragraphs six and seven, and finally by 24 St. 80, by providing that no fees shall be charged for issuing of license or granting of certificate of enrolment, including all indorsements on the same and bond and oath; indorsement of change of master; certifying and receiving manifest, including master's oath and permit; granting permit to vessels licensed for the fisheries to touch and trade; granting certificate of payment of tonnage dues.

SECT. 4382. — This section is amended by 23 St. 132, ch. 228, by modifying paragraphs six and eight, and by 24 St. 80, as stated in the preceding section. Paragraphs seven and nine are repealed by 23 St. 132. S. T. D. 9315.

SECT. 4384. — See note, § 4381.

SECT. 4385. — The Ohio, 9 Phila. 448.

SECTS. 4386-4390. — These statutes are constitutional. *United States v. Boston & Albany R. R. Co.*, 15 F. R. 209. The unlawful confinement of each animal does not constitute a separate offence. *Id.* 212. See *United States v. Louisville*, 18 F. R. 480. Animals only are included that are conveyed from one State to another. *United States v. East Tennessee*, 13 F. R. 642. By 19 St. 251, § 4390 is amended by striking out, in the second line, "forty-four hundred and fifty-three" and inserting "forty-three hundred and eighty-seven."



## TITLE LI.

## REGULATION OF FISHERIES.

PROVISION is made authorizing the President to deny vessels, &c., of British North America entry into United States waters in certain contingencies ; also authorizing the prohibition of the importation of fish or other goods, and stating penalties, &c., in Act of March 3, 1887, ch. 339 (24 St. 475). This chapter does not apply to whaling voyages. The Atlantic Abb. Adm. 451, 474. See The Antelope, 1 Lowell, 130.

SECT. 4391. — See note, § 4523. The original act contained the words "or skipper" after "master" in the first line, and "or print" after "writing" in the fifth line. 2 Com. D. 2111. The history and meaning of this section are discussed in The Cornelia M. Kingsland, 25 F. R. 856.

SECT. 4392. — The original act contained the words "or skipper" after "master" in the last sentence. 2 Com. D. 2112.

SECT. 4393. — "Master's" in fifth line substituted for "skipper's" in the original act. 2 Com. D. 2112. See The Cornelia M. Kingsland, *supra*.

SECTS. 4395-4398. — Provision is made in 21 St. 517 for printing the report of the Commissioner from time to time ; in 22 St. 332, 629, for distribution of duplicate specimens of the National Museum and Fish Commission to colleges, academies, &c. ; in 22 St. 628 and 23 St. 450, for the Commissioner to designate an assistant, from the employees, to discharge his duties in case of absence, &c. ; in 23 St. 494, for the Secretary of the Treasury to detail from time to time for duty under the Commissioner any officers and men of the Revenue Marine Service whose services can be spared for such duty ; and for the Secretary of the Navy to provide a sailing-vessel, if one can be spared, for collecting, &c., spawning food-fishes, in which event the appropriation provided for was not to be expended ; in 24 St. 523, for withholding the appropriation for a salmon-hatchery on the Columbia River until the legislatures of Oregon and Washington Territory should enact suitable legislation for the protection of salmon ; in 25 St. 521, for the occupancy jointly by the United States Commission of Fish and Fisheries and the National Museum of the Armory Building, Washington ; and finally by the act of Jan. 20, 1888, ch. 1 (25 St. 1), for the amendment of § 4395, so as to read as follows : —

"That there shall be appointed by the President, by and with the advice and consent of the Senate, a person of scientific and practical acquaintance with the fish and fisheries to be a Commissioner of Fish and Fisheries, and he shall receive a salary at the rate of five thousand dollars a year, and he shall be removable at the pleasure of the President. Said Commissioner shall not hold any other office or employment under the authority of the United States or any State."



## TITLE LII.

## REGULATION OF STEAM-VESSELS.

## CHAPTER I.

## INSPECTION.

SECT. 4399. — See notes, §§ 4400, 4426, 5294; *Joslyn v. Nickerson*, 1 F. R. 133.

SECT. 4400. — See notes, §§ 4401, 4426, 4500, 5294. The words "any waters of the United States which are" are here substituted for the words "the lakes, bays, inlets, sounds, rivers, harbors, or other navigable waters of the United States, when such waters," in the cited act. 2 Com. D. 2120. Amended and enlarged by act of Aug. 7, 1882, ch. 441 (22 St. 346), by adding to the end thereof the following:—

"And all foreign private steam-vessels carrying passengers from any port of the United States to any other place or country shall be subject to the provisions of sections forty-four hundred and seventeen, forty-four hundred and eighteen, forty-four hundred and twenty-one, forty-four hundred and twenty-two, forty-four hundred and twenty-three, forty-four hundred and twenty-four, forty-four hundred and seventy, forty-four hundred and seventy-one, forty-four hundred and seventy-two, forty-four hundred and seventy-three, forty-four hundred and seventy-nine, forty-four hundred and eighty-two, forty-four hundred and eighty-eight, forty-four hundred and eighty-nine, forty-four hundred and ninety-six, forty-four hundred and ninety-seven, forty-four hundred and ninety-nine and forty-five hundred of this title, and shall be liable to visitation and inspection by the proper officer, in any of the ports of the United States, respecting any of the provisions of the sections aforesaid, *Provided*, That where the term 'local inspector' is used in the foregoing section it shall be construed to mean the special inspectors hereinafter provided for.

"SEC. 2. That for the purpose of carrying into effect the provisions of this act the Secretary of the Treasury shall appoint officers to be designated as special inspectors of foreign steam-vessels, at a salary of two thousand dollars per annum each, and there shall be appointed of such officers at the port of New York, six; at the port of Boston, two; at the port of Baltimore, two; at the port of Philadelphia, two; at the port of New Orleans, two; and at the port of San Francisco, two.

"SEC. 3. The special inspectors of foreign steam-vessels shall perform the duties of their office and make reports thereof to the Supervising Inspector-General of Steam Vessels, under such regulations as shall be prescribed by the Secretary of the Treasury.

"SEC. 4. That each special inspector of foreign steam-vessels shall execute a proper bond, to be approved by the Secretary of the Treasury, in such form and upon such conditions as the Secretary may prescribe, for the faithful performance of the duties of his office.

"SEC. 5. That the Secretary of the Treasury shall procure for the several inspectors heretofore referred to such instruments, stationery, printing, and other things necessary, including clerical help, where he shall deem the same necessary for the use of their respective offices, as may be required therefor.

"SEC. 6. That the salaries of the special inspectors of foreign steam-vessels and clerks provided for, together with their traveling and other expenses, when on official duty, and all instruments, books, blanks, stationery, furniture, and other things necessary to carry into effect the provisions of this act, shall be paid for by the Secretary of the Treasury, out of any moneys in the Treasury not otherwise appropriated."

Instead of confining the offence to vessels carrying on commerce between different States, it provides that "*all* steam-vessels navigating *any* waters of the United States shall be within the requirements and penalties of the act." *United States v. Burlington*



Co., 21 F. R. 331, 342. It is stated in *The Daniel Ball*, 10 Wall. 557, 563, that these rivers "constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form, in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water." See *The Montello*, 11 Wall. 411; *The Gretna Green*, 20 F. R. 901; *The Hazel Kirke*, 23 Blatch. 292; 25 F. R. 601; *The Oyster Police Steamers*, 31 Id. 763, 767; *The Sunswick*, 6 Ben. 112; *The Thomas Swan*, Id. 42; *The Sun*, 1 Biss. 373; *The Oconto*, 5 Id. 460; *Hartman v. Du Pont*, 118 U. S. 223; *The Bright Star*, Woolw. 266; *Allen v. Newberry*, 21 How. 245; *Steamboat v. King*, 16 Id. 469; 13 A. G. Op. 248; *Virginia Co. v. United States*, Taney, 418; *City of Chicago v. McGinn*, 51 Ill. 266; S. T. D. 8010.

"*Excepting public vessels of the United States.*" — 16 A. G. Op. 647; 13 Id. 248.

SECT. 4401. — See notes, §§ 4400, 4426, 4444. See also *Sprague v. Thompson*, 118 U. S. 90; *Joslyn v. Nickerson*, 1 F. R. 133; *The Daniel Ball*, 10 Wall. 557.

SECT. 4404. — See *United States v. Miller*, 26 F. R. 95.

SECT. 4405. — See note, § 4412. The authority given the supervising inspectors to establish rules under this section does not extend to the subject of lights, and the amendment made February, 1885, to section twenty of general rule three, requiring barges in tow to carry a red and a green light, is void. *United States v. Miller*, 26 F. R. 95. See *The Eleanora*, 17 Blatch. 88, 94; *Erwin v. Neversink Co.*, 88 N. Y. 184; S. T. D. 8711. Rules prescribed by the board in violation of the laws of Congress are void, and a pilot who obeys such rules does so at his own risk. *The American Eagle*, 1 Lowell, 425.

SECT. 4407. — "Steam" is here added in the second line, and the words "any officer found delinquent" in the last two lines are here substituted for "the delinquent" in the cited act. 2 Com. D. 2122.

SECT. 4409. — See note, § 4405. Amended by 19 St. 251, by striking out, in the third line, the word "and" and inserting the word "or."

SECT. 4412. — In so far as the rules established by the inspectors pursuant to this section are not in violation of any statute or of the rules of navigation (§ 4233), they are valid and binding. *The Grand Republic*, 16 F. R. 424; *The B. B. Saunders*, 19 Id. 118; *The Garden City*, Id. 529, 533; *United States v. Miller*, 26 Id. 95, 97; *Greenman v. The Narragansett*, 4 Id. 244; *The Milwaukee*, Brown, Adm. 313; *The Sweepstakes*, Id. 509; *The Atlas*, 4 Ben. 27. This section is not repealed by 23 St. 438. *United States v. Greenman*, 37 F. R. 64.

SECT. 4413. — See note, § 4412. *United States v. Greenman*, *supra*.

SECT. 4414. — In the third paragraph the original act began with the words "At Portland, in the district of Oregon," and contained the words "in Maine" after "Portland"; the word "Willamette" is here added. 2 Com. D. 2124. Amended by 24 St. 354 by inserting after the word "Savannah" in the second line of the sixth paragraph, the words "Duluth, Minnesota." By 22 St. 153 a board of inspectors of hulls and boilers of steam vessels is created at Gallipolis, Ohio, to be compensated and vacancies to be filled as provided in this section.

SECT. 4415. — The words "and fill the vacant or new inspectorship" are here added in the seventh line. 2 Com. D. 2125. Amended by 19 St. 251 by striking out in the twentieth line the word "liable" and inserting the word "able"; by striking out in the twenty-sixth line the word "inspectors" and inserting the word "inspector"; and by inserting in the twenty-fifth line, after the word "hulls," the words "or an inspector of boilers."

SECT. 4416. — The original act contained the words "life-preserver, life-boat, gauge, or any" after "patented" in the second line, and in the ninth line substituted "either" for "steamboat." 2 Com. D. 2126.



SECT. 4417. — See note, § 4400. Maryland steam vessels used to enforce State fishery laws, &c., in Chesapeake Bay, come within this and § 4418. The Oyster Police Steamers, 31 F. R. 763. It is the duty of the master or owner to make the application, and vessels at the time carrying passengers for hire are included, as well as those making it a regular business. The Jacob G. Neafie, 8 Ben. 251. There is no duty to make application or to inspect while the vessel is unfinished. The Joshua Leviness, 9 Id. 339.

SECT. 4418. — See notes, §§ 4400, 4417, 4428. Amended by act of June 19, 1886, ch. 421, § 14 (24 St. 82), by striking out from the nineteenth and following lines thereof the words "and, to indicate the pressure of steam, suitable steam-registers that will correctly record each excess of steam carried above the prescribed limit, and the highest point attained," and inserting in lieu thereof the following: "and suitable steam gauges to indicate the pressure of steam." Failure to have boiler tested, as a new one, after one sheet had been condemned as burnt and had been replaced by a new sheet, was held to be negligence in Posey v. Scoville, 10 F. R. 140. See The Sunswick, 6 Ben. 112; The Lac La Belle, 3 Biss. 313; Virginia Co. v. United States, Taney, 418; Hartranft v. Du Pont, 118 U. S. 223.

SECT. 4420. — Amended by 19 St. 251, by striking out, in the first line, after the word "preceding," the word "section," and inserting therefor the word "sections." It is provided by act of Jan. 6, 1874, ch. 6 (18 St. 2), that the provisions of this act, —

"so far as they relate to the limitation of steam pressure of steamboats used exclusively for towing and carrying freight on the Mississippi River and its tributaries, are hereby so far modified as to substitute for such boats 150 pounds of steam pressure in place of 110 pounds, as provided in said act for the standard pressure upon standard boilers of 42 inches diameter, and of plates of one-quarter of an inch in thickness: And such boats may, on the written permit of the supervising inspector of the district in which such boats shall carry on their business, be permitted to carry steam above the standard pressure of 110 pounds, but not exceeding the standard pressure of 150 pounds to the square inch."

SECT. 4421. — See note, § 4400. Amended by 19 St. 251 by inserting, in the fifth line, after the word "made," a comma. By 23 St. 59, ch. 28, provision is made as to fees. But by 24 St. 80, § 1, fees are abolished as to "inspecting, examining, and licensing steam-vessels, including inspection-certificate and copies thereof." See The Lewellen, 4 Biss. 156; United States v. The Manhattan, 3 Blatch. 270; The Oyster Police Steamers, 31 F. R. 763; The Daniel Ball, 10 Wall. 557; Hartranft v. DuPont, 118 U. S. 223; 16 A. G. Op. 680.

SECT. 4422. — See note, § 4400.

SECT. 4423. — See note, § 4400. The duty hereby imposed does not attach in the case of a vessel never inspected. The Joshua Leviness, 9 Ben. 339. See cases cited under § 4421.

SECT. 4424. — See notes, §§ 4400, 4474. The Oyster Police Steamers, *supra*.

SECT. 4426. — See notes, §§ 4400, 4470, 4471. A small wooden vessel with a small engine and boiler was held liable to inspection in Hartranft v. Du Pont, 118 U. S. 223. See The Garden City, 26 F. R. 766; The Oyster Police Steamers, *supra*; United States v. Burlington, 21 F. R. 331; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 217; United States v. The Mollie, 2 Woods, 318, 322; The "Bright Star," Woolw. 266; The Sunswick, 6 Ben. 112; S. T. D. 8403, 8836, 9316.

SECT. 4428. — See 16 A. G. Op. 680; S. T. D. 8403, 8836.

SECT. 4429. — By 22 St. 310 this section is amended by adding at the end thereof the following: —

"Provided, however, That the Secretary of the Treasury may grant permission to use any boiler or steam generator not constructed of riveted iron or steel plates upon the certificate of the supervising inspector of steamboats for the district wherein such boiler or generator is to be used, and other satisfactory proof that the use of the same is safe and efficient; said permit to be valid until the next regular meeting of the supervising inspectors who shall act thereon."



SECT. 4430. — See note, § 3718.

SECT. 4431. — See S. T. D. 8403, 8836.

SECT. 4434. — By act of Feb. 11, 1885, ch. 55 (23 St. 298), amended by adding thereto a proviso so as to read as follows:—

“SECT. 4434. No boiler to which the heat is applied to the outside of the shell thereof shall be constructed of iron or steel plates of more than twenty-six one-hundredths of an inch in thickness, the ends or heads of the boilers only excepted; and every such boiler employed on steam-vessels navigating rivers flowing into the Gulf of Mexico, or their tributaries, shall have not less than three inches space between and around its internal flues: *Provided*, That boilers to which the heat is applied to the outside of the shell thereof, may, in the discretion of the Secretary of the Treasury, be authorized and used on steam-vessels navigating the Atlantic or Pacific oceans, or salt-water bays or sounds, or the great lakes, or any of them, and waters flowing to and from the same, or any of them, when constructed of iron or steel plates not exceeding fifty one-hundredths of an inch in thickness.”

SECT. 4438. — See notes, §§ 4441, 4442, 4444. A naval officer to serve as master of a private steam-vessel in the merchant-service must obtain the license required by this section. 15 A. G. Op. 61. For a case under the statute of 1864, see 11 A. G. Op. 488. It has been held that unlicensed pilots and engineers may be employed on a government steam-tug not subject to inspection laws. 13 A. G. Op. 248. It has been held under the former law that an unlicensed engineer cannot recover wages for services on a steam-vessel engaged in carrying passengers on United States waters. *The Maria, Deady*, 89, 101. An indictment for a violation of this section need not charge that the employer knew that the employee had not been licensed as required. *United States v. Sims*, 9 F. R. 443. Neither is it necessary to prove such knowledge on the trial; for the purpose of this section is to require the employer to know that such license has been obtained, and he employs the engineer at his peril if he be not in fact so licensed. *Id.* See further *Joslyn v. Nickerson*, 1 F. R. 133; *Steamship Co. v. Joliffe*, 2 Wall. 450; *United States v. Huff*, 13 F. R. 630; S. T. D. 8010.

SECT. 4440. — Amended by 19 St. 251, by striking out, in the second line, the word “inspector” and inserting the word “inspectors.”

SECT. 4441. — See notes, §§ 4438, 4442. Amended by 19 St. 252, as § 4440 is amended. It is provided by act of April 17, 1874, ch. 107 (18 St. 30),—

“That any alien who, in the manner provided for by law, has declared his intention to become a citizen of the United States, and who shall have been a permanent resident of the United States for at least six months immediately prior to the granting of such license, may be licensed, as if already naturalized, to serve as an engineer or pilot upon any steam-vessel subject to inspection under the provisions of the act entitled ‘An act to provide for the better security of life on board of vessels propelled, in whole or in part, by steam, and for other purposes,’ approved Feb. 28, 1871.”

SECT. 4442. — See note, § 4441. Penalties under State laws for piloting without a State license do not apply to those employed as pilots upon vessels whose decks are within the exclusive jurisdiction of the United States. 16 A. G. Op. 647.

SECT. 4443. — The intent to authorize the master to act as pilot was held to be sufficiently expressed in *Joslyn v. Nickerson*, 1 F. R. 133.

SECT. 4444. — See notes, §§ 4235–4237, 4442, 4443. It was held in *Sprague v. Thompson*, 118 U. S. 90, that a vessel, being under the lawful direction of a United States pilot, could not be required to take a State pilot. See *The George S. Wright, Deady*, 588, 594; *Joslyn v. Nickerson, supra*; *Steamship Co. v. Joliffe*, 2 Wall. 450; *Flanders v. Tripp*, 2 Lowell, 15.

SECT. 4445. — See S. T. D. 8064.

SECT. 4446. — See S. T. D. 8453.

SECT. 4450. — *The Charles Morgan*, 115 U. S. 69, 77; S. T. D. 8030, 8434.

SECT. 4452. — See *United States v. Huff*, 13 F. R. 630; S. T. D. 8030, 9316.



SECT. 4454. — United States *v.* Miller, 26 F. R. 95, 100.

SECT. 4457. — See 24 St. 79, § 1.

SECT. 4458. — Amended by 22 St. 40 as to fees; but fees were abolished by 24 St. 80, § 1, for licensing of master, engineer, pilot, or mate of a vessel. See § 1. of last act as amended by 25 St. 80, § 2. See note, § 4461.

SECT. 4460. — The original act contained the following clause at the end of this section: "and shall make such rules and regulations as may be necessary to secure the proper execution of this Title." 2 Com. D. 2141.

SECT. 4461. — By act of April 4, 1888, ch. 61, § 2 (25 St. 80), section 1 of 24 St. 80 is amended, in the third line from the end of the section, by inserting, after the words "shipping commissioners," the words "and clerks of steamboat inspectors, and such allowances for fees of United States marshals and witnesses for services under the steamboat inspection laws, and for expenses of steamboat inspectors provided for" by this section.

## CHAPTER II.

### TRANSPORTATION OF PASSENGERS AND MERCHANDISE.

SECT. 4463. — S. T. D. 8144. For the law as to the regulation of the carriage of passengers and merchandise by sea, see p. 795 *et seq.*

SECT. 4464. — This and §§ 4465, 4466, have no application to a ferry-boat, though temporarily employed as an excursion boat. *Schwerin v. North Pac. R. Co.*, 36 F. R. 710; *The Sylph*, 4 Blatch. 24. See *The Hazel Kirke*, 23 Blatch. 292; 25 F. R. 601, 608; *The Elizabethport Co. v. United States*, 5 Blatch. 198; *United States v. The Echo*, 4 Id. 446; *The Ottawa*, Newb. 536.

SECT. 4465. — See note, § 4464, 4469; *The Idaho*, 29 F. R. 187. Where the persons in excess of the allowed number were intruders, it was held that the penalty was not incurred. *The Geneva*, 26 F. R. 647. A steamboat was held in *The Hazel Kirke*, *supra*, to be engaged in interstate commerce to an extent sufficient to bring her within this and § 4469. Questions of pleading are considered in *Pollock v. The Laura*, 5 F. R. 133. The United States need not be a party to the suit; and it is not necessary to allege that the libellant was a passenger on the steamer, or that he was an informer, or to set out the names of the passengers taken on board. *Pollock v. The Sea Bird*, 3 F. R. 573; *The Laura M. Starin*, 11 Id. 177 and note; *Hatch v. The Boston*, 3 Id. 807; 8 Id. 628. The statute gives a separate penalty for each violation, and a direct remedy against the vessel in admiralty for its recovery. *Pollock v. The Sea Bird*, *supra*; *The Laura M. Starin*, *supra*. A penalty incurred under this and § 4469 may be remitted by the Secretary of the Treasury, under the authority given him by § 5294; and such remission operates as a full discharge. *The Laura*, 19 Blatch. 562; 8 F. R. 612; 114 U. S. 411. See further *Union Ins. Co. v. Shaw*, 2 Dillon, 14.

SECT. 4466. — See notes, §§ 4464, 4465, 4469, 4499. "Excursion" is defined in *The Pope Catlin*, 31 F. R. 408. A case within this and § 4500 is stated in *United States v. Burlington Co.*, 21 F. R. 331. See *Pollock v. The Laura*, 5 Id. 133, 144. To find the defendants liable the violation must be clearly made out. *The Harlem*, 27 Id. 236.

SECT. 4467. — Amended by 19 St. 252, by striking out in the fourth line the word "opened" and inserting the word "open."

SECT. 4468. — See *Hatch v. The Boston*, *supra*.

SECT. 4469. — See note, § 4465. There is a direct remedy against the vessel in admiralty for the recovery of the penalty. *Pollock v. The Sea Bird*, *supra*; *Hatch v. The Boston*, *supra*. See *Schwerin v. North Pac. R. Co.*, 36 F. R. 710.



SECT. 4470. — See notes, §§ 4400, 4471. The adoption of precautions under this and § 4471 is considered in *The Garden City*, 26 F. R. 766. For a case of salvage, see *The Cherokee*, 31 Id. 167.

SECT. 4471. — See notes, §§ 4400, 4470. See *United States v. The Thomas Swan*, 9 L. R. N. S. 201.

SECT. 4472. — See note, § 4400. Amended by 19 St. 252, by striking out in the fifteenth line the word "practical" and inserting the word "practicable." A case where hay in bales was so piled as to comply with the statute is stated in *Union Ins. Co. v. Shaw*, 2 Dillon, 14. An action of debt is the proper proceeding, and not a proceeding *in rem*. *United States v. The C. B. Church*, 1 Woods, 275. *The James D. Parker*, 23 Int. Rev. Rec. 66. The meaning of the word "practicable" is treated in *United States v. Wise*, 7 F. R. 190; 6 Id. 41. A violation in April, 1874, cannot be punished under the Revised Statutes. *The James D. Parker*, *supra*.

SECT. 4473. — See note, § 4400.

SECT. 4474. — Amended by act of Oct. 18, 1888, ch. 1197 (25 St. 564), by adding thereto the following:—

"Provided, however, That the Secretary of the Treasury may permit the use of petroleum as fuel on steamers not carrying passengers, without the certificate of the Supervising Inspector of the district where the vessel is to be used, subject to such conditions and safeguards as the Secretary of the Treasury in his judgment shall provide. For a violation of any of the conditions imposed by the Secretary of the Treasury a penalty of \$500 shall be imposed, which penalty shall be a lien upon the vessel, but a bond may, as provided in other cases, be given to secure the satisfaction of the judgment."

SECT. 4477. — A count in an indictment based upon this section was held to be good in *United States v. Beacham*, 29 F. R. 285; see *The Idaho*, Id. 187, 191.

SECT. 4479. — See note, § 4400.

SECT. 4482. — See note, § 4400; *The Pope Catlin*, 31 F. R. 408.

SECT. 4483. — The original act contained the word "if" before "of" in the first line, and the words "less than" in place of "over" in the fourth line. 2 Com. D. 2149.

SECT. 4488. — See notes, §§ 4400, 4489; *The Pope Catlin*, *supra*; *The Thomas Swan*, 9 L. R. N. S. 201.

SECT. 4489. — See note, § 4400. This and § 4488 are amended by act of March 2, 1889, ch. 418 (25 St. 1012), by inserting after the words "life preservers," wherever they occur, the words "line-carrying projectiles, and the means of propelling them."

SECT. 4490. — Amended by 19 St. 252, by striking out in the second line the word "carry" and inserting the word "carrying." It is provided by 24 St. 129, ch. 755, § 3, that certain steam vessels in the coastwise bays and harbors may be licensed to carry passengers or excursions on the ocean or Great Lakes, not over fifteen miles from the mouth of such bays or harbors, without cross-bulkheads as herein required; provided that in the judgment of the local inspector there is no danger to human life; but "they shall have one water-tight collision bulkhead not less than five feet abaft the stem of said steamer."

SECT. 4491. — S. T. D. 8048.

SECT. 4492. — "*Barge carrying passengers.*" — See *Transportation Line v. Cooper*, 99 U. S. 78; *United States v. Miller*, 26 F. R. 95, 97; *The Gretna Green*, 20 Id. 901.

SECT. 4493. — This section does not take claims for personal injury or loss of baggage out of § 4282 *et seq.* *Re Long Island Co.*, 5 F. R. 599. The remedy *in rem* is confined to passengers; employees are limited to the remedy *in personam*. *The Highland Light*, Chase Dec. 150; *The Clatsop Chief*, 7 Sawyer, 274; 8 F. R. 163, 767. As to the explosion of steam being *prima facie* evidence of negligence under the statute of 1838, see *Steamboat v. King*, 16 How. 469. See also *Dunlap v. Steamboat*, 4 Woods, 420; 2 F. R. 249; *The Oriflamme*, 3 Sawyer, 397; *The Nederland*, 14 F. R. 63; 7 Id. 926; *Carroll v. Staten Island Co.*, 58 N. Y. 126. This section does not preclude a mariner from pro-



ceeding against the vessel for damages suffered by himself in consequence of the neglect of the officers of the vessel. *Brown v. The D. S. Cage*, 1 Woods, 401; *The Clatsop Chief*, *supra*. The cost of the recovery of a mariner injured while in the service of a ship is a charge against the vessel which may be recovered in a proceeding *in rem*, and if the injury is the result of neglect or misconduct on the part of the officers, he will be allowed damages in the nature of additional wages to be recovered in the same manner. *Brown v. The D. S. Cage*, *supra*. As long as Congress has not made any special provisions upon a particular subject, the legislation of a State, not inconsistent with existing Federal laws, is valid. It was held that the act of a State legislature allowing an action for a personal tort, when resulting in the death of the person injured, to be brought by the personal representatives of the deceased, was constitutional. *Sherlock v. Alling*, 93 U. S. 99. See *The Sea Gull*, Chase Dec. 145. The liability of the owners extends to the negligence of the pilot, though the owners are obliged by law to take a pilot, and are restricted in their choice to those licensed by the government inspectors. *Sherlock v. Alling*, *supra*.

SECT. 4495. — *The Lewellen*, 4 Biss. 167.

SECTS. 4496, 4497. — See note, § 4400. *The Joshua Leviness*, 9 Ben. 339.

SECT. 4498. — See *The Sun*, 1 Biss. 373.

SECT. 4499. — See notes, §§ 4400, 4417, 4465. The meaning of this section is defined in *The Idaho*, 12 Sawyer, 156; 29 F. R. 187; *United States v. The Science*, 2 Pittsb. 446; 5 Phila. 257; *Pollock v. The Sea Bird*, 3 F. R. 573. The moving of an unfinished vessel in construction, and not for the earning of money, is not navigation within this section. *The Joshua Leviness*, *supra*. See the *Oyster Police Steamers*, 31 F. R. 763; 35 Id. 926; *United States v. The Laurel*, Newb. 269; *The James D. Parker*, 23 Int. Rev. Rec. 66; *The Thomas Swan*, 6 Ben. 42; *United States v. The Frank Sylvia*, 37 F. R. 155; S. T. D. 8337; *United States v. The Manhattan*, 3 Blatch. 270; *The Nashville* 4 Biss. 188; *The Ranier*, Deady, 438.

SECT. 4500. — See note, § 4400. By 24 St. 81, § 8, it is provided that foreign vessels transporting passengers between United States ports, having been taken on board in the United States, shall be liable to a fine of two dollars for each one landed; but by § 9, the fine may be remitted by the Secretary of the Treasury. See *United States v. Miller*, 26 F. R. 95, 99; *United States v. Burlington Co.*, 21 Id. 332; *United States v. Moore*, 2 Bond, 34, S. T. D. 8337, 9316.



## TITLE LIII.

## MERCHANT SEAMEN.

## CHAPTER I.

## SHIPPING COMMISSIONERS.

It was provided by act of June 9, 1874, (18 St. 64), ch. 260, that none of the provisions of this act should apply to sail or steam vessels in the coastwise trade, except that between the Atlantic and Pacific coasts, or in the lake-going trade touching at foreign ports or otherwise, or in the trade between the United States and the British North American possessions, or in any case where the seamen are by custom or agreement entitled to participate in the profits or result of a cruise or voyage. It was held in *United States v. Buckley*, 12 Sawyer, 508; 31 F. R. 804, that 18 St. 64 repeals, with the exceptions indicated, not only such provisions of the act of 1872 (of which this Title is largely made up) as applied to *vessels eo nomine*, but also the other provisions as to masters and owners and their duties, and to seamen and apprentices and their discipline; and that seamen deserting from a coasting vessel plying between different California ports were not liable to information; and it was also held that the same statute repeals so much of the act of June 7, 1872, as is re-enacted in this Title. See *Scott v. Rose*, 2 Lowell, 381; *McCarty v. Steam-Propeller*, 4 F. R. 813, 821; *The Cetewayo*, 9 Id. 717; *United States v. Rose*, 12 Id. 576; *The Lizzie M. Dun*, 30 Id. 927; *United States v. King*, 23 Id. 138, 141; *United States v. Bain*, 5 Id. 192; *Ross v. Bourne*, 14 Id. 858; *The J. S. Woodward*, 6 Id. 636; *Burdett v. Williams*, 27 Id. 113.

Sections 4501 to 4512 do not apply to British vessels. *The Montapedia*, 14 F. R. 427. See notes, §§ 4601, 4612. As to refunding fines, &c., see 23 St. 59, ch. 121, § 26.

By act of June 19, 1886, ch. 421, § 1 (24 St. 79), it is provided that collectors or other officers of customs, inspectors of steam vessels and shipping commissioners paid wholly or partly by fees shall make report to the Secretary of the Treasury, who shall pay for such services the compensation each would have received prior to this act, including compensation to clerks of shipping commissioners.

SECT. 4501. — See notes, §§ 4592–4595. The act of June 26, 1884, ch. 121, § 27 (23 St. 59), amends this section so as to read as follows:—

“SEC. 4501. The Secretary of the Treasury shall appoint a commissioner for each port of entry, which is also a port of ocean navigation, and which, in his judgment, may require the same; such commissioner to be termed a shipping commissioner, and may, from time to time, remove from office any such commissioner whom he may have reason to believe does not properly perform his duty, and shall then provide for the proper performance of his duties until another person is duly appointed in his place: *Provided*, That Shipping Commissioners now in office shall continue to perform the duties thereof until others shall be appointed in their places. Shipping Commissioners shall monthly render a full, exact, and itemized account of their receipts and expenditures to the Secretary of the Treasury, who shall determine their compensation, and shall from time to time determine the number and compensation of the clerks appointed by such commissioner, with the approval of the Secretary of the Treasury, subject to the limitations now fixed by law. The Secretary of the Treasury shall regulate the mode of conducting business in the shipping offices to be established by the shipping commissioners as hereinafter provided,



and shall have full and complete control over the same, subject to the provisions herein contained; and all expenditures by shipping commissioners shall be audited and adjusted in the Treasury Department in the mode and manner provided for expenditures in the collection of customs. All fees of Shipping Commissioners shall be paid into the Treasury of the United States and shall constitute a fund which shall be used under the direction of the Secretary of the Treasury to pay the compensation of said Commissioners and their clerks and such other expenses as he may find necessary to ensure the proper administration of their duties."

It was held in *Re Shipping Commissioner*, 22 Blatch. 148; 20 F. R. 211; 17 Id. 138, decided before the above act was passed, that the court could not compel the commissioner to pay over moneys to the Government. See 24 St. 79, § 1, *supra*. *Ravesies v. United States*, 35 F. R. 917; *Ferris v. The E. D. Jewett*, 2 Id. 111.

SECT. 4504. — See notes, §§ 4511, 4513, 4520, 4549, 4552. This section qualifies § 4549. *United States v. French*, 14 Phila. 497; 9 F. R. 369. It was held in *United States v. The "Grace Lothrop"*, 95 U. S. 527; 1 Holmes, 342, that the agreement in writing need not be signed in the presence of a shipping commissioner when the voyage is to a port in the West India islands. And where the voyage was to such islands and return, it was held that a mariner's discharge need not be signed in the presence of the commissioner. *Burton v. Frye*, 139 Mass. 131. Under this and § 4549, it was held not incumbent on the master to pay the sailor in the commissioner's presence. *The Bark Brothers*, 10 Ben. 400. See further *United States v. The City of Mexico*, 11 Blatch. 489; 7 Ben. 31; *United States v. Smith*, 95 U. S. 536; *United States v. Idell*, 16 Int. Rev. Rec. 147; *United States v. Rose*, 14 F. R. 681; 12 Id. 576.

SECT. 4505. — See notes, §§ 4505, 4594; 24 St. 79, § 1, *supra*.

SECT. 4506. — The mutual release provided for by § 4552 need not be made or authenticated under seal, and is conclusive if executed and attested as required, without fraud or coercion. *Rosenberg v. Doe*, 146 Mass. 191.

SECT. 4508. — In the first line "duties" is here substituted for "business" in the original act; and the fifth clause is substituted for "To arbitrate such questions affecting seamen as may be duly submitted to him."

## CHAPTER II.

### SHIPMENT.

SEE 18 St. 64, cited on p. 824, *ante*.

SECT. 4511. — See notes, §§ 4501, 4504, 4512, 4513, 4535. By the act of June 26, 1884, ch. 121, § 19 (23 St. 58), it is provided —

"That a master of a vessel in the foreign trade may engage a seaman at any port in the United States, in the manner provided by law, to serve on a voyage to any port, or for the round trip from and to the port of departure, or for a definite time whatever the destination. The master of a vessel making regular and stated trips between the United States and a foreign country may engage a seaman for one or more round trips, or for a definite time, or on the return of said vessel to the United States may reship such seaman for another voyage in the same vessel, in the manner provided by law, without the payment of additional fees to any officer for such reshipment or re-engagement."

Articles providing for forfeiture of wages in excess of that provided by law for the same offence are not in conformity to this section. *The San Marcos*, 27 F. R. 567. Where there were no shipping articles and no understanding to the contrary, it was held that there was an implied contract that deck-hands on an Ohio river packet are to be returned to their several ports of shipment. *The Hudson*, 8 F. R. 107. It has been held that if a sailor signs shipping articles before the British consul at Bordeaux, it is assumed, in the absence of proof to the contrary, that the consul explained to him the agreement. *The*



Exile, 20 F. R. 878; see *Thompson v. The Ship Oakland*, 4 Law Rep. 349. In the absence of fraud the contract of the master of a whaling-ship with his owners cannot be varied by parol evidence. *Slocum v. Swift*, 2 Lowell, 212. "A whaling voyage not exceeding five years in duration" ends when the object has been attained, that is, when a full cargo is obtained, not to exceed five years; and does not mean that the seaman is to serve five years, no matter what may have been the success of the voyage, nor how long it has lasted. *Id.* But the contract of seamen in the whaling service need not be in writing. *Frates v. Howland*, 2 Lowell, 36. See further *Smith v. Chase*, 2 Haskell, 106.

SECT. 4512. — See notes, §§ 4504, 4511, 4515. The provision as to signing in the presence of a shipping commissioner does not include an agreement with seamen for a voyage from the United States to a port in the West Indies. *United States v. The Grace Lothrop*, 95 U. S. 527; 1 Holmes, 342; in which the court says that it cannot concur in the conclusions reached by other judges. And see *United States v. The City of Mexico*, 11 Blatch. 489; 7 Ben. 31, in which it was held that the provision in § 4511, exempting the master from signing an agreement for a voyage between the United States and Mexico, did not exempt the seaman from signing as provided in § 4512 for a voyage between the United States and Mexico, and the penalty provided for in §§ 4514, 4515, would be exacted for not requiring the seaman so to sign. See *The Australia*, 3 Ware, 242; *Young v. Steamship Co.*, 105 U. S. 41.

SECT. 4513. — See notes, §§ 4504, 4511, 4512, 4515; p. 824, *ante*. Amended by 19 St. 252, by striking out of the first line the words "preceding section," and inserting in lieu thereof the words "section forty-five hundred and eleven."

SECT. 4514. — See notes, §§ 4512, 4515.

SECT. 4515. — See notes, §§ 4504, 4511, 4512, 4517. There is nothing in this Title requiring a contract to be made in writing or in print between the master and seamen *before* the latter are received on board; and this section has no application to coasting voyages. *United States v. The Thomas W. Haven*, 3 F. R. 347.

SECT. 4517. — See *The Montopedia*, 14 F. R. 427; *The Belle of Oregon*, 19 Id. 924; *The Exile*, 20 Id. 878.

SECT. 4520. — See notes, §§ 4521, 4522, 4523. This section does not apply to seamen upon tug-boats not engaged in foreign commerce. *Milligan v. Propeller B. F. Bruce*, Newb. 539. Illinois and Michigan are "adjoining states" within the meaning of this statute. *Thorson v. Peterson*, 9 F. R. 517. The term "state" includes a "territory." *Re George Bryant*, Deady, 118; see *Graham v. The Exporter*, 21 Int. Rev. Rec. 110. A shipping contract is not dissolved by the illness of the master after the commencement of the voyage, and the appointment of a new one. Though made by the master, the contract is with the owners for the voyage. *United States v. Hamilton*, 1 Mason, 443; *United States v. Haines*, 5 Id. 272; *United States v. Cassedy*, 2 Sumner, 582. Where one taken as a seaman on a coasting voyage without signing articles went on shore, and, without intending to desert, was detained as a witness, it was held that he was not a deserter. *The Lizzie M. Dun*, 30 F. R. 927; *The Pacific*, 23 Id. 154, and cases cited. To show that shipping articles are incorrect, fraudulent, or void, the parol evidence must be clear. *The Elvine*, 19 F. R. 528. In *United States v. Bain*, 5 Id. 192, both *United States v. Smith*, 95 U. S. 536, and *The T. W. Haven*, 3 F. R. 348, were considered; and it was held that the articles in question were valid, but that articles for a coastwise voyage need not be signed by a seaman in the presence of a commissioner, master, consignee, or owner. See *Thompson v. The Oakland*, 4 Law Rep. 349. As to whether the libel should be joint or several, see *Oliver v. Alexander*, 6 Pet. 143. See further *M. W. Wright*, Brown, 293; *The Crusader*, 1 Ware, 437; *The Lizzie M. Dun*, 30 F. R. 927.

SECT. 4521. — See notes, §§ 4511, 4512, 4520, 4522, 4523, 4529. Whenever a clause in the articles is ambiguous the meaning most favorable to the seamen shall prevail, the



want of clearness not being their fault. *Wope v. Hemenway*, 1 Sprague, 300; 2 Curtis, 301. Shipping articles providing for a "voyage from Boston to Valparaiso or other ports of the Pacific Ocean, at and from thence home direct, or *via* ports in East Indies or Europe," are not sufficiently definite, and the seamen would not be bound by the articles to any service after reaching Valparaiso. *Id.*; *The Samuel Ober*, 15 F. R. 621. See *Magee v. The Moss*, Gilpin, 219, 226; *Johnson v. Dalton*, 1 Cow. 543; *Bartlett v. Wyman*, 14 Johns. 260. The act of 20 July, 1790, does not make the written agreement conclusive upon the seamen. They have often been permitted to prove that the shipping articles did not set forth correctly the agreement; and the courts, without impeaching proofs, will hold to be void such agreements in the articles as are injurious to the seamen. *The Juliana*, 2 Dod. 504; *The Minerva*, 1 Hagg. 347; *Harden v. Gordon*, 2 Mason, 541; *Abbott on Shipp.* ed. 1830, 435; *The Cypress*, Blatch. & H. 83, 87. Seamen's contracts to ship for the voyage are terminable at the will of the parties on arriving at port by the dismasting of the vessel in a collision. *Thorson v. Peterson*, 9 F. R. 517. Where the shipping articles are silent as to wages, the seaman may prove by parol what wages were stipulated for, or he may claim the highest rate payable at the port of shipment within the three months next preceding the date of the articles. *The Warrington*, Blatch. & H. 335. See *Rollins v. E. O. Stanard*, 4 F. R. 750.

Stipulations operating to the disadvantage of seamen will not be enforced against them by courts of admiralty, unless it appears from extrinsic evidence that the seamen fully understood the stipulations, and received an adequate consideration therefor; as, for example, a stipulation that they will prosecute their suits for wages only in courts of common law, amounting to a waiver of their lien upon the vessel. *The Sarah Jane*, Blatch. & H. 401. A stipulation provided that all *differences* should be referred to arbitration. It was held that when the wages due were agreed upon and demanded, but payment was refused, there was no difference, within the meaning of the stipulation. *Id.* When the seamen after the vessel has put to sea compel the master by threats to enter into new shipping articles at a higher rate of wages, they are void. *Bartlett v. Wyman*, 14 Johns. 260. Originally in the act of 1790 this and § 4521 were found together. The penalties in cases other than coasting voyages are found in §§ 4514, 4515. Old cases on this section before the revision, are *The Australia*, 3 Ware, 240; *The Atlantic*, Abb. Adm. 451, 470; *Page v. Sheffield*, 2 Curt. 377; 1 Sprague, 285; *Jameson v. Ship Regulus*, 1 Pet. Adm. 212; *Walton v. Ship Neptune*, *Id.* 142; *Wolverton v. Lacey*, 8 Law Rep. n. s. 672.

SECT. 4522. — See notes, §§ 4290, 4520, 4521, 4523. Amended by 19 St. 252, by inserting in the last line, after the word "proceed," the word "on." See *The John Martin*, 2 Abb. U. S. 172; *The Balize*, Brown Adm. 424; *The Magnet*, *Id.* 547.

SECT. 4523. — See notes, §§ 4504, 4512, 4520, 4521, 4522. It was held in *The Cornelia M. Kingsland*, 25 F. R. 856, that fishermen who ship for a "lay" or shares in the catch are not "seamen" within this section. See *The Ianthe*, 3 Ware, 126.

"*May leave the vessel at any time.*" — See *The City of Fremont*, 2 Biss. 415; 13 Int. Rev. Rec. 149; *Graham v. The Exporter*, 21 *Id.* 110; *The Theodore Perry*, 24 *Id.* 54; *The Australia*, 3 Ware, 240; *The Lizzie M. Dun*, 30 F. R. 927; *The Pacific*, 23 *Id.* 154; *The Crusader*, 1 Ware, 438.

## CHAPTER III.

### WAGES AND EFFECTS.

SEE 18 St. 64, cited on p. 824, *ante*. "Although the law is liberal in construing contracts in favor of seamen, still it holds those parties capable of contracting, and bound like other persons by their contracts when no fraud is practised upon them." 13 A. G. Op.



557. A controversy relating to the wages of seamen by custom in the menhaden or white-fish fishery is considered in *The S. L. Goodal*, 6 F. R. 539. Innocent seamen will be paid, although the vessel is forfeited. *The City of Mexico*, 28 F. R. 207.

SECT. 4524. — See note, § 4580.

SECT. 4525. — The limits and application of the rule repealed by this statute are stated, in certain old cases given in 4 Abb. Nat. Dig. 194, § 29. See *The Ocean Spray*, 4 Sawyer, 105; *The City of Mexico*, *supra*.

SECT. 4526. — See note, § 4532. A survey is not a necessary ingredient of wreck. The master fixes the termination; and his decision is final, unless wrong and injustice are done the seamen. *Flanagan v. United States*, 30 F. R. 202; *Tarleton v. Mallory*, 10 Ben. 46; *Boulton v. Moore*, 14 F. R. 922.

SECTS. 4527, 4528. — *The Jefferson Borden*, 6 F. R. 301. See *Smith v. Chase*, 2 Haskell, 106.

SECT. 4529. — See notes, §§ 4546, 4547, 4582 *et seq.* The extra pay herein provided is an incident to the claim of wages proper, and ranks with the latter as a prior lien. *The Charles L. Baylis*, 25 F. R. 862. See *The Wenonah*, 1 Haskell, 606. In *The Columbia*, 6 Ben. 398, seamen were held entitled to double pay for ten days, although the suit was brought before the expiration of ten days from their discharge. See *Gallagher v. Murray*, 10 Id. 290.

SECT. 4530. — See notes, §§ 4546, 4547; *Annie M. Smull*, 2 Sawyer, 226; *Johnson v. The Lady Walterstorff*, 1 Pet. Adm. 215. See also 18 St. 64, cited p. 824, *ante*.

SECT. 4532. — Where it is customary to charge seamen on whalers with interest and insurance on advances, &c., as an indemnity to owners in case of loss, they are not entitled to any of the insurance paid the owners. *Roberts v. Swift*, 13 F. R. 915. See *Duncan v. Shaw*, 19 Id. 521; also 18 St. 64 cited on p. 824, *ante*.

By act of June 26, 1884, ch. 121, § 10 (23 St. 55), it is provided —

“That it shall be, and is hereby, made unlawful in any case to pay any seaman wages before leaving the port at which such seaman may be engaged in advance of the time when he has actually earned the same, or to pay such advance wages to any other person, or to pay any person, other than an officer authorized by act of Congress to collect fees for such service, any remuneration for the shipment of seamen. Any person paying such advance wages or such remuneration shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished by a fine not less than four times the amount of the wages so advanced or remuneration so paid, and may be also imprisoned for a period not exceeding six months, at the discretion of the court. The payment of such advance wages or remuneration shall in no case, except as herein provided, absolve the vessel, or the master or owner thereof, from full payment of wages after the same shall have been actually earned, and shall be no defence to a libel, suit, or action for the recovery of such wages: *Provided*, That this section shall not apply to whaling-vessels: *And provided further*, That it shall be lawful for any seaman to stipulate in his shipping agreement for an allotment of any portion of the wages which he may earn to his wife, mother, or other relative, but to no other person or corporation. And any person who shall falsely claim such relationship to any seaman in order to obtain wages so allotted shall, for every such offence, be punishable by a fine of not exceeding five hundred dollars, or imprisonment not exceeding six months, at the discretion of the court. This section shall apply as well to foreign vessels as to vessels of the United States; and any foreign vessel the master, owner, consignee, or agent of which has violated this section, or induced or connived at its violation, shall be refused a clearance from any port of the United States.”

It has been held that the provisions of this section do not apply to steamboats engaged in trade and navigating the inland waters. *United States v. King*, 23 F. R. 138. In *The State of Maine*, 22 Id. 734, in which this statute is carefully considered, it was held not applicable to the shipment of seamen in foreign ports. See also *The Samuel E. Spring*, 27 F. R. 764.

By act of June 19, 1886, ch. 421, § 3 (24 St. 80), § 10 of 23 St. 55, just cited is, —

“amended by striking out the words ‘That it shall be lawful for any seaman to stipulate in his shipping agreement for an allotment of any portion of the wages which he may earn to his wife, mother, or other



relative, but to no other person or corporation,' and inserting in lieu thereof the following: 'That it shall be lawful for any seaman to stipulate in his shipping agreement for an allotment of all or any portion of the wages which he may earn to his wife, mother, or other relative, or to an original creditor in liquidation of any just debt for board or clothing which he may have contracted prior to engagement, not exceeding ten dollars per month for each month of the time usually required for the voyage for which the seaman has shipped, under such regulations as the Secretary of the Treasury may prescribe, but no allotment to any other person or corporation shall be lawful.' And said section ten is further amended by striking out all of the last paragraph after the words 'vessels of the United States,' and inserting in lieu of such words stricken out the following: 'And any master, owner, consignee, or agent of any foreign vessel who has violated this section shall be liable to the same penalty that the master, owner, or agent of a vessel of the United States would be for a similar violation.'"

SECT. 4533. — See notes, § 4532; 18 St. 64, cited on page 824, *ante*.

SECT. 4534. — See notes, § 4532; 18 St. 64, cited on page 824, *ante*. *Greefe v. Cortis*, 13 F. R. 299; *Duncan v. Shaw*, 19 Id. 521.

SECT. 4535. — See 18 St. 64, cited on page 824, *ante*. *Bonnah v. McMorran*, 31 N. W. Repr. 37; 7 W. Repr. 342; *The L. L. Lamb*, 31 F. R. 29; *The International*, 30 Id. 375; *The Cetewayo*, 9 Id. 717; *The Countess of Dufferin*, 10 Ben. 155. The lien is not discharged by a sale of the vessel on execution against the owners. *McGinnis v. The Grand Turk*, 2 Pittsb. 326; *Harris v. The Henrietta*, Newb. 284; *Foster v. The Pilot*, Id. 215; *Taylor v. The Royal Saxon*, 1 Wall. Jr. 311; *The Gazelle*, 1 Sprague, 378; *The Julia Ann*, Id. 382, and note, page 389. See *The Highlander*, Id. 510. The subject of laches is considered in *The Galloway C. Morris*, 2 Abb. (U. S.) 164; 7 Phila. 572; *The Artisan*, 8 Ben. 538; *Freeman v. The Jane, Crabbe*, 178. As to the lien not being assignable, see *Logan v. The Aeolian*, 1 Bond, 267; *Rusk v. The Freestone*, 2 Id. 234; *The Gate City*, 5 Biss. 200.

SECT. 4536. — See 18 St. 64, cited on page 824, *ante*. Seamen's wages under the maritime law are exempt from attachment on trustee process in suits at common law. *McCarty v. The City of New Bedford*, 4 F. R. 818; *The City of New Bedford*, 20 Id. 57. *Contra*, *Eddy v. O'Hara*, 132 Mass. 56; *White v. Dunn*, 134 Id. 271; and see *Bourne v. Ross*, 17 F. R. 703; 14 Id. 858; *The Lizzie Williams*, 11 Id. 619; *The Montauk*, 10 Ben. 455; *McKean v. Alexander*, 4 How. 20.

SECT. 4538. — The master was not allowed to deduct from the proceeds the amount due the ship by the sailor for wages advanced but not earned. *United States v. Tobey*, 12 F. R. 347. Where the seaman became separated from the ship, without fault of his own, and the master sold his effects without negligence and in good faith, the owner was held liable only for the amount realized by the sale. *Antone v. Hicks*, 2 Lowell, 383.

SECT. 4544. — *United States v. Hill*, 120 U. S. 169, 177.

SECT. 4545. — 14 A. G. Op. 520.

SECT. 4546. — A libel will not necessarily be dismissed because prematurely brought, if substantial justice can be done under it. *The L. B. Snow*, 15 F. R. 282; see *McCarty v. The City of New Bedford*, 4 Id. 818. Where the testimony is conflicting and equally balanced, the case must be decided against the party upon whom rests the burden of proof. *The Fritheoff*, 7 Sawyer, 58; 14 F. R. 302. "This is an enabling statute. It affords a cumulative, not an exclusive remedy; it is permissive, not imperative." *The Shelbourne*, 30 F. R. 510; *Murray v. Ferryboat*, 2 Id. 88; *The M. W. Wright*, Brown Adm. 290; *The Waverly*, 7 Biss. 465; *The Frank C. Barker*, 19 F. R. 332; *The Edwin Post*, 6 Id. 206. See *The William Jarvis* and other cases, *infra*. This section cannot override plain treaty stipulations with a foreign power. *The Salomoni*, 29 F. R. 534. The respondent cannot avoid the payment of costs by settling with the libellant without the knowledge of his proctors. *The Ontonagon*, 19 F. R. 800. In *The Jefferson Borden*, 6 Id. 301, it was held that jurisdiction was properly exercised by a United States commissioner. An attempted set-off of an indebtedness for a house was not



allowed in *The Two Brothers*, 4 F. R. 158. See *Smith v. The Joshua Levines*, Id. 846. As to who are "seamen" entitled to sue, see *The Ocean Spray*, 4 Sawyer, 105; *Covert v. The Brig Wexford*, 3 F. R. 577; *Moore v. Neafie*, Id. 650; *The Minna*, 11 Id. 759 and note; *The Ole Oleson*, 20 Id. 384; *The Modoc*, Id. 398; *The Wanderer*, Id. 655; *Thorson v. Peterson*, 14 Id. 742; *Boulton v. Moore*, Id. 922; *The Pacific*, 18 Id. 703; *Marsland v. The Yosemite*, Id. 331; *Black v. The Louisiana*, 2 Pet. Adm. 268. "The right of a seaman to his wages is perfect upon the completion of his service; and before the statute, if payment was refused, he could have instantly commenced a suit *in personam* against the owners or master, or *in rem* against the vessel or freight. The statute affects only one of these remedies, viz., against the vessel. It does not touch suits *in personam* or against the freight. By the statute, as a general rule, no proceedings can be had against the vessel until ten days after the right to wages has accrued. But there are three events in which such proceedings may be had within the ten days; viz., if a dispute has arisen, if the vessel has departed from her port of discharge, or if she is about to proceed to sea. In the last two cases the statute is inoperative, and the right to process is the same as if it had never been passed. The expiration of ten days, and a dispute having arisen, are by the act made equivalent to each other; and upon the happening of either, the new proceeding by summons to the master is authorized, but not required. The act is, in this respect, permissive, not imperative. The judge may order process against the vessel, without previous summons to the master. In the absence of the judge, the clerk may issue process according to rules prescribed, or instructions given by the judge." *The William Jarvis*, 1 Sprague, 485, 498. If the seaman is discharged before the delivery of the cargo, his right to sue *in personam* for his wages is perfect from the moment of his discharge. *Freeman v. Baker*, Blatch. & H. 372; *The Commerce*, 1 Sprague, 34. The remedies in the district courts are confined by the act of 20 July, 1790, to cases ordinarily belonging to admiralty jurisdiction. *The Thomas Jefferson*, 10 Wheat. 428. In this case it was held that the service must be essentially maritime. It is questionable whether a delay of ten days can be exacted where a seaman is absolutely discharged. Discharge terminates the contract and takes away his claim; and it would seem but a just reciprocity to hold that the ship's term of credit is expired, when by the act of the master the seaman can no longer charge her with wages. *The Cypress*, Blatch. & H. 83; *The Warrington*, Id. 335; *Collins v. Nickerson*, 1 Sprague, 126. Seamen are competent witnesses for each other. *The Cypress*, *supra*; *The Susan*, 3 Ware, 222; *The Cabot*, Abb. Adm. 150; *Walsh v. The Louisiana*, 4 F. R. 751. Where the voyage is completed or the seamen are discharged before that time, a stipulation in the articles that the seamen shall not in any case demand their wages until the expiration of a certain time is void. *The Cypress*, *supra*. Matter in bar may be set up in the answer, and be urged at the final hearing, although not presented on the preliminary hearing before the magistrate on the summons. That hearing is not designed to preclude the owner from interposing a substantial defence on the merits, whether set up on such hearing or not. The silence of the defendant is no implied waiver, nor is the decision of the magistrate, as to the sufficiency of the cause shown, conclusive. *The Warrington*, *supra*.

After a vessel is sold and the proceeds paid into the registry every person claiming a right, whether for wages on bottomry bonds, or as material-man, must make his claim then. All having liens or a right in the proceeds may intervene and make themselves parties to the cause, before or after the sale; and when parties, they are so not only for the purpose of enforcing their own rights, but of contesting the claims of others interfering with theirs. *The Phebe*, 3 Ware, 360. Where a minor has no parent or guardian to receive his wages, the contract being made with him, courts of admiralty will permit him to bring suit in his own name. *The David Faust*, 1 Ben. 183; see *Gifford v. Kollock*, 3 Ware, 45; *McGinnis v. The Grand Turk*, 2 Pittsb. 326; *Wicks v. Ellis*, Abb. Adm.



444; *Coffin v. Shaw*, 11 L. R. (N. S.) 463; *Loyrein v. Thompson*, 1 Sprague, 355; *Luscom v. Osgood*, Id. 82. The discharge of the seaman may be established circumstantially. *The David Faust*, 1 Ben. 183. A receipt from a seaman purporting to be "in full of all debts, dues, and demands" is not conclusive, as it may be shown that it was given under duress, fraud, or mistake. *Jackson v. White*, 1 Pet. Adm. 179; *Whitman v. Ship Neptune*, Id. 180. A dispute does not arise within the statute so as to authorize a mariner to sue before the ten days by the fact that the wages are demanded by him, and the owner refuses to pay until the ten days have expired. *The Commerce*, 1 Sprague, 34. The owner cannot make as a condition of payment that the mariner shall sign a receipt in full. Id. A certificate by a justice of the peace, or commissioner of the circuit court, must show on its face that the officer by whom issued had the power to act. It must therefore recite that the residence of the district judge is more than three miles from the place, or that he is absent from the place of his residence. *Kief v. Steamboat London*, Newb. 6; 6 McLean, 184. It is doubtful whether a district court has jurisdiction of an appeal from proceedings before a commissioner. *The Eagle*, Olc. 232. The fact that the master or owner defers beyond a reasonable time to unload the vessel may be regarded as equivalent to a discharge; but the burden to show a discharge before the unlading is upon the seamen, and the oath of a seaman is not sufficient to establish it. Id. That the provisions of this and § 4547 apply only to merchant ships and their masters and crews, see *The Grace Darling*, 2 Haskell, 278. See further on this section *The Rockie E. Yates*, Id. 430.

SECT. 4547. — See notes, § 4546. The fact that the master has executed a bill of sale of the vessel to the claimant does not render him an incompetent witness for the libellant in a suit *in rem* for wages. *The Trial*, Blatch. & H. 94. And in the absence of shipping articles, the testimony of the master is sufficient to establish the time of each seaman's service, and the amount of wages due. Id. It is sufficient to show a reasonable ground of belief that the vessel is about to proceed to sea within ten days. Id. See *The Jefferson Borden*, 6 F. R. 301, 304; *Olsen v. The Edwin Post*, Id. 314; *Smith v. Oakes*, 141 Mass. 451; *The Brig Osceola*, Olc. 450.

"*All the seamen . . . shall be joined as complainants.*" — *The Sloop Merchant*, Abb. Adm. 1; *Oliver v. Alexander*, 6 Pet. 143.

## CHAPTER IV.

### DISCHARGE.

SEE 18 St. 64, cited on p. 824, *ante*; also *Green v. Swift*, 14 F. R. 877.

SECT. 4549. — See notes, §§ 4504, 4580. See *Walsh v. The Louisiana*, 4 F. R. 751.

SECT. 4550. — See notes, §§ 4290, 4538, 4597. *The T. F. Whiton*, 10 Ben. 369; *The Mentor*, 4 Mason, 102. See *The Lilian M. Vigus*, 10 Ben. 385; *Ardrey v. Karthaus*, Taney, 379. In cases of the misconduct or negligence of the seamen, reasonable deductions have been allowed. *Bates v. Seabury*, 1 Sprague, 433; *Brown v. The Neptune*, Gilp. 89; *The Hudson*, 6 F. R. 830; *The Coldstream*, 4 Sawyer, 172. In many cases deductions have been disallowed. *Macpherson v. Blytheswood*, 1 Phila. 546; *Chatfield v. The Wolga*, 3 L. Repr. 387; *Wilson v. The Mary*, Gilp. 31; *Magee v. The Moss*, Id. 219; *Johnson v. The Coriolanus*, Crabbe, 239; *The Saratoga*, 2 Gall. 164; *Pitman v. Hooper*, 3 Sumner, 50; *The Lethe*, Bee, 423. See *Brice v. The Nancy*, Id. 429; *Hart v. The Littlejohn*, 1 Pet. Adm. 115; *Howland v. The Lavinia*, Id. 213; *Pedro v. Allen*, 1 Lowell, 435; *The Hudson*, Olc. 396. As to a minor, see *The Lucy Anne*, 3 Ware, 253. The provisions of this section do not apply to cases within the provisions of § 4604. *Stevenson v. Hare*, 2 Sawyer, 583.



SECT. 4552. — See notes, §§ 4504, 4506, 4583. In *Burton v. Frye*, 139 Mass. 131, it was held that a discharge, not purporting to be signed in the presence of a shipping commissioner, was not void on the face of the pleadings, and was admissible in evidence. The mutual release need not be made or authenticated under seal, and is conclusive if executed and attested as required, without fraud or coercion. *Rosenberg v. Doe*, 146 Mass. 191. This section "does not absolve the vessel from liability for the expenses of the seaman's medical treatment and cure for a hurt received prior to the discharge, nor does the act of June 26, 1884. This is the construction put by Judge Lowell on the British shipping act in the case of *The Magna Charta*, 2 Lowell, 136; and is the proper construction, I think, of our own statutes." *The W. L. White*, 25 F. R. 503.

## CHAPTER V.

### PROTECTION AND RELIEF.

SEE 18 St. 64, cited on p. 824, *ante*. The statute forbidding consular fees for services to seamen, &c., is given in note, § 1718. It was held in 1853 that expenditures for the ransom of the crew and passengers of a wrecked American vessel, held prisoners by the Indians of Queen Charlotte's Island, do not come within the scope of the appropriations for the relief of American seamen administered by the Secretary of State. 6 A. G. Op. 126.

SECT. 4554. — See *United States v. Hill*, 25 F. R. 375, 377.

SECT. 4556. — See *United States v. Givings*, 1 Sprague, 75; *The Hibernia*, Id. 78; *United States v. Ashton*, 2 Sumner, 13; *The William Harris*, 1 Ware, 367.

SECT. 4559. — See *United States v. Givings*, *supra*; *The Hibernia*, *supra*.

SECT. 4561. — By act of June 26, 1884, ch. 121, § 4 (23 St. 53), this section is amended so as to read as follows:—

"SEC. 4561. The inspectors in their report shall also state whether, in their opinion, the vessel was sent to sea unsuitably provided in any important or essential particular, by neglect or design, or through mistake or accident; and in case it was by neglect or design, and the consular officer approves of such finding, he shall discharge such of the crew as request it, and shall require the payment by the master of one month's wages for each seaman over and above the wages then due. But if, in the opinion of the inspectors, the defects or deficiencies found to exist have been the result of mistake or accident, and could not, in the exercise of ordinary care, have been known and provided against before the sailing of the vessel, and the master shall, in a reasonable time, remove or remedy the causes of complaint, then the crew shall remain and discharge their duty."

SECT. 4562. — See *Potter v. The Ocean Ins. Co.*, 3 Sumner, 27.

SECT. 4564. — In the act of 1790, a part of which forms this section, it was provided that in case of violation the master or owner was to pay "to each of the crew one day's wages beyond the wages agreed on, for every day they shall be so put to short allowance, to be recovered in the same manner as their stipulated wages." See now § 4568, to which the decisions here given also relate.

Where the articles mentioned can be procured, no equivalents can be substituted. But in ports where they cannot be obtained, the law admits equivalents of other good and wholesome food in place of that damaged or consumed. *Sundry Mariners v. The Washington*, 1 Pet. Adm. 219. After the requisite provisions are taken in, the master is the sole judge of their expenditure; and in case of a probably long voyage or accidental diminution in quantity, he may abridge the usual allowance, and mariners cannot complain where equivalents are substituted. Id. To entitle the crew to the remedy provided, the neglect or omission of the master to take on board the required provisions, and the short allowance



must be shown. *Ferrara v. The Talent*, Crabbe, 216; *The Elizabeth v. Rickers*, 2 Paine, 291; Blatch. & H. 195; *Piehl v. Balchen*, Olc. 24; *The John L. Diminick*, 3 Ware, 196; *The Childe Harold*, Olc. 275. "To subject the master or owners to the extra wages, the crew must be put upon short allowance, by which I should understand that there must be some order or command given to that effect, or some gross negligence in the master. An accidental or unintentional deficiency in weight would not subject the master or owner to the penalty." *The Elizabeth v. Rickers*, *supra*, 298. An exception will lie for the insufficiency of an answer not setting forth specifically whether the vessel shipped the statutory quantity and quality of provisions, where a libel claims extra wages. *Id.* The navy ration is the usual standard of full allowance; and five pounds a week to each man was held a short allowance. *The Mary Paulina*, 1 Sprague, 45; *The Mary*, *infra*. In *The Harriet Bee*, 80, the court "gave only one-third of the additional wages for a short allowance of one of the articles. No reasons are assigned, and the case is a solitary one. I am unable to follow that precedent. The statute is in the disjunctive, and in my opinion does not admit of such a construction, but gives one day's pay for a short allowance of any of the specified articles." *The Mary Paulina*, 1 Sprague, 45, 47; *Collins v. Wheeler*, *Id.* 188; *The Mary*, 1 Ware, 454, 459. It is no defence to a claim for double wages that flour was furnished as a substitute. It is important to have food that does not require cooking, especially in case of wreck or bad weather. *Foster v. Sampson*, 1 Sprague, 182. As to whether the fact that it is impracticable to procure the required provisions is a defence to a claim of double wages, Judge Sprague says, "The point has never been decided by the Supreme Court, or by any circuit court; and the only case in which the defence was sustained in the district courts, is that in *The Washington*, 1 Pet. Adm. 219; while in *The Harriet Bee*, 80, the defence was not sustained. In *The Mary*, 1 Ware, 459, on the other hand, the reasoning of the court sustains the decision in *Peters*." *Id.* 183.

An action for double wages was held not to lie because the crew were fed on unwholesome food. For such a wrong the seaman must resort to a special action for damages against the master. *The Childe Harold*, *supra*. It was held that a seaman shipping in a foreign port may maintain a suit for double wages. *The New Jersey*, 1 Pet. Adm. 223. The case of a Swedish vessel with an inadequate supply of provisions is treated in *The Amalia*, 2 Haskell, 406; 3 F. R. 652.

SECT. 4565. — See 18 St. 64, cited on p. 824, *ante*.

SECT. 4567. — See *Morris v. Cornell*, 1 Sprague, 62; *Knowlton v. Boss*, *Id.* 163; *Jordan v. Williams*, 1 Curtis, 69.

SECT. 4568. — See notes, §§ 978, 4564.

SECT. 4569. — The cited act was deemed to supersede § 8 of 1 St. 134 and 2 St. 330 2 Com. D. 2186. By act of June 26, 1884, ch. 121, § 11 (23 St. 56), it is provided —

"That every vessel mentioned in § 4569 of the Revised Statutes shall also be provided with a slop-chest, which shall contain a complement of clothing for the intended voyage for each seaman employed, including boots or shoes, hats or caps, under clothing and outer clothing, oiled clothing, and everything necessary for the wear of a seaman; also a full supply of tobacco and blankets. Any of the contents of the slop-chest shall be sold, from time to time, to any or every seaman applying therefor, for his own use, at a profit not exceeding ten per centum of the reasonable wholesale value of the same at the port at which the voyage commenced. And if any such vessel is not provided, before sailing, as herein required, the owner shall be liable to a penalty of not more than \$500. The provisions of this section shall not apply to vessels plying between the United States and the Dominion of Canada, Newfoundland, the Bermuda Islands, the Bahama Islands, the West Indies, Mexico and Central America."

By act of June 19, 1886, ch. 421, § 13 (24 St. 82), it is provided that the above § 11 "shall not be construed to apply to vessels engaged in the whaling or fishing business." See *The City of Alexandria*, 17 F. R. 390; *Peterson v. The Chandos*, 4 *Id.* 645; *Longstreet v. The R. R. Springer*, *Id.* 671, 672, and cases cited; *Harden v. Gordon*, 2 Mason,



541, 551; *Holmes v. Hutchinson*, Gilp. 447; *Freeman v. Baker*, Blatch. & H. 372; *The Grace Darling*, 2 Haskell, 278, 288; *The Centennial*, 10 F. R. 397.

SECT. 4573. — See note, §§ 4337; *Taber v. United States*, 1 Story, 1.

SECT. 4574. — This appears to have been intended to aid in enforcing the prohibition of St. March 3, 1813, ch. 42, the policy of which was to prevent the employment of foreigners as seamen on United States vessels, and which, superseding all the sections of the cited act of 1813, except § 3, was in part repealed by 13 St. 201. 2 Com. D. 2188. As to abolishing fees, see 24 St. 80, § 1. See also 7 A. G. Op. 730.

SECT. 4575. — See notes, §§ 4582, 4583. Amended by 19 St. 252, by striking out, in the second line of the second subdivision, the words "shipping commissioner or officer acting as such in," and inserting the words "collector of the customs of." The certificate of a consul of the United States in a foreign port, given under the act of July 20, 1840 (see §§ 4582, 4583), that the discharge of a seaman was granted upon his consent, is conclusive, unless the conduct of the consul was corrupt or fraudulent. *Lamb v. Briard*, Abb. Adm. 367. Erasures and interlineations in shipping articles must be of such a character as to affect the rights of seamen to subject the master to any penalty. *The Schooner Eagle*, Olc. 232. As to vessels in the coasting trade, see *The Richard Vaux*, 20 F. R. 654. "In *Hutchinson v. Coombs*, Ware, 65, it is laid down that the certificate as to the discharge of a seaman will not preclude the court from inquiring into the cause of his discharge, and awarding damages if his discharge was unjustifiable." *Campbell v. Steamer Uncle Sam*, McAll. 77, 80. See *The Atlantic*, Abb. Adm. 451; *Miner v. Harbeck*, Id. 546; *The Elvine*, 19 F. R. 528; *Snow v. Wope*, 2 Curtis, 301; 1 Sprague, 300.

SECT. 4576. — By act of June 26, 1884, ch. 121, § 20 (23 St. 58), it is provided —

"That every master of a vessel in the foreign trade may engage any seaman at any port out of the United States, in the manner provided by law, to serve for one or more round trips from and to the port of departure, or for a definite time, whatever the destination; and the master of a vessel clearing from a port of the United States with one or more seamen engaged in a foreign port as herein provided shall not be required to reship in a port of the United States the seamen so engaged, or to give bond, as required by § 4576 of the Revised Statutes, to produce said seamen before a boarding officer on the return of said vessel to the United States."

A bond neither referring to the statute nor stating who was the principal and who the surety was held good; and the declaration also, though it did not refer to the statute. *United States v. Hatch*, 1 Paine, 336. It has been held that the amount of the bond is intended as a forfeiture in case of breach, and not as a penalty to cover such damages as may be assessed. Id. The bond does not include a vessel sold in a foreign port, and which does not return to the United States; neither does it extend to cases where the seaman is lawfully separated from the ship without the fault of the master or owner. It applies to those cases only where the vessel returns; that is, to cases where the seaman continues subject to the lawful authority of the master, and it is in his power to bring him home. *Montell v. United States*, Taney, 24. See *United States v. Parsons*, 1 Lowell, 107; *The Grace Darling*, 2 Haskell, 278, 288; *Case of the Chinese Waiter*, 13 F. R. 289.

SECT. 4577. — See notes, §§ 1736, 4578 *et seq.*, 5363; Rev. Stats. § 1719. Foreigners are "mariners and seamen of the United States" within this section, while employed as seamen in the merchant ships of the United States. *Matthews v. Offley*, 3 Sumner, 115. See *United States v. Sharp*, Pet. C. C. 118, 121; *Kelly v. Otis*, 23 F. R. 903.

SECT. 4578. — See notes, §§ 4577, 4579 *et seq.* By act of June 26, 1884, ch. 121, § 9 (23 St. 55), this section is amended so as to read as follows: —

"SEC. 4578. All masters of vessels of the United States, and bound to some port of the same, are required to take such destitute seamen on board their vessels, at the request of consular officers, and to transport them to the port in the United States to which such vessel may be bound, on such terms, not exceeding ten dollars for each person for voyages of not more than thirty days, and not exceeding twenty-



dollars for each person for longer voyages, as may be agreed between the master and the consular officer; and said consular officer shall issue certificates for such transportation, which certificates shall be assignable for collection. If any such destitute seaman is so disabled or ill as to be unable to perform duty, the consular officer shall so certify in the certificate of transportation, and such additional compensation shall be paid as the First Comptroller of the Treasury shall deem proper. Every such master who refuses to receive and transport such seamen on the request or order of such consular officer shall be liable to the United States in a penalty of one hundred dollars for each seaman so refused. The certificate of any such consular officer, given under his hand and official seal, shall be presumptive evidence of such refusal in any court of law having jurisdiction for the recovery of the penalty. No master of any vessel shall, however, be obliged to take a greater number than one man to every one hundred tons burden of the vessel on any one voyage."

By act of June 19, 1886, ch. 421, § 18 (24 St. 83), the above is amended in the eighth line by inserting after the words "and the consular officer," the following: "when the transportation is by a sailing vessel; and the regular steerage-passenger rate, not to exceed two cents per mile, when the transportation is by steamer;" and by adding at the end the following: "or to take any seaman having a contagious disease." This act has been held not to apply to seamen or other persons accused of crime. 7 A. G. Op. 722. It is limited to vessels bound from the port where the request is made direct to some port of the United States. 4 A. G. Op. 185. It does not apply to seamen on vessels of war. 3 A. G. Op. 683, 685. An action for the penalty must be brought in the name of the United States, and not in that of the consul or vice consul. *Matthews v. Offley*, 3 Sumner, 115. If a seaman voluntarily leaves after being brought only half the way, the master is entitled to compensation for the distance he brought him only. 2 A. G. Op. 468. The consul is judge of the ship on which the seaman should be placed, and his certificate is *prima facie* evidence of the master's refusal; and a seaman deserting from a ship still in port may be destitute. *Matthews v. Offley*, *supra*.

SECT. 4579. — "First" here added in last line. 2 Com. D. 2192.

SECT. 4580. — See notes, §§ 1736, 4577, 4578, 4581 *et seq.* By act of June 26, 1884, ch. 121, § 2 (23 St. 54), this section is amended so as to read as follows:—

"SEC. 4580. Upon the application of the master of any vessel to a consular officer to discharge a seaman, or upon the application of any seaman for his own discharge, if it appears to such officer that said seaman has completed his shipping agreement, or is entitled to his discharge under any act of Congress or according to the general principles or usages of maritime law as recognized in the United States, such officer shall discharge said seaman, and require from the master of said vessel, before such discharge shall be made, payment of the wages which may then be due said seaman; but no payment of extra wages shall be required by any consular officer upon such discharge of any seaman except as provided in this act."

"The causes for which the consul may discharge on the application of the seaman are specified, but not in the case of the application by the master. In either case, before a discharge is made, the consul must require of the master payment of the wages then due the seaman; but, as I read the statute, the payment of extra wages is not required when a seaman is discharged for misconduct." The *T. F. Oakes*, 36 F. R. 442, 445. The causes for which a seaman may be discharged on the master's application are such as are sanctioned by "the principles or usages of maritime law, as recognized in the United States." *Id.*

SECT. 4581. — See notes, §§ 1736, 4577, 4578, 4580, 4582, 4583, 4584. By act of June 26, 1884, ch. 121, § 7 (23 St. 55), this section is amended so as to read as follows:—

"SEC. 4581. If any consular officer when discharging any seaman, shall neglect to require the payment of and collect the arrears of wages and extra wages required to be paid in the case of the discharge of any seaman, he shall be accountable to the United States to the full amount thereof. If any seaman, after his discharge, shall have incurred any expense for board or other necessities at the place of his



discharge, before shipping again, or for transportation to the United States, such expense shall be paid out of the arrears of wages and extra wages received by the consular officer, which shall be retained for that purpose and the balance only paid over to such seaman." [The W. L. White, 25 F. R. 503.]

By act of April 4, 1888, ch. 61, § 3 (25 St. 80), the above is amended by striking out all after the word "thereof," in the fifth line, and inserting in lieu thereof as follows : —

"If any seaman, after his discharge, shall have incurred any expense for board or other necessities, or for reasonable charges for medical care and nursing, at the place of his discharge, before shipping again, or for transportation to the United States, such expense shall be paid out of the arrears of wages and extra wages received by the consular officer, which shall be retained for that purpose, and the balance only paid over to such seaman; and if such arrears and extra wages are not sufficient to defray such expense, the deficiency shall be paid from the fund in the Treasury for the maintenance and transportation of destitute American seamen." [The W. L. White, *supra*.]

SECT. 4582. — See notes, §§ 4575, 4577, 4578, 4580, 4581, 4583, 4584. By act of June 26, 1884, ch. 121, § 5 (23 St. 54), this section is amended so as to read as follows : —

"SEC. 4582. Whenever a vessel of the United States is sold in a foreign country, and her company discharged, it shall be the duty of the master to produce to the consular officer the certified list of his ship's company, and also the shipping articles, and to pay to said consular officer for every seaman so discharged one month's wages over and above the wages which may then be due to such seaman; but in case the master of the vessel so sold shall, with the assent of said seaman, provide him with adequate employment on board some other vessel bound to the port at which he was originally shipped, or to such other port as may be agreed upon by him, then no payment of extra wages shall be required."

The following decisions were rendered under the old law, but many of the points are still applicable : —

Where, by the mutual consent of a seaman and the mate, the mate while in command assisted the seaman to leave the vessel and paid his fare on the railroad to the nearest hospital, it was held that the seaman was not guilty of desertion, because the mate was *pro hac vice* the master, and that the seaman was entitled to the extra wages. The Caroline E. Kelley, 2 Abb. U. S. 160; 7 Phila. 570. The words "foreign country" refer to a port or place abroad intermediate between the termini of the voyage. Pray's Case, 10 Ct. Cl. 453. If the three months' pay be not given to the consul it is recoverable by the seaman in his libel. Orne v. Townsend, 4 Mason, 541, 549; Emerson v. Howland, 1 Id. 45. If the seaman is named as an American citizen on the master's list of the crew, it is no objection to the recovery of the extra wages that his name is omitted as an American citizen in the list of the crew certified from the collector's office under § 4588. Orne v. Townsend, *supra*. The burden is on the master to show that the three months' extra wages have been paid. Id. A seaman in the whaling service discharged abroad may recover the three months' extra wages. Bates v. Seabury, Sprague, 433. This statute applies only to a voluntary sale and to a strictly voluntary discharge, and not to a sale or discharge rendered unavoidable by the perils of the seas. The Dawn, Daveis, 121; 1 Ware, 485; Pool v. Welsh, Gilpin, 193; 1 A. G. Op. 148; 2 Id. 418. Where the sale is rendered necessary by shipwreck or other casualty, it is doubtful whether the statute applies, but it does apply to a voluntary sale on account of the vessel's unseaworthiness rendered so by natural wear or by her imperfect condition when sent to sea. "There seems to be no ground for a distinction, so far as the mariner is concerned, between a sale for the purpose of positive profit and one for the purpose of avoiding a loss." Wells v. Meldrun, Blatch. & H. 342, 344. See Hoffman v. Yarrington, 1 Lowell, 168. The statute regards that part of the extra wages intended for the crew, as their wages, and the master is directly liable to them therefor, if he has not deposited it with the consul. Wells v. Meldrun, Blatch. & H. 342, criticising Ogden v. Orr, 12 Johns. 143. This act is silent as to seamen liable by their contract to be discharged in a foreign country, though mentioned in the act of 1840. "Taking the whole



law together, it seems reasonable to understand it as meaning that all those shall be brought home, who by their contract are entitled to be brought home, unless, etc. I cannot readily believe that the intent of the law is that the men who have freely, and for reasons satisfactory to themselves, agreed on a month's voyage, to end abroad, are to be paid three months' wages, and that the United States is to be paid for still another month unless the consul shall remit it." *United States v. Parsons*, 1 Lowell, 107, 109. When the facts are that a vessel needing repairs from a sea peril has been condemned, and the master has acted in good faith, and his conduct has been such as a prudent owner would have adopted in like circumstances had he been uninsured, the owner is not liable to extra wages upon selling the vessel, as the case comes within § 4583. *Hoffman v. Yarrington*, 1 Lowell, 168. Seamen of foreign birth in our vessels are within this section. *Pray's Case*, 10 Ct. Cl. 453. But it has been held that American seamen on foreign vessels must look to the laws of the country under whose flag they sail. 2 A. G. Op. 448. As to a case involving the maritime code of Sweden, see *The Adolph*, 7 F. R. 501. When the certified list of the crew does not designate their nationality, it is to be taken, as against the owners, that the seamen were American citizens, although some were foreigners. *Pray's Case*, *supra*. In this case it was held that according to the description of the voyage and the provisions in the articles as to discharge, Liverpool being an intermediate port in the voyage, a discharge there would not take the case out of the provisions of this section; and that though the seamen might waive their right to the payment of two months' wages, the United States would be entitled to the payment of the one month's wages. Other cases decided under the old statute are *Miner v. Harbeck*, Abb. Adm. 546; *Gove v. Judson*, 19 F. R. 523; *Boulton v. Moore*, 11 Biss. 500; 14 F. R. 922, 925; *Heynsohn v. Merriman*, 1 Id. 728; *The Wenonah*, 1 Haskell, 606; *Dustin v. Murray*, 5 Ben. 10; *Brown v. The Independence*, Crabbe, 54; *Henop v. Tucker*, 2 Paine, 151, 156; *The Saratoga*, 2 Gall. 164; *Wilson v. Borstel*, 73 Maine, 273; *Luscom v. Osgood*, 1 Sprague, 83; 11 A. G. Op. 458; 2 Id. 256; 1 Id. 593. See *The Zack Chandler*, 10 Biss. 372; 7 F. R. 684; *Worth v. The Lioness*, 3 Id. 922.

SECT. 4583. — See notes, §§ 4575, 4577 *et seq.*, 4582, 4584 *et seq.* By act of June 26, 1884, ch. 121, § 3 (23 St. 54), this section is amended so as to read as follows: —

"SEC. 4583. Whenever on the discharge of a seaman in a foreign country, on his complaint that the voyage is continued contrary to agreement, the consular officer shall be satisfied that such voyage has been designedly and unnecessarily prolonged in violation of the articles of shipment, or whenever a seaman is discharged by a consular officer in consequence of any hurt or injury received in the service of the vessel, such consular officer shall require the payment by the master of one month's wages for such seaman over and above the wages due at the time of discharge."

Where a seaman is hurt in the service of the ship, his right to recover the expenses of his cure from the ship accrues at once, and is not affected by his subsequent discharge, while sick ashore, under the above § 3, by a consul in a foreign port. Whether the discharge is valid, *quære*. *The W. L. White*, 25 F. R. 503. See further under the old statute, *The Wenonah*, 1 Haskell, 606; *Drew v. Pope*, 2 Sawyer, 72; *United States v. Parsons*, 1 Lowell, 107; 16 A. G. Op. 268; 1 Id. 148; *Gallagher v. Murray*, 10 Ben. 290; *The Atlantic*, Abb. Adm. 451; *Hoffman v. Yarrington*, 1 Lowell, 168.

SECT. 4584. — Repealed by act of June 26, 1884, ch. 121, § 8 (23 St. 55). See under the old statute, *The Hermon*, 1 Lowell, 515; 16 A. G. Op. 268. *Pray's Case*, 10 Ct. Cl. 453.

SECTS. 4585, 4586, 4587. — By act of June 26, 1884, ch. 121 § 15, these sections —

"and all other acts and parts of acts providing for the assessment and collection of a hospital tax for seamen are hereby repealed, and the expense of maintaining the Marine Hospital Service shall hereafter be borne by the United States out of the receipts for duties on tonnage provided for by this act; and so much thereof as may be necessary, is hereby appropriated for that purpose."



By act of March 3, 1875, ch. 156 (18 St. 485), ample provisions are made "to promote economy and efficiency in the marine-hospital service," parts of which are affected by the act of 1884. See notes, Title LIX. Old cases under the repealed statutes are *Reed v. Canfield*, 1 Sumner, 195, 200; *Buckley v. Brown*, 3 Wall. Jr. 199; 4 A. G. Op. 233; *Holt v. Cummings*, 102 Penn. St. 212; *Ryan v. Hook*, 34 Hun, 185, 190. It is stated in 2 Com. D. 2195, as to § 4587, that the cited provision of 1870 was deemed to supersede §§ 1, 2 of 1 St. 605; 5 St. 602, ch. 49; 13 St. 61, ch. 70.

SECT. 4588. — See notes, §§ 2174, 4582.

## CHAPTER VI.

### FEES OF SHIPPING COMMISSIONER.

SEE 18 St. 64, cited on p. 824, *ante*; also notes, pp. 824–827.

SECT. 4592. — See notes, §§ 4501, 4612. The proper construction of this and § 4594 is that the shipping commissioner is authorized to apply to the payment of necessary and proper rent, clerk hire, and other expenses, the fees received by him, and that such expenses are not to be paid out of the sum which the statute allows for his salary. *Re Shipping Commissioners, Port of New York*, 13 Blatch. 339.

SECT. 4593. — The *Grace Darling*, 2 Haskell, 278, 288.

SECT. 4594. — See notes just before § 4501; also note, § 4592.

## CHAPTER VII.

### OFFENCES AND PUNISHMENTS.

SEE 18 St. 64, cited on p. 824, *ante*.

SECT. 4596. — See notes, §§ 4546, 4547.

The cited act was deemed to supersede 1 St. 133, ch. 29, § 5. 2 Com. D. 2205. This section has much in common with the act of 1790, but there have been so many changes that the early cases cannot always be followed with safety.

*First and Second.* — Since the passage of 18 St. 64, this provision has no application to coasting vessels navigating the Pacific between San Francisco and San Diego. *United States v. Mason*, 34 F. R. 129; *United States v. Buckley*, 12 Sawyer, 508; 31 F. R. 804; *United States v. Bain*, 5 Id. 192. See *Scott v. Rose*, 2 Lowell, 381. To make out desertion there must generally be an intention to desert. *Olsen v. The Edwin Post*, 6 F. R. 314; *The Catawanteak*, 2 Ben. 189. See *The Galina*, 6 F. R. 927; *Piehl v. Balchen, Ole*. 24. It was held that § 5 of the act of July 20, 1790, did not repeal the maritime law of desertion. *The John Martin*, 2 Abb. (U. S.) 172, 178, and cases cited. See *The Merrimac*, 1 Ben. 490. Shipping articles are void so far as they provide for a forfeiture of wages in excess of that provided by statute. *The San Marcos*, 27 F. R. 567. Stipulations in shipping articles are further considered in *The Quintero*, 1 Lowell, 38; *Freeman v. Baker*, Blatch. & H. 372. See *The Gem*, 1 Lowell, 180. It is in the discretion of the court to determine the punishment for absence without leave and without sufficient excuse. *Brink v. Lyons*, 18 F. R. 605. This case was held to be one not of desertion under the maritime law, *i. e.*, leaving with the intention not to return, but an absence without sufficient excuse. The statute of 1790 was held not to apply to a tug plying between Lake Erie and Lake Huron, in *The John Martin*, *supra*. Desertion, to be followed by forfeiture of wages under the maritime or statute law, must be during the voyage. *Cloutman v. Tunison*, 1 Sumner, 373. See *Coffin v. Jenkins*, 3 Story, 113. As



to whether this section applies to seamen on foreign vessels, see 14 A. G. Op. 325. See also *United States v. McArdle*, *infra*. See further *The Ericson*, 3 Sawyer, 559; *Johnson v. Blanchard*, 7 F. R. 597; *The City of Mexico*, 28 Id. 207.

*Third.* — *Francis v. Bassett*, 1 Sumner, 16; *Cloutman v. Tunison*, *supra*.

*Fourth and Fifth.* — These provisions do not appear in the act of July 20, 1790, but there are many old decisions on disobedience, &c. Wages are forfeited for gross, and not for slight, faults. *The Mentor*, 4 Mason, 84; *Orne v. Townsend*, Id. 541; *Gladding v. Constant*, 1 Sprague, 73; *The Almatia*, Deady, 473. See *Benton v. Whitney*, Crabbe, 417; *Airey v. The Ann C. Pratt*, 1 Curtis, 395; *Thorne v. White*, 1 Pet. Adm. 168; *Wood v. The Nimrod*, Gilpin, 83; *Smith v. Treat*, 2 Ware, 266; *The Cornelia Amsden*, 5 Ben. 315. The deduction of a mate's wages for misconduct was ordered in *Humphreys v. The America*, Bee, 237; *Cloutman v. Tunison*, 1 Sumner, 373. Damages for the misconduct of a seaman can be recovered only when the direct result of his acts or omissions. *Macomber v. Thompson*, 1 Sumner, 384. A cook guilty of negligence, disobedience, &c., has no right to wages for the time put off duty therefor. *The Antioch*, 6 Sawyer, 328; 11 F. R. 165. Wages cannot be forfeited for misconduct on a past voyage. Hiring continuously by the month, upon river boats, is like hiring for separate sea voyages. *The Pioneer*, Deady, 72. "It is only where a mariner is incorrigibly disobedient, and his confinement, in consequence of his own dangerous character, is necessary to the safety of the ship, that a forfeiture of wages has also been imposed." *The Paul Revere*, 10 F. R. 156, 160, and cases cited. See *The Superior*, 22 Id. 927. The question of fines under the Merchant Shipping Act of Great Britain is considered in *The Alps*, 19 F. R. 139. In *Smith v. The J. C. King*, 3 Id. 302, it was held that a seaman refusing to work on Sunday was, under the circumstances, rightfully expelled from the vessel, and forfeited his wages for his disobedience. This section applies to seamen on foreign vessels in American waters. *United States v. McArdle*, 2 Sawyer, 367. See further *The Olive Chamberlain*, 1 Sprague, 9; *Hayes v. The J. J. Wickwire*, 7 Phila. 594; *The Wm. Cummings*, Id. 598; *The John Martin*, 1 Brown Adm. 149; *The Magnet*, Id. 547; *Marsland v. The Yosemite*, 18 F. R. 331.

*Sixth.* — See notes, § 5359.

*Seventh.* — See notes, § 5360.

*Eighth.* — See *Mason v. The Blaireau*, 2 Cranch, 240; *Mariners v. The Kensington*, 1 Pet. Adm. 239; *Alexander v. Galloway*, Abb. Adm. 261; *Joy v. Allen*, 2 Woodb. & M. 303; *Edwards v. Sherman*, Gilpin, 461. See *Anderson v. The Solon*, Crabbe, 17; *Parker v. The Calliope*, 2 Pet. Adm. 272; *Knap v. The Eliza*, 1 Id. 200. "Where the embezzlement has arisen from the fault, fraud, connivance, or negligence of any of the crew, they are bound to contribute to it, in proportion to their wages; where the embezzlement is fixed on an individual, he is *solely* responsible; where the embezzlement is clearly shown to have been made by the crew, but the particular offenders are unknown, and from the circumstances of the case strong presumptions of guilt apply to the whole crew, all must contribute; but where no fault, fraud, connivance, or negligence is proved against the crew, and no reasonable presumption is shown against their innocence, the loss must be borne exclusively by the owner or master. In no case are the innocent part of the crew to contribute for the misdemeanors of the guilty; and further, in a case of uncertainty, the burthen of the proof of innocence does not rest on the crew; but the guilt of the parties is to be established beyond all reasonable doubt, before the contribution can be demanded." *Spurr v. Pearson*, 1 Mason, 104, 115. But see *Sullivan v. Ingraham*, Bee, 182; *Crammer v. The Fair American*, 1 Pet. Adm. 242.

*Ninth.* — See notes, § 3082; *United States v. Claflin*, 13 Blatch. 178, 184; *Scott v. Russell*, Abb. Adm. 258; *Sheppard v. Taylor*, 5 Pet. 675; *The Langdon Cheves*, 2 Mason, 58; *The Mary*, 1 Sprague, 204.



SECT. 4597. — See notes, §§ 1624, 4290, 4538, 4547, 4596, 4598. See also Rev. Stats. §§ 4550, 4565. It is essential, to maintain a statute desertion, that there should be an entry in the log-book conforming to the requirements of the statute. The *Hercules*, 1 Sprague, 534; *Wood v. The Nimrod*, Gilpin, 83; *Magee v. The Moss*, Id. 219; *Brower v. The Maiden*, Id. 294; *Mary v. The Washington*, Crabbe, 204; *Cloutman v. Tunison*, 1 Sumner, 373. The act of 1790 required the entry to be made on the day of the desertion. See *Cloutman v. Tunison*, *supra*; *The Cadmus v. Matthews*, 2 Paine, 229; *The Phoebe v. Dignum*, 1 Wash. 48; *The Catawanteak*, 2 Ben. 189. And in *United States v. Brown*, 3 Sawyer, 602 (1876), it is said that it should be made as soon as possible after the occurrence, and read over to the seaman, &c. For the case of a British vessel, see *The Lilian M. Vigus*, 10 Ben. 385. Where desertion is according to the maritime law, an entry in the log under this section is not a condition of forfeiture of wages. *Welcome v. The Yosemite*, 18 F. R. 383. Where a seaman leaves a vessel without permission, it is at the option of the master to make the requisite entry in the log-book required by this section, or to have him committed to prison and detained until the vessel is ready to sail according to § 4598. *Brower v. The Maiden*, Gilpin, 294. An entry is *prima facie* evidence, and not conclusive of the fact it recites. *The Hercules*, *supra*; *Orne v. Townsend*, 4 Mason, 541; *The Rovena*, 1 Ware, 309. See further *Knagg v. Goldsmith*, Gilpin, 207; *Snell v. The Independence*, Id. 140, 144; *Douglass v. Eyre*, Id. 147, 153; *Gifford v. Kollock*, 3 Ware, 45; *The John Martin*, 2 Abb. (U. S.) 172; *The Alps*, 19 F. R. 139; 14 A. G. Op. 521.

SECT. 4598. — See notes, §§ 4520, 4521, 4596, 4597. If the agent of the master in shipping a crew signs the seaman's name to the articles as his agent, the seaman is not liable to arrest for desertion; but he is probably so liable if he becomes bound to perform any lawful voyage by a contract containing the particulars stated in § 4520. *Re George Bryant*, Deady, 118. A prisoner was discharged on the ground that this statute did not apply to foreign seamen on foreign ships. *Ex parte D'Oliveira*, 1 Gall. 474. See notes, §§ 4601, 4612. A seaman who is apprehended and detained in jail until his vessel is ready to sail does not forfeit his wages, but the cost of his commitment and support while imprisoned, as well as the wages paid for the person employed in his place while in jail, are to be deducted from his wages. *Brower v. The Maiden*, Gilpin, 294. See *Bray v. The Atalanta*, Bee, 48; *Turner's Case*, Ware, 77; 2 Wheel. Cr. Cas. 615.

SECT. 4599. — 14 A. G. Op. 520.

SECT. 4600. — By act of June 26, 1884, ch. 121, § 6 (23 St. 55), this section is amended so as to read as follows: —

"SECT. 4600. It shall be the duty of consular officers to reclaim deserters and discountenance insubordination by every means within their power, and where the local authorities can be usefully employed for that purpose, to lend their aid and use their exertions to that end in the most effectual manner. In all cases where deserters are apprehended the consular officer shall inquire into the facts; and if he is satisfied that the desertion was caused by unusual or cruel treatment, he shall discharge the seaman, and require the master of the vessel from which such seaman is discharged to pay one month's wages over and above the wages then due; and the officer discharging such seaman shall enter upon the crew-list and shipping articles the cause of discharge, and the particulars in which the cruelty or unusual treatment consisted, and the facts as to his discharge or re-engagement, as the case may be, and subscribe his name thereto officially." [Chester v. Benner, 2 Lowell, 76; Jordan v. Williams, 1 Curtis, 69; United States v. Parsons, 1 Lowell, 107; Johnson v. The Coriolanus, Crabbe, 239; Peters v. Martens, 2 Week. N. of Cas. 603; United States v. Lunt, 8 Law Rep. N. S. 683; Wilson v. The Mary, Gilpin, 31; The William Harris, 1 Ware, 367.]

SECT. 4601. — Amended by 18 St. 320 by striking out, in the fifth line, the word "persecuting," and inserting the word "prosecuting." This section is to be read with, and is limited by, § 4612. "Title LIII., Merchant Seamen," is not applicable to foreign vessels. *United States v. Minges*, 5 Hughes, 494; 16 F. R. 657. See note, § 5280.



SECT. 4604.—See Rev. Stats. § 4550. The cited section and § 52 of the same act were deemed to supersede 11 St. 62, ch. 127, § 25. 2 Com. D. 2209; 14 A. G. Op. 521.

SECT. 4605.—Amended by 19 St. 252, by striking out, in the fifth line, the word "seamen," and inserting the word "seaman."

SECT. 4606.—In *United States v. Anderson*, 10 Blatch. 226, the provisions of this section receive ample interpretation. It is held to be constitutional and to apply to foreign vessels.

SECT. 4609.—See note, § 4610. Under this section, no suit can be brought for a penalty for having received remuneration for providing employment to seamen on a foreign vessel. *United States v. Kellum*, 19 Blatch. 372; 7 F. R. 843.

SECT. 4610.—A civil suit under this section for the penalties imposed by § 4609 may be brought in the name of the United States. *United States v. Kellum*, *supra*. See 14 A. G. Op. 521.

SECT. 4611.—See notes, § 5347. The officers of a steamboat are liable for injuries caused by severely beating a deck-hand. *Riley v. Allen*, 23 F. R. 46. See *United States v. Trice*, 30 F. R. 490; also *Shorey v. Rennell*, 1 Sprague, 507; *Saunders v. Buckup*, Blatch. & H. 264; *United States v. Cutter*, 1 Curtis, 501, 509; *Forbes v. Parsons*, Crabbe, 283; *Schelter v. York*, Id. 449.

SECT. 4612.—See note, § 4601. By act of June 19, 1886, ch. 421, § 1 (24 St. 80), it is provided that there shall be no fees for "shipping or discharging of seamen, as provided by Title LIII. of the Revised Statutes and § 2 of this act." Said § 2 is as follows:—

"That shipping commissioners may ship and discharge crews for any vessel engaged in the coast-wise trade, or the trade between the United States and the Dominion of Canada, or Newfoundland, or the West Indies, or the Republic of Mexico, at the request of the master or owner of such vessel, the shipping and discharging fees in such cases to be one-half that prescribed by § 4612 of the Revised Statutes, for the purpose of determining the compensation of shipping commissioners." [*Ravenles v. United States*, 35 F. R. 917.]

This section applies only to merchant vessels. *The Grace Darling*, 2 Haskell, 278. See *The Carolina*, 14 F. R. 424; *The Montapedia*, Id. 427; *Smith v. Oakes*, 141 Mass. 451; *Re Shipping Commissioner*, 13 Blatch. 339.



## TITLE LIV.

## PRIZE.

SECT. 4613. — See notes, pp. 78–81, *ante*. Property captured on land by a United States naval force is not “maritime prize” (*Mrs. Alexander’s Cotton*, 2 Wall. 404; *United States v. Stevenson*, 3 Ben. 119; *The Nuestra Senora*, 108 U. S. 92); nor is a capture made on the Roanoke River 130 miles from its mouth (*The Cotton Plant*, 10 Wall. 577); nor is prize money, or bounty in lieu thereof, allowed by the laws of Congress where vessels of the enemy are captured or destroyed by the navy and army in co-operation. *The Siren*, 13 Wall. 389; *Porter v. United States*, 106 U. S. 607. Coin may be prize. *The Wando*, 1 Lowell, 18. So may cotton abandoned by the enemy or a blockade runner, and taken by a cruiser. *Bales of Cotton*, Id. 11. If the vessel is liable to confiscation, the cargo is presumed to be so also. *The Sally Magee*, 3 Wall. 451. Prize is not attachable at the suit of a private party. *The Nassau*, 4 Wall. 634. Persons found on the captured vessel, though subject to the court’s control for the purpose of examination, do not pass into judicial custody with the vessel and cargo. *The Salvor*, 4 Phila. 409. St. 1864 did not exhaust the subject of prize or no prize. There may still be captures which go to the United States only, and not to the captors; and there may be prize without captors. *The Siren*, 1 Lowell, 280. A statute creating a municipal forfeiture does not override or displace the law of prize. *The Sally*, 8 Cranch, 382; *The Hampton*, 5 Wall. 376. The capturing power has in general the exclusive cognizance of prize questions. *L’Invincible*, 1 Wheat. 238. Condemnations by prize courts, being final in actions between individuals and as to the condemned vessels, give to purchasers a good title against all the world, but they do not bind foreign nations or bar claims which are valid by international law. *Cushing v. United States*, 22 Ct. Cl. 1. A neutral power may inquire whether its neutrality has been violated. *The Estrella*, 4 Wheat. 298; *The Santissima Trinidad*, 7 Id. 283. To sustain a libel in prize, a state of war must exist; in a case of piracy, the pirate is presumed to have declared universal war. *The City of Mexico*, 28 F. R. 148; *The Ambrose Light*, 25 Id. 408; *The Nuestra Senora*, 4 Wheat. 497; *Prize Cases*, 2 Black, 635. Any measures which the commander of an armed vessel may take to ascertain the nationality of another vessel, beyond firing a blank shot, or in case of delay, a shot across the latter’s bows, is at his own peril. 9 A. G. Op. 455. Salvage may be given, in lieu of prize, to persons not of the Navy. *The Deer*, 1 Lowell, 95. Irregularities in prize cases may be readily corrected. *United States v. Bales of Cotton*, Woolw. 236, 245. The law of nations does not authorize the seizure of enemy’s property as prize of war on land. Such a seizure must be upheld by the municipal laws of the nation seeking to enforce the forfeiture. *United States v. Stevenson*, 3 Ben. 119.

SECT. 4618. — Usually a case in prize will not be heard on further proofs than such as come from the ship, unless upon this evidence the case is not sufficiently clear to warrant condemnation or restitution. *The Sir Wm. Peel*, 5 Wall. 517; *The Georgia*, 7 Id. 32; *The Dos Hermanos*, 2 Wheat. 76; *The Pizarro*, Id. 227; *The Amiable Isabella*, 6 Id. 1. In prize proceedings the burden of proof is on the vessel. *Hooper v. United States*, 22 Ct. Cl. 408. Cases of prize are usually heard, in the first instance, upon the papers found on board the vessel, and the examinations taken *in preparatorio*. *The Sally Magee*, 3 Wall. 451. The ship’s papers should be brought into court and verified, on oath, by the captors, and the examination of the captured crew should be taken upon the standing interrogatories, and not *viva voce* in open court. Nor should the captured crew be per-



mitted to be re-examined in court, for they are bound to declare the whole truth upon their first examination. *The Pizarro*, 2 Wheat. 227. Some act should be done showing an intention to seize and retain as prize in order to constitute a capture; but it is sufficient if such intention is fairly to be inferred from the conduct of the captor. *The Grotius*, 9 Cranch, 368.

Whenever a capture is made by a non-commissioned captor, the government may, after a decree of condemnation, and before the distribution of the prize proceeds, contest the rights of the captor, and the condemnation must be to the government. It rests on the claimant to prove that his interest is neutral, according to the rules of the prize courts, and if it is not established beyond a reasonable doubt, condemnation follows. The assertion of a false claim, in whole or in part, by an agent, or in connivance with the real owner, is a substantive cause of condemnation. *The Amiable Isabella*, 6 Wheat. 1. When a vessel is liable to confiscation, the first presumption is that the cargo is also, and ownership thus presumptively in the enemy is not disproved by a test affidavit couched in general terms of denial and unsupported by other affirmative evidence. The ownership of property belonging to the enemy cannot be changed while it is *in transitu*. The capture clothes the captors with all the rights of the owner which subsisted at the commencement of the voyage, and anything done thereafter designed to incumber the property, or change its ownership, is a nullity. *The Sally Magee*, 3 Wall. 451. The rule is that a libel in prize must allege generally the fact of capture as prize of war. It need not allege the particular cause for which the vessel has been seized. *The Andromeda*, 2 Wall. 481. The filing of the libel is not necessary to give jurisdiction to a court of admiralty over a vessel captured *de jure belli*. The fact of the capture gives such jurisdiction. Property arrested as prize is not attachable at the suit of private parties, and if they have any claims against it they must present them to the court of prize. *The Nassau*, 4 Wall. 634. The decree of an inferior court will not necessarily be reversed because in its discretion it has allowed an invocation to be made on the first or original hearing, such invocation not being regularly made on the first hearing, but only after a cause has been fully heard on the ship's documents and the preparatory proofs, and where suspicious circumstances appear therefrom. *The Springbok*, 5 Wall. 1. A mortgage on a vessel or cargo held by an innocent party is not a *ius in re suo* as to be protected by the law of nations in a prize court. It is a mere lien, and simply a security for the debt for which it is given. *The Hampton*, 5 Wall. 374. Where no case of prize was made out by the evidence, but there were other suspicious circumstances showing a *prima facie* case of violation of the navigation laws, and probably of the revenue laws also, the court held that the proper practice was to dismiss the libel, and to remand the case to the court below for an amendment of the libel, or for such other proceedings as the government might, under all the circumstances, see fit to adopt. *The Watchful* 6 Wall. 91. Where both parties have taken further proofs without objection, the inference is that there must have been an order for the same, or else that the depositions were taken by mutual consent, and the court of appeal will not entertain a motion that all the depositions, except those *in preparatorio*, should be stricken out or disregarded, because it does not appear that any order had been granted on behalf of either party to take further proofs. *The Georgia*, 7 Wall. 32.

The word "distribution" refers to two things: first, a division of the prize money between two or more vessels making or aiding in the capture, or between the capturing vessel or vessels and the United States; second, a division among the fleet officers and the officers and crew of a capturing vessel of the prize money awarded to her by judicial decree. The former must be decreed by a prize court; the latter by the Treasury and Navy Departments. *Swan v. United States*, 19 Ct. Cl. 51. Demands against property captured as prize of war can be adjudged only in a prize court. *The Nassau*, 4 Wall. 634; *The Andromeda*, 2 Id. 481.



SECT. 4620. — Repealed by 19 St. 252.

SECT. 4622. — Under the act of March 25, 1862 (12 St. 374), it was held that where the prize commissioners certified to the circuit court that a prize steamer had arrived in the district, and was delivered into their hands, there was sufficient evidence before the court that the vessel was claimed as prize of war, and was in the jurisdiction of a prize court. *The Nassau*, 4 Wall. 634.

SECT. 4624. — 16 A. G. Op. 340.

SECT. 4630. — The vessels making the capture may include not only those doing damage by their fire, but also those which are near at hand, and by diverting the enemy's fire, &c., hasten the surrender. *The Atlanta*, 3 Wall. 425; *The Selma*, 1 Lowell, 30; 1 A. G. Op. 594; 11 Id. 9, 147. Neither the act of July 13, 1861, providing for the forfeiture of vessels and cargoes in certain cases, nor the act of March 3, 1863, to protect the liens upon vessels in certain cases, refers to captures *jure belli*; and neither affects the law of prize. "The case of *The Sally*, 8 Cranch, 382, is a direct decision of this court, that a statute creating a municipal forfeiture does not override or displace the law of prize." *The Hampton*, 5 Wall. 372, 376. No title can be derived but from the prize acts, and seizures made *jure belli* by non-commissioned captors are made for the government. The non-commissioned captor can proceed in a prize court only as for salvage, the amount of which lies in the discretion of the court, and unless there is a very clear case of mistake in the exercise of this discretion, the appellate court will not interfere. *The Dos Hermanos*, 10 Wheat. 306.

SECT. 4631. — 14 A. G. Op. 150, 524; 11 Id. 326, 519. By St. June 8, 1874, ch. 256 (18 St. 63), repealing all acts inconsistent therewith, par. 1, 2 of this section are to apply to commanders of divisions and fleet-captains —

"from April, 1861 (the commencement of the late war), and the shares shall be paid in the manner as provided for division-commanders in said par. 2, said payments to made out of the naval pension fund."

In the re-enactment of the fourth rule, the words "commander of a single vessel" are here substituted for "commander of a single ship." *United States v. Steever*, 113 U. S. 753. The law regulating the distribution of prize-money among naval captors is a conditional grant by Congress, which becomes absolute as soon as the conditions are fulfilled. 11 A. G. Op. 94, 102, 147, 148. Apart from such express grant, the proceeds of property captured as prize of war belong exclusively to the government. *The Merrimac*, Blatch. Pr. Cas. 584. A torpedo steam launch is a "ship" within the meaning of this act, and under the last clause of rule 5, prize money is to be distributed among the subordinate officers and crew of a ship according to their pay at the time of the capture, unaffected by subsequent promotion as of that time. *United States v. Steever*, *supra*; 14 A. G. Op. 150, 365; 15 Id. 64; *Swan v. United States*, 19 Ct. Cl. 51. An officer absent on leave is not entitled to share in prizes captured during his absence. 11 A. G. Op. 327. The rights of individual captors become fixed at the moment of capture. The promotion of an officer after capture and before distribution, though his commission takes effect from the date of capture, does not affect his share of the prize money. *Swan v. United States*, *supra*. Where a captured vessel, which was of superior force to either of two vessels she proceeded to attack, but of inferior force to the two combined, fired on one, but was forced to surrender by the destructive fire of the other, at the second shot, the capturing force was held to be of superior strength, as both vessels must be counted, and consequently that they were entitled to only one half the prize money. *The Atlanta*, 3 Wall. 425.

SECT. 4632. — An armed merchant-vessel which is not in the service of the United States, and has no commission from the government, is not entitled to share in the proceeds of a prize, although she is present at the capture and co-operates therein. *The Merrimac*, Blatch. Pr. Cas. 584.



SECT. 4639. — 15 A. G. Op. 388. The United States district courts cannot make the expenses incident to the sale of prize property a charge upon the fund for defraying expenses of suits in which the United States is a party, under this provision, if there was a prize fund upon which to charge the expenses. *Root v. United States*, 9 Ct. Cl. 211. Such courts take cognizance of questions of prize by virtue of their general jurisdiction. *The Amy Warwick*, 2 Sprague, 123; 1 A. G. Op. 85; *The Siren*, 7 Wall. 152. Prize courts properly deny damages or costs where there has been probable cause for seizure, which exists where the circumstances warrant suspicion, but not condemnation. *The Thompson*, 3 Wall. 155; *The Amelia*, 1 Cranch, 1; 4 Dall. 34; *The George*, 1 Mason, 24. But if the capture is made without probable cause, the captor, even though in command of a United States war vessel, is liable to make restitution in the full value of the property injured or destroyed, although the vessel is afterwards taken from him by superior force. *The Charming Betsy*, 2 Cranch, 64; *Maley v. Shattuck*, 3 Id. 458; *The Resolution*, 2 Dall. 1; *Hollingsworth v. The Betsy*, 2 Pet. Adm. 330; *The Grand Sachem*, 3 Dall. 333; *The Anna Maria*, 2 Wheat. 327. An order of restitution proves neutrality, not lack of probable cause. *Jennings v. Carson*, 4 Cranch, 2. A non-commissioned captor can proceed only in the Prize Court as for salvage, the amount of which is discretionary and reviewable by the appellate court. *The Dos Hermanos*, 10 Wheat. 306; *The Aigburth*, Blatch. Pr. Cas. 635. The Executive cannot revise the judgments of prize courts. 11 A. G. Op. 117, 445. But it may disavow the capture, and thereafter the courts cannot condemn the vessel as prize. *The Florida*, 101 U. S. 37.

SECT. 4640. — A prize cause is finally disposed of when the captured property is adjudged to be, or not to be lawful prize; for that is the judgment on the merits, and then the rights of the parties are fixed, and nothing remains to be done but the application of the judgment. *Root v. United States*, 9 Ct. Cl. 211.

SECT. 4641. — 15 A. G. Op. 576. The distribution here contemplated is that between vessels, or between a vessel or vessels and the United States. They confer no right on the court to decree that the residue be distributed among individuals. *Swan v. United States*, 19 Ct. Cl. 51, 67.

SECT. 4646. — In *The Hattie*, Blatch. Pr. Cas. 595, a charge by the prize commissioner in his bill of costs of one per cent custody fee on the proceeds of the vessel and cargo was disallowed as exceeding the maximum fixed by statute.

SECT. 4647. — See note, § 833.

SECT. 4652. — Cases of recapture are cases of prize. Salvage is an incident to the question of prize, and American property recaptured may be restored on payment of salvage. *The Adeline*, 9 Cranch, 244; *The Star*, 3 Wheat. 78; *The Ann Green*, 1 Gall. 274, 289. By the general maritime law a sentence of condemnation completely extinguishes the title of the original owner, and where property was recaptured after a sentence of condemnation had been passed upon it, the original owner was held not entitled to restitution on the payment of salvage. *The Star*, *supra*.



## TITLE LV.

## LIGHTS AND BUOYS.

SECT. 4653. — See note, § 4675.

SECTS. 4654, 4655. — Substituted for § 9 of the cited act. 2 Com. D. 2237.

SECT. 4658. — See note, § 4675. 19 St. 252 changes "fo" to "of" in the seventh line. 22 St. 310, 608, provides —

"That it shall be the duty of the Light-House Board to apply the money herein appropriated, other than for surveys, as far as can be without detriment to the interests of the government, by contract. Where work cannot be done, or materials purchased, by contract, without injury to the public interests, it may be prosecuted by hired labor and materials purchased in open market."

St. Aug. 7, 1882, ch. 433 (22 St. 309), provides —

"That all parties owning, occupying, or operating bridges over any navigable river shall maintain at their own expense, from sunset to sunrise, throughout the year, such lights on their bridges as may be required by the Light-House Board for the security of navigation: and in addition thereto all persons owning, occupying, or operating any bridge over any navigable river shall, in any event, maintain all lights on their bridge that may be necessary for the security of navigation."

SECT. 4660. — 16 A. G. Op. 372.

SECT. 4661. — This includes only structures of a fixed and permanent character. 16 A. G. Op. 328. By 18 St. 371, ch. 130, par. 8, the Light-House Board is authorized to lease grounds for light-house service at the mouth of the Saginaw River in Michigan. 20 St. 206, ch. 359, par. 4, authorizes the Light-House Board to lease land for a small pier-head light at Portage Lake Ship Canal, Lake Superior, provided that Rev. Stats. §§ 355, 4661, shall not be applicable to this structure so far as the title to the site and cession of jurisdiction are involved. 16 A. G. Op. 369. Other special provisions are made by 23 St. 197; 24 St. 15, 19, 142, 149, 159; 25 St. 105, 137, 138, 352, 499, 508, 511, 570, 614, 657. 23 St. 200, 487, and 25 St. 512, 946, authorize the Light-House Board —

"to lease the necessary ground for all such lights and beacons as are used to point out changeable channels, and which in consequence cannot be made permanent."

SECTS. 4662, 4669. — These are substituted for the acts cited in the margin. 2 Com. D. 2239, 2242.

SECT. 4663. — The clause from "light-ship" to and including "by law," following "light-house" in the second line, is new; and in next to the last line the words "cessions of" are substituted for "State." The section is generalized from the cited acts making appropriations for light-houses at designated points. 2 Com. D. 2239.

SECT. 4667. — Generalized from the cited appropriation act. 2 Com. D. 2241.

SECT. 4670. — Amended by St. July 26, 1886, ch. 779 (24 St. 148), to read as follows: —

"The Light-House Board shall arrange the ocean, gulf, lake, and river coasts of the United States into light-house districts, not exceeding 16 in number. That any law or regulation prohibiting the employment in the light-houses of the United States of persons of more than 45 years of age be and the same is hereby repealed."

SECT. 4672. — Collectors of customs, when acting as superintendents and disbursing agents for light-houses, may receive commissions on their disbursements. 4 A. G. Op. 272.



They are also entitled, if the compensation does not exceed \$3000 a year, to their compensation for services as such disbursing agents, the amount, not exceeding \$400 per year, to be determined by the Secretary of the Treasury. 15 A. G. Op. 348.

SECT. 4675. — 18 St. 18 reserves from sale the site of the old light-station at Nayatt Point. St. June 23, 1874, ch. 455 (18 St. 217), provides —

“That the Secretary of the Treasury shall have power to order the sale at auction, after due public notice, of any real estate or other property pertaining to the Light-House Establishment, no longer required for light-house purposes; the proceeds of such sales, after the payment therefrom of the expenses of making the same, to be deposited and covered into the Treasury as miscellaneous receipts, as now provided by law in like cases. . . . That whenever it may become necessary, in the adjustment of boundary lines or in the opening or changing of necessary roadways affecting lands belonging to the United States and used for the purposes of the light-house establishments at Staten Island, New York, and at the Highlands of Neversink, New Jersey, or any part thereof, the Secretary of the Treasury is hereby authorized to execute for such purposes touching the property above referred to, or any part thereof, the necessary conveyances and assurances, and to receive, in consideration thereof, such other conveyances or assurances of adjoining lands, or of lands in the immediate vicinity, or other consideration, as may be agreed upon. . . . The jurisdiction of the Light-House Board is hereby extended over the Mississippi, Ohio, and Missouri Rivers, for the establishment of such beacon-lights, day-beacons, and buoys as may be necessary for the use of vessels navigating those streams; and for this purpose the said board is hereby required to divide the designated rivers into one or two additional light-house districts, to be in all respects similar to the already existing light-house districts; and is hereby authorized to lease the necessary ground for all such lights and beacons as are used to point out changeable channels, and which in consequence cannot be made permanent.”

SECT. 4677. — The cited provision was that “the Secretary of the Treasury shall authorize the Light-House Board to properly mark,” &c. 2 Com. D. 2244. See note, § 4261.

SECT. 4680. — “Interested” is here substituted for “engaged” in the cited act. The acts, 1 St. 53; 5 St. 185, 292, 762; 9 St. 627, were omitted in the Revision as having been substantially superseded or impliedly repealed by later legislation, especially St. 1852. 2 Com. D. 2245.



## TITLE LVI.

## THE COAST SURVEY.

SECT. 4683. — 3 A. G. Op. 479. St. Aug. 4, 1886, ch. 902 (24 St. 228; see also 25 St. 947), in providing for the expenses of survey of Atlantic, Gulf, and Pacific coasts and rivers, contains the proviso —

“That no advance of money to chiefs of field parties under this appropriation shall be made unless to a commissioned officer or to a civilian officer who shall give bond in such sum as the Secretary of the Treasury may direct.”

The same act (Id. 230; see also Id. 515) provides that no new appointments shall be made to the force of field officers until the whole number of assistants, sub-assistants, and aids shall be reduced to 52. The same act (Id. 233; see also Id. 518) provides —

“That no part of the money herein appropriated for the Coast and Geodetic Survey shall be available for allowance to civilian or other officers for subsistence while on duty in the office at Washington, or to officers of the Navy attached to the Survey; nor shall there hereafter be made any allowance for subsistence to officers of the Navy attached to the Coast and Geodetic Survey.”

SECTS. 4684, 4688. — The additional allowances for subsistence provided for by § 4688 are not within the prohibition of the final clause of this section. 15 A. G. Op. 283. By St. July 7, 1884, ch. 334 (23 St. 239), the act of 21 St. 150, relating to pensions —

“shall be construed as having given to the United States Commissioner of Fish and Fisheries, to July 1, 1884, but no longer, the same authority in regard to allowances for subsistence to officers and men of the Navy serving in the operations of the United States Commissioner of Fish and Fisheries as is given to the Secretary of the Treasury in regard to service of officers and men of the Navy in the Coast Survey by § 4638.”

SECT. 4691. — By 20 St. 377, ch. 182, § 1, senators, representatives, and delegates to the House of Representatives are each entitled to not more than ten charts published by the Coast Survey for each regular session of Congress. St. June 20, 1878, ch. 359, § 1 (20 St. 206), provides —

“That the charts published by the Coast Survey shall be sold at the office at Washington at the price of the printing and paper thereof, and elsewhere at the same price with the average cost of delivery added thereto; and hereafter there shall be no free distribution of such charts except to the departments of the United States and to the several States and officers of the United States requiring them for public use, in accordance with the act of June 3, 1844.”

St. March 2, 1889, ch. 411 (25 St. 952), provides —

“That no part of the money herein appropriated for the Coast and Geodetic Survey shall be available for allowance to civilian or other officers for subsistence while on duty in the office at Washington, or to officers of the Navy attached to the Survey; nor shall there hereafter be made any allowance for subsistence to officers of the Navy attached to the Coast and Geodetic Survey, except that when officers are detailed to do work away from their vessel under circumstances involving them in extra expenditure, the Superintendent may allow to any such officer subsistence at a rate not exceeding one dollar per day for the period actually covered by such duty away from such vessel.”



## TITLE LVII.

## PENSIONS.

As to pension to widow or children of deceased members of life-saving service, see notes, §§ 4243, 4244. As to jurisdiction and powers of the Commissioner of Pensions, see note, § 471. A digest of the laws relating to pensions and bounty-lands, &c., was published in 1885.

SECT. 4694. — See § 4700.

SECT. 4695. — See note, § 4702. St. March 3, 1877, ch. 121 (19 St. 403), enacts —

“That from and after the passage of this act, the pension for total disability of passed assistant engineers, assistant engineers, and cadet engineers in the naval service, respectively, shall be the same as the pensions allowed to officers of the line in the naval service with whom they have relative rank, and that all acts or parts of acts inconsistent herewith be, and are hereby, repealed.”

By St. June 18, 1878, ch. 268 (20 St. 166), pensions granted to lieutenant-commanders in the Navy for disability, or on account of their death, are made the same as those for lieutenants-commanding.

SECT. 4698. — See note, § 4787. It is provided by St. June 18, 1874, ch. 298 (18 St. 78), that, after June 4, 1874, —

“all persons who, while in the military or naval service of the United States, and in the line of duty, shall have been so permanently and totally disabled as to require the regular personal aid and attendance of another person, by the loss of the sight of both eyes, or by the loss of the sight of one eye, the sight of the other having been previously lost, or by the loss of both hands, or by the loss of both feet, or by any other injury resulting in total and permanent helplessness, shall be entitled to a pension of \$30 per month;” in lieu of the former pension of \$31.25 per month.

St. June 18, 1874, ch. 299 (18 St. 78), provides that, from June 4, 1874, —

“all persons who are now entitled to pensions under existing laws and who have lost either an arm at or above the elbow, or a leg at or above the knee, shall be rated in the second class, and shall receive \$24 per month: *Provided*, That no artificial limbs, or commutation therefor, shall be furnished to such persons as shall be entitled to pensions under this act.”

St. Feb. 28, 1877, ch. 73 (19 St. 264), provides —

“That all persons who, while in the military or naval service of the United States, and in the line of duty, shall have lost one hand and one foot, or been totally and permanently disabled in both, shall be entitled to a pension for each of such disabilities, and at such a rate as is provided for by the provisions of the existing laws for each disability: *Provided*, That this act shall not be so construed as to reduce pensions in any case.”

St. Aug. 27, 1888, ch. 913 (25 St. 449), provides —

“That from and after the passage of this act all persons on the pension-rolls of the United States, or who may hereafter be thereon, drawing pensions on account of loss of hearing, shall be entitled to receive, in lieu of the amount now paid in case of such disability, the sum of \$30 in cases of total deafness, and such proportion thereof in cases of partial deafness as the Secretary of the Interior may deem equitable; the amount paid to be determined by the degree of disability existing in each case.”



St. Feb. 12, 1889, ch. 132 (25 St. 659), provides —

“That from and after the passage of this act all persons who, in the military or naval service of the United States and in the line of duty, have lost both hands, shall be entitled to a pension of \$100 per month.”

St. June 17, 1878, ch. 261 (20 St. 144), increases the pension of —

“all soldiers and sailors who have lost either both their hands, or both their feet, or the sight of both eyes in the service of the United States, to \$72 per month.”

This act, according to St. March 3, 1879, ch. 200 (20 St. 484), is to —

“be so construed as to include all soldiers and sailors who have become totally blind from causes occurring in the service of the United States.”

St. March 3, 1879, ch. 198 (20 St. 483), gives to —

“all pensioners now on the pension-rolls, or who may hereafter be placed thereon, for amputation of either leg at the hip-joint, a pension at the rate of \$37.50 per month,” from the date of the approval of the act.

St. June 16, 1880, ch. 236 (21 St. 281), provides —

“That all soldiers and sailors who are now receiving a pension of \$50 per month, under the provisions of St. June 18, 1874, ch. 298, noted *supra*, shall receive, in lieu of all pensions now paid them by the Government of the United States, and there shall be paid them in the same manner as pensions are now paid to such persons, the sum of \$72 per month;” the increase to date from June 17, 1878.

This act, being in terms limited to those who *at the time of its enactment* were receiving a pension of \$50 a month under the act of 1874, its benefits cannot be extended to those who may *thereafter* become entitled to receive \$50 a month under the act of 1874. 16 A. G. Op. 594. St. March 3, 1883, ch. 91 (22 St. 453), provides —

“That from and after the passage of this act all persons on the pension-roll, and all persons hereafter granted a pension, who, while in the military or naval service of the United States, and in the line of duty, shall have lost one hand or one foot, or been totally or permanently disabled in the same, or otherwise so disabled as to render their incapacity to perform manual labor equivalent to the loss of a hand or a foot, shall receive a pension of \$24 per month; that all persons now on the pension-roll, and all persons hereafter granted a pension, who in like manner shall have lost either an arm at or above the elbow, or a leg at or above the knee, or shall have been otherwise so disabled as to be incapacitated for performing any manual labor, but not so much as to require regular personal aid and attendance, shall receive a pension of \$30 per month: *Provided*, That nothing contained in this act shall be construed to repeal Rev. Stats. § 4699, or to change the rate of \$18 per month therein mentioned to be proportionately divided for any degree of disability established for which § 4695 makes no provision.”

By St. March 3, 1885, ch. 352 (23 St. 437), it is provided —

“That all soldiers and sailors of the United States who have had an arm taken off at the shoulder-joint, caused by injuries received in the service of their country while in the line of duty, and who are now receiving pensions, shall have their pensions increased to the same amount that the law now gives to soldiers and sailors who have lost a leg at the hip-joint;” (see St. March 3, 1879, ch. 198, noted *supra*;) the act to apply to all thereafter placed in the pension-roll.

St. Aug. 4, 1886, ch. 899 (24 St. 220), still further increasing the pensions of the above described classes, with some others, reads as follows: —

“That from and after the passage of this act, all persons on the pension-rolls, and all persons hereafter granted a pension, who, while in the military or naval service of the United States and in line of duty, shall have lost one hand or one foot, or been totally disabled in the same, shall receive a pension of \$30 a month; that all persons now on the pension-rolls, and all persons hereafter granted a pension, who in like manner shall have lost either an arm at or above the elbow, or a leg at or above the knee, or been totally disabled in the same, shall receive a pension of \$36 per month; and that all persons now on the pension-rolls, and all persons, hereafter granted a pension who in like manner shall have lost either an



arm at the shoulder-joint or a leg at the hip-joint, or so near the joint as to prevent the use of an artificial limb, shall receive a pension at the rate of \$45 per month: *Provided*, That nothing contained in this act shall be construed to repeal § 4699 of the Revised Statutes of the United States, or to change the rate of \$18 per month therein mentioned to be proportionately divided for any degree of disability established for which § 4695 makes no provision."

SECT. 4698½. — "Specific disabilities" are those specified in the statutes, — such as the loss of a hand, foot, or eye. Injuries requiring medical examination to ascertain and declare their nature and extent, and as to the effect of which there is room for difference of opinion, are not "specific" disabilities. 16 A. G. Op. 335.

SECT. 4702. — *State v. Schmitt*, 9 Atl. Rep. 776. Amended by St. Aug. 7, 1882, ch. 438 (22 St. 345), by adding the following: —

"Except when such widow has continued to draw the pension-money after her remarriage, in contravention of law, and such child or children have resided with and been supported by her, their pension will commence at the date to which the widow was last paid.

"SEC. 2. That marriages, except such as are mentioned in Rev. Stats. § 4705, shall be proven in pension cases to be legal marriages according to the law of the place where the parties resided at the time of marriage or at the time when the right to pension accrued; and the open and notorious adulterous cohabitation of a widow who is a pensioner shall operate to terminate her pension from the commencement of such cohabitation."

St. March 19, 1886, ch. 22 (24 St. 5), provides —

"That from and after the passage of this act the rate of pension for widows, minor children, and dependent relatives now on the pension-roll, or hereafter to be placed on the pension-roll, and entitled to receive a less rate than hereinafter provided, shall be \$12 per month; and nothing herein shall be construed to affect the existing allowance of \$2 per month for each child under the age of 16 years: *Provided*, That this act shall apply only to widows who were married to the deceased soldier or sailor prior to its passage, and to those who may hereafter marry prior to or during the service of the soldier or sailor. And all acts or parts of acts inconsistent with the provisions of this act are hereby repealed.

"SEC. 2. That no claim agent or attorney shall be recognized in the adjudication of claims under this act, nor shall any such person be entitled to receive any compensation whatever for services or pretended services in making applications thereunder."

The widow is entitled only to the pension that the husband "would have been entitled to had he been totally disabled," although he may have received more, for permanent specific disability. *Burnett v. United States*, 116 U. S. 158; 20 Ct. Cl. 190. The word "children" (in certain earlier statutes) construed to include grandchildren of a deceased pensioner, who are held entitled, *per stirpes*, to a distributive share of the pension. *Walton v. Cotton*, 19 How. 355.

SECT. 4705. — The words "and Indian" in the first line were here added in behalf of widows of three loyal regiments of Cherokees and Creeks; and the words "or, if otherwise, to date of death," in the tenth line, were inserted as requisite in order to cover the continuance of cohabitation after leaving the service. The last twenty-nine words of this section were also added by the Revision. 2 Com. D. 2264.

The distinction made by statute between colored and other soldiers in pension cases, in regard to proof of marriage, extends only to the marriage of the soldier, and does not affect that of his parents or other relatives. 16 A. G. Op. 630. Sect. 4705 recognized the validity of marriages, especially among colored people, formed by agreement only, when immediately followed by cohabitation and sanctioned by State law. *United States v. Route*, 33 F. R. 246. A deserted wife who re-marries, thinking her first husband dead, and continues the new relation after discovering her husband to be alive, is precluded from claiming a pension, her husband having meanwhile entered and died in the service of the United States. *United States v. Hays*, 20 F. R. 710.

SECT. 4707. — The words "in whole or in part, at the date of his death," in the eighth and ninth lines, were here added to fix the time when dependence existed. 2 Com. D. 2265.



SECT. 4708. — The words "dependent sister" in the first line were here added. 2 Com. D. 2266.

SECT. 4709. — Repealed by St. March 3, 1879, ch. 187, § 3 (20 St. 469), cited below. St. Jan. 25, 1879, ch. 23 (20 St. 265), provides —

"That all pensions which have been granted under the general laws regulating pensions, or may hereafter be granted, in consequence of death from a cause which originated in the United States service during the continuance of the late war of the rebellion, or in consequence of wounds, injuries, or disease received or contracted in said service during said war of the rebellion, shall commence from the date of the death or discharge from said service of the person on whose account the claim has been or shall hereafter be granted, or from the termination of the right of the party having prior title to such pension: *Provided*, The rate of pension for the intervening time for which arrears of pension are hereby granted shall be the same per month for which the pension was originally granted. SEC. 2. That the Commissioner of Pensions is hereby authorized and directed to adopt such rules and regulations for the payment of the arrears of pensions hereby granted as will be necessary to cause to be paid to such pensioners, or, if the pensioners shall have died, to the person or persons entitled to the same, all such arrears of pension as the pensioner may be, or would have been, entitled to under this act."

This act was amended and construed by St. March 3, 1879, ch. 187 (20 St. 469), as follows: —

"That the rate at which the arrears of invalid pensions shall be allowed and computed in the cases which have been or shall hereafter be allowed, shall be graded according to the degree of the pensioner's disability from time to time, and the provisions of the pension laws in force over the period for which the arrears shall be computed. That § 1 of the act of Jan. 25, 1879, granting arrears of pensions, shall be construed to extend to and include pensions on account of soldiers who were enlisted or drafted for the service in the war of the rebellion, but died or incurred disability from a cause originating after the cessation of hostilities, and before being mustered out: *Provided*, That in no case shall arrears of pensions be allowed and paid from a time prior to the date of actual disability. SEC. 2. All pensions which have been, or which may hereafter be, granted in consequence of death occurring from a cause which originated in the service since March 4, 1861, or in consequence of wounds or injuries received or disease contracted since that date, shall commence from the death or discharge of the person on whose account the claim has been or is hereafter granted if the disability occurred prior to discharge, and if such disability occurred after the discharge then from the date of actual disability or from the termination of the right of party having prior title to such pension: *Provided*, The application for such pension has been or is hereafter filed with the Commissioner of Pensions prior to July 1, 1880, otherwise the pension shall commence from the date of filing the application; but the limitation herein prescribed shall not apply to claims by or in behalf of insane persons and children under 16 years of age."

In 16 A. G. Op. 639, § 2 of this act was construed unfavorably to the claim of a widow pensioner for arrears of pension from date of her husband's discharge, he never having applied for a pension, and she having already obtained a pension from the date of his death, in 1878.

SECT. 4710. — The pension appropriation act of June 7, 1888, ch. 369 (25 St. 173; see Id. 922), provides —

"*Provided*, That the appropriation aforesaid for Navy pensions shall be paid from the income of the Navy pension fund, so far as the same may be sufficient for that purpose: *And provided further*, That all pensions which have been, or which may hereafter be, granted under the general laws regulating pensions to widows in consequence of death occurring from a cause which originated in the service since March 4, 1861, shall commence from the date of death of the husband: *And provided further*, That the amount expended under each of the above items shall be accounted for separately: *And provided further*, That all United States officers now authorized to administer oaths are hereby required and directed to administer any and all oaths required to be made by pensioners and their witnesses, in the execution of their vouchers for their pensions free of charge.

"For fees and expenses of examining surgeons for services rendered within the fiscal year 1889, \$1,000,000. And each member of each examining board shall, as now authorized by law, receive the sum of \$2 for the examination of each applicant whenever five or a less number shall be examined on any one day, and \$1 for the examination of each additional applicant on such day: *Provided*, That if twenty



or more applicants appear on one day, no fewer than twenty shall, if practicable, be examined on said day, and that if fewer examinations be then made, twenty or more having appeared, then there shall be paid for the first examinations made on the next examination day the fee of one dollar only until twenty examinations shall have been made. For clerk hire, \$178,000: *Provided*, That the amount of clerk-hire for each agency shall be apportioned as nearly as practicable in proportion to the number of pensioners paid at each agency. . . . And the Secretary of the Treasury, where practicable, shall cause suitable rooms to be set apart in the public buildings under his control in cities where pension agencies are located, which shall be acceptable to the Secretary of the Interior, for the use and occupancy of the said agencies respectively."

SECT. 4712. — St. June 9, 1880, ch. 166 (21 St. 170), provides that this section, and § 3 of St. July 25, 1866, ch. 235 (14 St. 230), and § 13 of St. July 27, 1868, ch. 264 (15 St. 235), —

"shall not operate to reduce the rate of any pension which had actually been allowed to the commissioned, non-commissioned, or petty officers of the Navy or their widows or minor children, prior to July 25, 1866;" and that such pensions as have already been so reduced shall be restored to the rate originally granted and allowed, to take effect from the date of such reduction.

SECT. 4714. — See note, § 4748.

SECT. 4715. — See note, § 4720.

SECT. 4716. — See note, § 4736. By St. March 3, 1877, ch. 120 (19 St. 403), this section —

"shall not be construed to apply to such persons as afterward voluntarily enlisted in the army of the United States, and who, while in such service, incurred disability from a wound or injury received or disease contracted in the line of duty."

24 St. 371, ch. 70, granting pensions to the soldiers and sailors of the Mexican War, &c., repeals this section so far as it relates thereto or to pensioners thereunder.

SECT. 4717. — Repealed by St. Jan. 25, 1879, ch. 23, § 3 (20 St. 265).

SECT. 4718. — St. June 3, 1884, ch. 63, §§ 2, 3 (23 St. 35), provides —

"That the heirs or legal representatives of any officer whose muster into the service has been or shall be amended" thereby "shall be entitled to receive the arrears of pay due such officer, and the pension, if any, authorized by law, for the grade into which such officer is mustered under the provisions of" said act; all claims under the act to be barred after three years.

The words "pensioner," and "persons entitled to a pension," in this section, include a widow pensioner. 15 A. G. Op. 591. The widow of a soldier who was not a pensioner when he died and who had not applied for a pension is not entitled to arrears of pension from the date of his discharge, under St. 1879, chs. 25, 187, although she obtained a pension running from the date of his death. 16 A. G. Op. 639. The limitation of the legal fee in pension cases (see note, § 4785), and the penalty provided by Rev. Stats. § 5485, do not apply to a claim under this section for reimbursement for expenses incurred. *United States v. Nicewonger*, 20 F. R. 438. The pension due to a widow under St. July 4, 1836, and St. March 3, 1837, and disposed of by her by will, becomes a part of her estate, and goes to her executor, and not to her children, although the certificate was issued after her decease. *Foot v. Knowles*, 4 Met. 386. *Comp. Slade v. Slade*, 11 Cush. 466; *Garland v. Thompson*, 29 N. H. 396. The pension due at the death of a widow pensioner under act of June 19, 1840, goes to her children, and not to her creditors, although payable to the executor or administrator. *Shirley v. Walker*, 31 Maine, 541; *Fogg v. Perkins*, 19 N. H. 101. The provision that the "accrued pension shall not be considered as a part of the assets of the estate," was held to apply to the later act of Jan. 25, 1879 (see note, § 4709), providing for "arrears of pension." The issuing of a certificate for arrears of pension does not create a debt against the government which survives to the administrator. *Donnelly v. United States*, 17 Ct. Cl. 105. Under an apparent misapprehension of the



meaning of the term "accrued pension," it has been held that the executor of a deceased widow pensioner cannot be compelled to apply unexpended pension money, left by her, to the payment of her debts, she leaving children under sixteen years of age surviving her. *Hodge v. Leaning*, 2 Dem. 553.

SECT. 4720. — This was a re-enactment, with modifications, which seemed necessary to reconcile the provisions of 15 St. 237, ch. 264, § 15, and 16 St. 191, ch. 213, § 1. 2 Com. D. 2271. St. June 6, 1874, ch. 219 (18 St. 61), enacts —

"That all persons entitled to pensions under special acts fixing the rate of such pensions, and now receiving or entitled to receive a less pension than that allowed by the general pension laws under like circumstances, are, in lieu of their present rate of pension, hereby declared to be entitled to the benefits and subject to the limitations of St. March 3, 1873 (now included in Rev. Stats. §§ 4692-4791), and that this act go into effect from and after its passage: *Provided*, That this act shall not be construed to reduce any pension granted by special act."

St. July 25, 1882, ch. 349, § 5 (22 St. 176), provides —

"That no person who is now receiving, or shall hereafter receive a pension under a special act, shall be entitled to receive in addition thereto a pension under the general law, unless the special act expressly states that the pension granted thereby is in addition to the pension which said person is entitled to receive under the general law."

Payment of double pension was refused in *United States v. Teller*, 107 U. S. 64.

SECT. 4724. — St. March 1, 1879, ch. 124 (20 St. 327), provides, that certain pensioners, deprived of their pensions by 13 St. 499, by reason of their being in the civil service, shall be paid the pensions withheld, for and during the period from March 3, 1865, to June 6, 1866.

SECT. 4725. — For construction of § 2 of St. Feb. 3, 1853, providing that widows of soldiers of the Revolutionary war, married subsequently to January, 1800, shall be entitled to a pension "in the same manner" as those who were married before that date, see *United States v. Alexander*, 12 Wall. 177, reversing s. c. 4 Ct. Cl. 218.

SECT. 4728. — See note, § 4695; 25 St. 922.

SECT. 4730. — See 24 St. 371, noted *ante*, on § 4716. St. Feb. 19, 1879, ch. 90 (20 St. 316), directs the Secretary of the Treasury —

"Out of any moneys in the Treasury not otherwise appropriated, to pay to the officers and soldiers 'engaged in the military service of the United States in the war with Mexico, and who served out the time of their engagement or were honorably discharged,' the three months' extra pay provided for by the act of July 19, 1848, and the limitations contained in said act, in all cases, upon the presentation of satisfactory evidence that said extra compensation has not been previously received: *Provided*, That the provisions of this act shall include also the officers, petty-officers, seamen, and marines of the U. S. Navy, the Revenue Marine Service and the officers and soldiers of the United States Army employed in the prosecution of said war."

The act of 1848, referred to above, contains the following language:—

"SEC. 5. And first to the widows, second to the children, third to the parents, and fourth to the brothers and sisters of such who have been killed in battle, or who died in service, or who, having been honorably discharged, have since died, or may hereafter die, without receiving the three months' pay herein provided for . . . ;" and limits the provision thereby made, "to those who have been in actual service during the war."

The foregoing acts were fully considered and construed in *Emory v. United States*, 19 Ct. Cl. 254, affirmed in 112 U. S. 510. The right of each beneficiary to the allowance granted by foregoing acts must be deemed to terminate on the death of such beneficiary, and not thereafter to become part of the estate of the deceased. 16 A. G. Op. 409.

SECT. 4736. — The law granting pensions to the soldiers and sailors of the war of 1812 and their widows was amended by 20 St. 27. The *service of 14 days* must have been ren-



dered previously to the ratification of the treaty of peace between the United States and Great Britain. 16 A. G. Op. 134.

SECT. 4739. — The authority given to the Secretary to strike names from the pension roll extends to all pensioners, and may be exercised upon the evidence of an *ex parte* report of special agents. *Harrison v. United States*, 20 Ct. Cl. 122, citing *United States v. Moore*, 95 U. S. 763; *United States v. Pugh*, 99 Id. 265; *Hahn v. United States*, 107 Id. 402; *Brown v. United States*, 113 Id. 568. The latter clause of this section includes all pensioners, notwithstanding the first part of the section relates wholly to soldiers of the war of 1812. *Harrison v. United States*, 20 Ct. Cl. 122.

SECT. 4744. — St. March 3, 1875, ch. 130 (18 St. 374), provides that the additional compensation authorized by this section —

“shall be the actual and necessary expenses of transportation, and a per diem allowance in lieu of subsistence, not exceeding \$4 per diem.”

This limitation was made \$3 by St. July 7, 1884, ch. 331 (23 St. 187), and later acts.

This section was amended by St. July 25, 1882, ch. 349 (22 St. 175) — which act is a revision of the section and may be taken as a legislative construction of it (*Harrison v. United States*, 20 Ct. Cl. 122) — to read: —

“SEC. 4744. The Commissioner of Pensions is authorized to detail from time to time clerks or persons employed in his office to make special examinations into the merits of such pension or bounty land claims, whether pending or adjudicated, as he may deem proper, and to aid in the prosecution of any party appearing on such examinations to be guilty of fraud, either in the presentation or in procuring the allowance of such claims; and any person so detailed shall have power to administer oaths and take affidavits and depositions in the course of such examinations, and to orally examine witnesses, and may employ a stenographer, when deemed necessary by the Commissioner of Pensions, in important cases, such stenographer to be paid by such clerk or person, and the amount so paid to be allowed in his accounts. SEC. 3. That in addition to the authority conferred by Rev. Stats. § 184, any judge or clerk of any court of the United States in any State, District, or Territory shall have power, upon the application of the Commissioner of Pensions, to issue a subpoena for a witness, being within the jurisdiction of such court, to appear, at a time and place in the subpoena stated, before any officer authorized to take depositions to be used in the courts of the United States, or before any officer, clerk, or person from the Pension Bureau designated or detailed to investigate or examine into the merits of any pension claim and authorized by law to administer oaths and take affidavits in such investigation or examination, there to give full and true answers to such written interrogatories and cross interrogatories as may be propounded, or to be orally examined and cross-examined upon the subject of such claim; and witnesses subpoenaed pursuant to this and the preceding section shall be allowed the same compensation as is allowed witnesses in the courts of the United States, and paid in the same manner.”

SECT. 4745. — See *Powell v. Jennings*, 3 Jones (N. C.) L. 547. Amended by St. Feb. 28, 1883, ch. 58 (22 St. 432), to read as follows: —

“Any pledge, mortgage, sale, assignment, or transfer of any right, claim, or interest in any pension which has been, or may hereafter be, granted, shall be void and of no effect, and any person who shall pledge, or receive as a pledge, mortgage, sale, assignment, or transfer of any right, claim, or interest in any pension, or pension certificate, which has been, or may hereafter be granted or issued, or who shall hold the same as collateral security for any debt, or promise, or upon any pretext of such security, or promise, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not exceeding \$100 and the costs of the prosecution; and any person who shall retain the certificate of a pensioner and refuse to surrender the same upon the demand of the Commissioner of Pensions, or a United States pension agent, or any other person, authorized by the Commissioner of Pensions, or the pensioner, to receive the same shall be guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not exceeding \$100 and the costs of the prosecution.”

A verbal promise by a pension claimant to pay a debt out of his pension money is not a “pledge,” under this section (*Crane v. Linneus*, 77 Maine, 59): nor is a gift, by the pensioner to his wife, of a check received in settlement of a pension, such a transfer as this



section declares void, although the money be deemed still "in course of transmission," and so exempt from execution under Rev. Stats. § 4747. *Farmer v. Turner*, 64 Iowa, 691. For a case where a pledge of certificate by a widow pensioner was held void, see *Payne v. Woodhull*, 6 Duer, 169. For a case where the agreement was held not to be a "transfer," within the meaning of an earlier law, see *Jenkins v. Hooker*, 19 Barb. 435.

SECT. 4746. — See note, § 819. This act repealed all former ones on the subject of pension affidavits. 9 Crim. Law Mag. 707. It is not necessary that the indictment should charge the act to have been done "feloniously," or with "felonious intent." *United States v. Staats*, 8 How. 41. Prosecutions under this section must be by indictment, and not by information. *United States v. Tod*, 25 F. R. 815.

SECT. 4747. — Pension money is not exempt, as being "in course of transmission," when the pensioner deposits the same to his credit in a bank (*Jardain v. Fairton Ass.*, 44 N. J. L. 376; *Martin v. Hurlburt*, 60 Vt. 364; *Cranz v. White*, 27 Kan. 319; *Webb v. Holt*, 57 Iowa, 712); or where the pension money is actually in the hands of the pensioner (*Triplett v. Graham*, 58 Iowa, 135; *Robin v. Walker*, 82 Ky. 60; *Friend v. Garcelon*, 77 Maine, 25; *Crane v. Linneus*, Id. 59; *Rozelle v. Rhodes*, 116 Penn. St. 129; 9 Atl. Rep. 160); or where the attorney, with the consent of the pensioner, deposited the money to the credit of the pensioner's wife. *Spelman v. Aldrich*, 126 Mass. 113. But under N. Y. Code, § 1393, a deposit of pension money was held exempt (*Burgett v. Fancher*, 35 Hun, 647), even though bearing interest (*Stockwell v. Malone Bank*, 36 Hun, 583); and land held for the wife of a pensioner, bought with the proceeds of pension drafts, was held not liable for the payment of judgments against the pensioner. *Hissen v. Johnson*, 27 W. Va. 644. See also *Re Winans*, 5 Dem. (N. Y.) 138; *Hayward v. Clark*, 50 Vt. 612; *Folschow v. Werner*, 51 Wis. 85. The question whether a pension is exempt from the payment of the debts of a decedent must be determined by the law in force where the pensioner died. *Baugh v. Barrett*, 69 Iowa, 497.

SECT. 4748. — Under this provision a regulation is proper directing such officers as justices of the peace to administer oaths to evidence of pension-claims. *United States v. Boggs*, 31 F. R. 337.

SECT. 4751. — See p. 560, *ante*. Modified by St. April 30, 1878, ch. 76 (20 St. 46), which provides —

"that all moneys heretofore, and that shall hereafter be, collected for depredations upon the public lands, shall be covered into the Treasury of the United States as other moneys received from the sale of public lands."

The entire section is repealed, so far as it relates to California, Oregon, Nevada, and Washington Territory, by St. June 3, 1878, ch. 151, §§ 4, 5 (20 St. 89).

The authority of the Secretary, under this section, to mitigate certain fines, penalties, and forfeitures, may be exercised by him as well where the proceedings have not, as where they have been, instituted with his knowledge and by his direction. 15 A. G. Op. 436.

SECT. 4756. — Amended by St. Dec. 23, 1886, ch. 9 (24 St. 353), by inserting "or any appointed petty officer, or both" after "person" in the third line. The jurisdiction of the Secretary of the Navy, under this section, is final and exclusive. *Davidson v. United States*, 21 Ct. Cl. 298.

SECT. 4757. — Amended by the same act (24 St. 353), by inserting the same quoted words after "man" in the second line.

SECT. 4758. — The legislation relating to the Privateer-pension fund began and ended with the war of 1812. Its provisions were continued as useful in a future war with a commercial power. 2 Com. D. 2281. The duties of a head of a department are not ordinarily ministerial, and a mandamus will not lie to compel such officers to perform them. It will not lie to compel the Secretary of the Navy to pay money out of the pension fund



where his discretion may be exercised. *Decatur v. Paulding*, 14 Pet. 497; *United States v. Black*, 128 U. S. 40; see note, § 158.

SECT. 4765. — The pension appropriation act of March 1, 1889, ch. 332 (25 St. 782), provides —

*“Provided further, That a check or checks drawn by a pension agent in payment of pension due, and mailed by him to the address of the pensioner, shall constitute payment within the meaning of Rev. Stats. § 4765, in the event of the death of a pensioner subsequent to the mailing and before the receipt of said check; and the amount which may have accrued on the pension of any pensioner subsequent to the last quarterly payment on account thereof and prior to the death of such pensioner shall in the case of a husband be paid to his widow, or if there be no widow to his surviving minor children or the guardian thereof, and in the case of a widow to her minor children: Provided further, That hereafter whenever a pension certificate shall have been issued and the pensioner mentioned therein dies before payment shall have been made, leaving no widow and no surviving minor children, the accrued pension due on said certificate to the date of the death of such pensioner may in the discretion of the Secretary of the Interior be paid to the legal representatives of said pensioner: And provided further, That hereafter all United States officers now authorized to administer oaths are hereby required and directed to administer any and all oaths required to be made by pensioners and their witnesses in the execution of their vouchers for their pensions free of charge.”*

SECT. 4766. — See note, § 4785; and as to pensions of inmates of Navy Hospital, Rev. Stats. § 4813; of Soldiers' Home, § 4820; of National Home, § 4832. See also §§ 5435, 5436. This section was amended by St. Aug. 8, 1882, ch. 469 (22 St. 373), to read as follows: —

*“Hereafter no pension shall be paid to any person other than the pensioner entitled thereto, nor otherwise than according to the provisions of this title; and no warrant, power of attorney, or other paper executed or purporting to be executed by any pensioner to any attorney, claim agent, broker, or other person shall be recognized by any agent for the payment of pensions, nor shall any pension be paid thereon; but the payment to persons laboring under legal disabilities may be made to the guardians of such persons in the manner herein prescribed, and pensions payable to persons in foreign countries may be made according to the provisions of existing laws: Provided, That in case of an insane invalid pensioner having no guardian, but having a wife or children dependent upon him (the wife being a woman of good character), the Commissioner of Pensions is hereby authorized, in his discretion, to cause the pension to be paid to the wife, upon her properly-executed voucher, or in case there is no wife, to the guardian of the children, upon the properly-executed voucher of such guardian, and in like manner to cause the pension of invalid pensioners who are or may hereafter be imprisoned as punishment for offenses against the laws to be paid while so imprisoned to their wives or the guardians of their children. And pensions to Indian pensioners residing in the Indian Territory may be paid in person by the pension agent, upon a suitable voucher, at some convenient point in said Territory, which, together with the form and manner of identification of the pensioners, may be prescribed by the Secretary of the Interior; such payments to be made in standard silver, at least once in each current year. And payments in person shall be made to the pensioner, in cash, by the pension agent whenever in the discretion of the Commissioner of Pensions such personal payment shall be by him deemed necessary or proper to secure to the pensioner his rights; and the necessary and actual expenses of such pension agent in making such payments shall be paid by the Secretary of the Interior upon properly-executed vouchers, out of the contingent fund appropriated for the use of the Pension-Office. The Commissioner of Pensions may, when in his judgment it shall be deemed necessary or proper, visit in person, for the purpose of examination and inspection, or may send any one or more of the officers of his bureau for that purpose, any of the pension agencies or medical examining boards or surgeons; and the necessary and actual expenses of such visits shall be paid by the Secretary of the Interior, upon properly-executed vouchers, out of the contingent fund of said bureau.”*

The violation of the provisions of this section does not give the pensioner a right of action on the agent's bond; nor is the agent personally liable to the pensioner if the latter assented to the unlawful act. *Hughes v. Cotton*, 13 Bush, 596.

SECT. 4768. — See note, § 4785. Amended by St. Feb. 27, 1877, ch. 69 (19 St. 252), by substituting in the second line “pensions” for “pension.” This certificate appears to be *prima facie* evidence of the facts certified. *Alexander's Case*, 4 Ct. Cl. 218; *United*



*States v. Scott*, 25 F. R. 473. The attorney's charge, if beyond \$10, is against public policy, and the pensioner may recover the excess as money received for his use. *United States v. Moyerss*, 15 F. R. 411; *Smart v. White*, 73 Maine, 332; *Hall v. Kimmer*, 61 Mich. 269; *Ladd v. Barton*, 6 Atl. Rep. 483.

SECT. 4769. — See note, § 4785.

SECT. 4770. — Stricken out by St. Feb. 27, 1877, ch. 69 (19 St. 240). See § 3646.

SECTS. 4771-4773. — See §§ 4775, 4776. Repealed by St. June 21, 1879, ch. 34, § 3 (21 St. 23), which provides —

“That the Commissioner of Pensions shall have the same power as heretofore to order special examinations, whenever, in his judgment, the same may be necessary, and to increase or reduce the pension according to right and justice; but in no case shall a pension be withdrawn or reduced except upon notice to the pensioner and a hearing upon sworn testimony, except as to the certificate of the examining surgeon.”

SECTS. 4774-4777. — Fee of examining-surgeon limited by St. June 14, 1878, ch. 188 (20 St. 112), to —

“\$1 for each examination of pensioner, as provided by law, except when the examination is made by a board of surgeons, in which case the fees now allowed by law shall be paid.”

Later appropriating statutes contain similar provisos.

St. July 25, 1882, ch. 349, § 4 (22 St. 175), provides, —

“SEC. 4. That the Commissioner of Pensions is hereby authorized to appoint surgeons who, under his control and direction shall make such examination of pensioners and claimants for pension or increased pension as he shall require; and he shall organize boards of surgeons, to consist of three members each, at such points in each State as he shall deem necessary, and all examinations, so far as practicable, shall be made by the boards, and no examination shall be made by one surgeon excepting under such circumstances as make it impracticable for a claimant to present himself before a board: *Provided*, That the Commissioner may, when in his opinion the exigencies of the service require it, organize a board of three surgeons who, under his direction, shall review the work of any regularly-appointed board or surgeon: *Provided further*, That all examinations shall be thorough and searching, and the certificate contain a full description of the physical condition of the claimant at the time, which shall include all the physical and rational signs and a statement of all structural changes. The fee for each examination, and satisfactory certificate thereof, shall be \$2 to each member when made by a board, and \$2 when made by one surgeon: *Provided*, That when a claimant is so disabled as not to be able to present himself to a board of surgeons for examination, the Commissioner may order a surgeon to make the examination at the claimant's residence; and the fee for such examination shall be \$2, in addition to the payment of the actual traveling expenses of the surgeon: *Provided further*, That no fee shall be allowed or paid to any member of such board of examining surgeons who does not actually participate in such examination and sign the certificate thereof. The Commissioner may, when in his judgment the degree of disability cannot be determined truthfully or satisfactorily excepting by expert examination, employ an expert, not a regularly appointed surgeon, to make the examination; and the fee for such examination shall be \$5: *Provided*, That the fee for an expert examination shall not be paid to any regularly-appointed examining surgeon. The fee for the examination of claimants who reside out of the United States shall not exceed \$10, which shall be paid, upon the presentation of satisfactory vouchers, out of the appropriation for the payment of the examining surgeons, and through the United States consulate nearest to the claimant's place of residence.”

St. March 3, 1885, ch. 340 (23 St. 362; see also 24 St. 122, 440), provides for fees of examining-surgeons as follows: —

“That each member of each examining board shall, as now authorized by law, receive the sum of \$2 for the examination of each applicant whenever five or a less number shall be examined on any one day, and \$1 for the examination of each additional applicant on such day: *Provided*, That if twenty or more applicants appear on one day, no fewer than twenty shall, if practicable, be examined on said day, and that if fewer examinations be then made, twenty or more having appeared, then there shall be paid for the first examinations made on the next examination day the fee of \$1 only until twenty examinations shall have been made: *Provided*, That all applicants for pensions shall be presumed to have had no disability at the time of enlistment; but such presumption may be rebutted.”



Civil surgeons, appointed under § 4777, are not officers of the United States. (See Rev. Stats. § 5481.) *United States v. Germaine*, 99 U. S. 508.

SECT. 4778. — As to agents, see 15 A. G. Op. 247; 14 Id. 147. Amended by St. March 8, 1878, ch. 25 (20 St. 26), as follows: —

“Whenever during a session of the Senate a vacancy shall occur in the office of Pension Agent, by reason of resignation, death, removal or expiration of the term of office, or where any such agent lawfully appointed shall have failed to qualify and assume the duties of such office, the President may, when the public exigency requires it, designate any officer of the United States to perform the duties of such office, but such designation shall not be for a longer time than 20 days, and such officer so designated shall give bonds if required by the President for the faithful discharge of the said duties, and the Secretary of the Interior shall allow in the settlement of the accounts of such officer, the necessary expenses incurred by him in the discharge of his duties under this act. The foregoing provisions shall apply to any vacancy now existing.”

It is competent for the Secretary of the Navy to require navy agents to pay navy pensions, and this having been done, the sureties of the navy agent are responsible for the faithful performance of that service. *United States v. Cutter*, 2 Curtis, 617; citing *Brown v. United States*, 1 Id. 15.

SECTS. 4781, 4782. — The fee for preparing vouchers and administering oaths was reduced to 25 cents by St. June 20, 1874, ch. 335 (18 St. 115). St. June 14, 1878, ch. 188 (20 St. 112), repealing all provisions inconsistent therewith, provides, —

“That from and after July 1, 1878, agents for the payment of pensions shall, in lieu of the percentage, fees, pay, and allowances now provided by law, be allowed and paid the following compensation for their services, postage upon vouchers and checks sent to pensioners, and all the expenses of their offices: First. A salary at the rate of \$4000 per annum. Second. \$15 for each 100 vouchers or at that rate for a fraction of 100 prepared and paid by any agent in excess of 4000 vouchers per annum. Third. Actual and necessary expenses for rent, fuel, and lights, and for postage on official matter directed to the departments and bureaus at Washington, to be approved by the Secretary of the Interior.”

St. March 3, 1879, ch. 187 (20 St. 469), provides that —

“pension agents shall receive for their services and expenses in paying the arrears upon pensions allowed previous to Jan. 25, 1879, including postage on the vouchers and checks sent to the pensioner, 30 cents for each payment.”

St. July 4, 1884, ch. 181, § 1 (23 St. 99), provides —

“That from and after July 1, 1884, agents for the payment of pensions shall receive only \$12.50 for each 100 vouchers, or at that rate for a fraction of 100, prepared and paid by any agent in excess of 4000 vouchers per annum.”

St. March 3, 1885, ch. 340 (23 St. 362), provides —

“That from and after June 30, 1885, the salary and emoluments of agents for the payment of pensions shall be \$4000, and no more, per annum; and of the fees provided by law for vouchers prepared and paid, only so much thereof as may be required for expenses incurred in having said vouchers prepared, as well as the necessary clerical work at the agencies, shall be available.”

The provisions of 23 St. 158, § 3, as to the transmission of official mail matter (see ch. 4, *ante*) are, by St. July 2, 1886, ch. 611 (24 St. 122),

“extended and made applicable to all official mail-matter of agents for the payment of pensions.”

SECT. 4783. — The provisions of this section are constitutional and valid, and the offence is cognizable by the Circuit Court. *United States v. Hall*, 98 U. S. 343; citing *United States v. Marks*, 2 Abb. (U. S.) 534; *United States v. Fairchilds*, 1 Id. 74; *United States v. Bennett*, 12 Blatch. 345. When money was received and withheld in September, 1872, and continued to be withheld until after the passage of this act, an indictment



under this provision, alleging the withholding to have occurred March 31, 1873, was not sustained, as no conviction could be had under it. *United States v. Bennett*, 12 Blatch. 345.

SECT. 4784. — See Rev. Stats. § 5487.

SECTS. 4785, 4786. — St. July 4, 1884, ch. 181 (23 St. 99), repealed St. June 20, 1878, ch. 637 (20 St. 243), which limited the fee of pension agents and attorneys to \$10 (see 22 St. 248), with a proviso and other provisions as follows. (See *United States v. Van Vliet*, 22 F. R. 643; *United States v. Hague*, Id. 706; *United States v. Mason*, 8 Id. 412.)

“That the rights of the parties shall not be abridged or affected as to contracts in pending cases, as provided for in said act; but such contracts shall be deemed to be and remain in full force and virtue, and shall be recognized as contemplated by said act.

“SEC. 2. That §§ 4768, 4769 and 4786, Rev. Stats., are hereby made applicable also to all cases hereafter filed with the Commissioner of Pensions, and to all cases so filed since June 20, 1878, and which have not been heretofore allowed, except as hereinafter provided.

“SEC. 3. That § 4785, Rev. Stats., is hereby re-enacted and amended so as to read as follows: ‘SEC. 4785. No agent or attorney, or other person shall demand or receive any other compensation for his services in prosecuting a claim for pension or bounty land, than such as the Commissioner of Pensions shall direct to be paid to him, not exceeding \$25; nor shall such agent, attorney or other person demand or receive such compensation, in whole or in part, until such pension or bounty-land claim shall be allowed: *Provided*, That in all claims allowed since June 20, 1878, where it shall appear to the satisfaction of the Commissioner of Pensions that the fee of \$10, or any part thereof, has not been paid, he shall cause the same to be deducted from the pension, and the pension agent to pay the same to the recognized attorney.’

“SEC. 4. That § 4786, Rev. Stats., is hereby amended so as to read as follows: ‘SEC. 4786. The agent or attorney of record in the prosecution of the case may cause to be filed with the Commissioner of Pensions, duplicate articles of agreement, without additional cost to the claimant, setting forth the fee agreed upon by the parties, which agreement shall be executed in the presence of and certified by some officer competent to administer oaths. In all cases where application is made for pension or bounty land, and no agreement is filed with the Commissioner as herein provided, the fee shall be \$10, and no more. And such articles of agreement as may hereafter be filed with the Commissioner of Pensions are not authorized, nor will they be recognized except in claims for original pensions, claims for increase of pension on account of a new disability, in claims for restoration where a pensioner's name has been or may hereafter be dropped from the pension rolls on testimony taken by a special examiner, showing that the disability or cause of death, on account of which the pension was allowed, did not originate in the line of duty, and in cases of dependent relatives whose names have been or may hereafter be dropped from the rolls on like testimony, upon the ground of non-dependence, and in such other cases of difficulty and trouble as the Commissioner of Pensions may see fit to recognize them: *Provided*, That no greater fee than \$10 shall be demanded, received, or allowed in any claim for pension or bounty land granted by special act of Congress, nor in any claim for increase of pension on account of the increase of the disability for which the pension had been allowed: *And provided further*, That no fee shall be demanded, received, or allowed in any claim for arrears of pension or arrears of increase of pension allowed by any act of Congress passed subsequent to the date of the allowance of the original claims in which such arrears of pension, or of increase of pension, may be allowed.’

“The articles of agreement herein provided for shall be in substance as follows, to wit:

#### ARTICLES OF AGREEMENT.

“Whereas I, ———, late a ——— in company ———, of the ——— regiment of ——— volunteers, war of 1861 (or, if the service be different, here state the same), having made application for pension under the laws of the United States:

“Now, this agreement witnesseth, that for and in consideration of services done and to be done in the premises, I hereby agree to allow my attorney, ———, of ———, the fee of ——— dollars, which shall include all amounts to be paid for any service in furtherance of said claim; and said fee shall not be demanded by or payable to my said attorney (or attorneys), in whole or in part, except in case of the granting of my pension by the Commissioner of Pensions; and then the same shall be paid to him (or them) in accordance with the provisions of §§ 4768 and 4769 of the Revised Statutes.

(Claimant's signature.)

(Two witnesses' signatures.)



STATE OF ——— }  
County of ——— } ss.

"Be it known that on this, the ——— day of ———, A. D. 188 —, personally appeared the above-named ———, who, after having had read over to ———, in the hearing and presence of the two attesting witnesses, the contents of the foregoing articles of agreement, voluntarily signed and acknowledged the same to be ——— free act and deed.

(Official signature.)

"And now, to wit, this ——— day of ———, A. D. 188 —, I (or we) accept the provisions contained in the foregoing articles of agreement, and will, to the best of my (or our) ability, endeavor faithfully to represent the interest of the claimant in the premises.

"Witness my (or our) hand, the day and year first above written.

(Signature of Attorney.)

STATE OF ——— }  
County of ——— } ss.

"Personally came ———, whom I know to be the person he represents himself to be, and who, having signed above acceptance of agreement, acknowledged the same to be ——— free act and deed.

(Official signature.)

"And if, in the adjudication of any claim for pension, in which such articles of agreement have been, or may hereafter be, filed, it shall appear that the claimant had, prior to the execution thereof, paid to the attorney any sum for his services in such claim, and the amount so paid is not stipulated therein, then every such claim shall be adjudicated in the same manner as though no articles of agreement had been filed, deducting from the fee of \$10 allowed by law such sum as claimant shall show that he has paid to his said attorney. Any agent, or attorney, or other person instrumental in prosecuting any claim for pension or bounty land, who shall directly or indirectly contract for, demand, or receive, or retain any greater compensation for his services or instrumentality in prosecuting a claim for pension or bounty land than is herein provided, or for payment thereof at any other time or in any other manner than is herein provided, or who shall wrongfully withhold from a pensioner or claimant the whole or any part of the pension or claim allowed and due such pensioner or claimant, or the land warrant issued to any such claimant, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall for every such offense be fined not exceeding \$500, or imprisoned at hard labor not exceeding two years, or both, in the discretion of the court.

"SEC. 5. That the Secretary of the Interior may prescribe rules and regulations governing the recognition of agents, attorneys, or other persons representing claimants before his department, and may require of such persons, agents, and attorneys, before being recognized as representatives of claimants, that they shall show that they are of good moral character and in good repute, possessed of the necessary qualifications to enable them to render such claimants valuable service, and otherwise competent to advise and assist such claimants in the presentation of their claims; and such Secretary may, after notice and opportunity for a hearing, suspend or exclude from further practice before his department any such person, agent or attorney shown to be incompetent, disreputable, or who refuses to comply with the said rules and regulations, or who shall with intent to defraud in any manner deceive, mislead, or threaten any claimant, or prospective claimant, by word, circular, letter, or by advertisement.

"SEC. 6. The Commissioner shall have power, subject to review by the Secretary, to reject or refuse to recognize any contract for fees, herein provided for, whenever it shall be made to appear that any undue advantage has been taken of the claimant in respect to such contract."

See § 2, St. March 19, 1886, under § 4702, *ante*. See §§ 190, 5498, Rev. Stats.

For convenience of reference, cases under Rev. Stats. § 5485 are considered here, in connection with § 4785. For effect of St. July 8, 1870 (16 St. 195), as a repeal of provisions of parts of act of July 4, 1864 (13 St. 389), relative to "wrongfully withholding," revived in § 5485, see *United States v. Bennett*, 12 Blatch. 345; *United States v. Connally*, 9 Biss. 338. The provisions of § 5485 apply to any person who shall violate the provisions of above act. St. March 3, 1881, ch. 130, par. 2 (21 St. 408), (repealed in St. Aug. 5, 1882, ch. 389; 22 St. 248). St. Jan. 25, 1879, ch. 23, § 4 (see also Rev. Stats. § 4711), provides that—

"no claim-agent or other person shall be entitled to receive any compensation for services in making application for arrears of pension."

No more than the lawful fee can be recovered, even upon a *quantum meruit* (*Morgan v. Davis*, 47 Vt. 610); and if more has been paid, it may be recovered (*Smart v. White*, 73



Maine, 332; 3 Jones (N. C.) L. 547), even though paid voluntarily and understandingly (*Ladd v. Burton*, 6 Atl. Rep. 483); and no action can be maintained, even upon the promise of a third person, for more than the statutory fee. *Wolcott v. Frissel*, 134 Mass. 1. The unlawful act defined in St. June 20, 1878 (*supra*), is "to demand or receive" for "services," &c. Neither fraud nor extortion is a necessary element in the offence; nor does the statute forbid reimbursement for money advanced or expenses incurred (*Barr, J.*, in *United States v. Moore*, 18 F. R. 686; see also *United States v. Hewitt*, 11 Id. 243; *Crane v. Linneus*, 77 Maine, 59; *Morgan v. Davis*, 47 Vt. 610); nor a charge—in excess of the statutory fee—for services in causing the removal of a charge for desertion. *United States v. Snow*, 2 Flippin, 1. But evidence will be admitted to show that trickery was practised to evade the statute. *United States v. Koch*, 21 F. R. 873; see, also, *United States v. Moyers*, 15 Id. 411, and *United States v. Ryckman*, 12 Id. 46.

The enactment as to "wrongfully withholding" (Rev. Stats. § 5485) is not limited to pension agents. *United States v. Schindler*, 18 Blatch. 227; 10 F. R. 547. St. May 21, 1872 (17 St. 137), although not carried into the Rev. Stats., is still in force as to the prohibition of the retention by claim agents of soldiers' discharges. *United States v. Webster*, 21 F. R. 187. One under indictment for withholding a pension cannot be permitted to show that the person to whom the pension office has allowed the pension, as due, was not entitled to it. *United States v. Schindler, supra*.

In *United States v. Jessup*, 15 F. R. 790 (disapproving *United States v. Mason*, 8 Id. 412, and *United States v. Hewitt*, 11 Id. 243), it was held, that the provisions of § 5485 apply to violations of the act of June 20, 1878 (*supra*), by which Rev. Stats. § 4785 was repealed. See, also, *United States v. Dowdell*, 10 Biss. 483; 8 F. R. 881; but see, *contra*, *United States v. Jenson*, 15 Id. 138, and *United States v. Starn*, 17 Id. 435. The doubt was removed by the acts of March 3, 1881, and July 4, 1884 (noted *supra*). As to the effect of the last-named repealing act, and the operation of Rev. Stats. § 13, to save prosecutions, see *United States v. Matthews*, 23 F. R. 74 (disapproving *United States v. Hague*, 22 Id. 706), and *United States v. Van Vliet*, 23 Id. 35 (reversing s. c. 22 Id. 641).

For a statement of what must be shown, to convict, and what constitutes the agency, under § 5485, see *United States v. Howard*, 7 Biss. 56. For a case of defective indictment, see *United States v. Chaffee*, 4 Ben. 330; and for the general requisites of indictments, see *United States v. Benecke*, 98 U. S. 447; *United States v. Irvine*, Id. 450; *United States v. Mason*, 8 F. R. 412; *United States v. Koch*, 21 Id. 873; *United States v. Wilson*, 29 Id. 286. See note, § 5438. As to evidence admissible to prove that the person from whom the money is withheld is a pensioner, see *United States v. Scott*, 25 F. R. 470.

SECT. 4787. — See note, § 4698. This section was amended by St. Feb. 27, 1877, ch. 69 (19 St. 240), by adding at the end thereof —

"The provisions of this section shall apply to all officers, non-commissioned officers, enlisted and hired men of the land and naval forces of the United States, who, in the line of their duty as such, shall have lost limbs or sustained bodily injuries depriving them of the use of any of their limbs, to be determined by the Surgeon-General of the Army; and the term of five years herein specified shall be held to commence in each case with the filing of the application for the benefits of this section."

St. Aug. 15, 1876, ch. 300 (19 St. 203), provides —

"That every officer, soldier, seaman and marine, who, in the line of duty, in the military or naval service of the United States, shall have lost a limb, or sustained bodily injuries, depriving him of the use of any of his limbs, shall receive once every five years an artificial limb or appliance, or commutation therefor, as provided and limited by existing laws, under such regulations as the Surgeon-General of the Army may prescribe; and the period of five years shall be held to commence with the filing of the first application after June 17, 1870.

"SEC. 2. That necessary transportation to have artificial limbs fitted shall be furnished by the



Quartermaster-General of the Army, the cost of which shall be refunded out of any money appropriated for the purchase of artificial limbs: *Provided*, That this act shall not be subject to the provisions of an act entitled 'an act to increase pensions,' approved June 18, 1874."

SECT. 4790. — Amended by 19 St. 240, ch. 69, by inserting, in the second line, after the word "rebellion," the words "or is entitled to the benefits of § 4787."

SECT. 4791. — See note, § 4787. Amended by St. Feb. 27, 1877, ch. 69 (19 St. 240), by adding at the end of the section the following: —

"The transportation allowed for having artificial limbs fitted shall be furnished by the Quartermaster-General of the Army, the cost of which shall be refunded from the appropriations for invalid pensions."



## TITLE LVIII.

## THE PUBLIC HEALTH.

LATER statutes affecting this topic are : 20 St. 484, establishing a National Board of Health ; 21 St. 5, relating to contagious diseases, to continue in force only four years, amended by 21 St. 46, ch. 61. By 22 St. 315, ch. 433, the duties of the Board of Health were confined to the diseases of cholera, small-pox, and yellow fever. See also 23 St. 207, 496 ; 25 St. 522. By 21 St. 50, ch. 6, the Secretary of the Navy may, in his discretion, at the request of the National Board of Health, place vessels at the disposal of quarantine authorities. As to the constitutionality of State quarantine laws, see *Morgan v. Louisiana*, 118 U. S. 464 ; 2 Harvard Law Rev. 267.

St. April 29, 1878, ch. 66 (20 St. 37), provides —

“SEC. 1. That no vessel or vehicle coming from any foreign port or country where any contagious or infectious disease may exist, and no vessel or vehicle conveying any person or persons, merchandise or animals, affected with any infectious or contagious disease, shall enter any port of the United States or pass the boundary line between the United States and any foreign country, contrary to the quarantine laws of any one of said United States, into or through the jurisdiction of which said vessel or vehicle may pass, or to which it is destined, or except in the manner and subject to the regulations to be prescribed as hereinafter provided.

“SEC. 2. That whenever any infectious or contagious disease shall appear in any foreign port or country, and whenever any vessel shall leave any infected foreign port, or, having on board goods or passengers coming from any place or district infected with cholera or yellow fever, shall leave any foreign port, bound for any port in the United States, the consular officer, or other representative of the United States at or nearest such foreign port shall immediately give information thereof to the Supervising Surgeon-General of the Marine Hospital Service, and shall report to him the name, the date of departure, and the port of destination of such vessel ; And shall also make the same report to the health officer of the port of destination in the United States, and the consular officers of the United States shall make weekly reports to him of the sanitary condition of the ports at which they are respectively stationed ; And the said Surgeon-General of the Marine-Hospital Service shall, under the direction of the Secretary of the Treasury, be charged with the execution of the provisions of this act, and shall frame all needful rules and regulations for that purpose, which rules and regulations shall be subject to the approval of the President, but such rules and regulations shall not conflict with or impair any sanitary or quarantine laws or regulations of any State or municipal authorities now existing or which may hereafter be enacted.

“SEC. 3. That it shall be the duty of the medical-officers of the Marine-Hospital Service and of customs-officers to aid in the enforcement of the national quarantine rules and regulations established under the preceding section ; but no additional compensation shall be allowed said officers by reason of such services as they may be required to perform under this act, except actual and necessary travelling expenses.

“SEC. 4. That the Surgeon-General of the Marine-Hospital Service shall, upon receipt of information of the departure of any vessel, goods, or passengers from infected places to any port in the United States, immediately notify the proper State or municipal and United States officer or officers at the threatened port of destination of the vessel, and shall prepare and transmit to the medical officer of the Marine Hospital Service, to collectors of customs, and to the State and municipal health authorities in the United States, weekly abstracts of the consular sanitary reports and other pertinent information received by him.

“SEC. 5. That wherever, at any port of the United States, any State or municipal quarantine system may now, or may hereafter exist, the officers or agents of such system shall, upon the application of the respective State or municipal authorities, be authorized and empowered to act as officers or agents of the national quarantine system, and shall be clothed with all the powers of United States officers for quarantine purposes, but shall receive no pay or emoluments from the United States. At all other ports where,



in the opinion of the Secretary of the Treasury, it shall be deemed necessary to establish quarantine, the medical officers or other agents of the Marine-Hospital Service shall perform such duties in the enforcement of the quarantine rules and regulations as may be assigned them by the Surgeon-General of that service under this act: *Provided*, That there shall be no interference in any manner with any quarantine laws or regulations as they now exist or may hereafter be adopted under State laws.

"SEC. 6. That all acts or parts of acts inconsistent with this act be, and the same are hereby repealed."

St. Aug. 1, 1888, ch. 727 (25 St. 355), provides —

"That whenever any person shall trespass upon the grounds belonging to any quarantine reservation, or whenever any person, master, pilot, or owner of a vessel entering any port of the United States, shall so enter in violation of § 1 of the act entitled 'An act to prevent the introduction of contagious or infectious diseases into the United States,' approved April 29, 1878, or in violation of the quarantine regulations framed under said act, such person, trespassing, or such master, pilot, or other person in command of a vessel shall, upon conviction thereof, pay a fine of not more than \$500, or be sentenced to imprisonment for a period of not more than thirty days, or shall be punished by both fine and imprisonment, at the discretion of the court. And it shall be the duty of the United States attorney in the district where the misdemeanor shall have been committed to take immediate cognizance of the offence, upon report made to him by any medical officer of the Marine-Hospital Service, or by any officer of the customs service, or by any State officer acting under authority of § 5 of said act."

SECT. 4792. — S. T. D. 8271, 8972. This act proceeds upon the idea that State laws on the subject of health are constitutional, but it does not imply an acknowledgment that a State may rightfully regulate commerce with foreign nations or among the States; for they do not imply that such laws are an exercise of that power, or enacted with a view to it. And in making these provisions the opinion is unequivocally manifested, that Congress may control the State laws, so far as it may be necessary to control them, for the regulation of commerce. *Gibbons v. Ogden*, 9 Wheat. 1, 205. Statutes of a State enacting that certain health officers shall be entitled to receive a designated sum of money from each alien passenger landed at the ports of such State are repugnant to the Constitution and laws of the United States, and therefore void. *Passenger Cases*, 7 How. 282. "Except to guard its citizens against diseases and paupers, the municipal power of a State cannot prohibit the introduction of foreigners brought to this country under the authority of Congress. It may deny to them a residence, unless they shall give security to indemnify the public should they become paupers." *Passenger Cases*, 7 How. 282, 406. A State law which provides that the master of every vessel arriving in the port of New York from any foreign port, or from a port of any of the States of the United States other than New York, shall, under certain penalties prescribed in the law, within twenty-four hours after the arrival of the vessel, make a report in writing containing the name, age, and last legal settlement of every person on board the vessel commanded by him during the voyage, etc., does not presume to regulate commerce between the States, and is therefore constitutional. *New York v. Miln*, 11 Pet. 102.

The National Board of Health can properly pay from funds under its control for tents furnished by the War Department, as a matter of urgent necessity, to the camp which was established to prevent the spread of yellow fever to other States. Such board has no power to aid in suppressing yellow fever except so far as is required to prevent it from being imported into the United States, or from one State into another. 16 A. G. Op. 372. The acts of 1879, 1881, and 1882, concerning expenditures, etc., by the National Board of Health, are considered in *Dunwoody v. United States*, 22 Ct. Cl. 269.



## TITLE LIX.

## HOSPITALS, ASYLUMS, AND CEMETERIES.

## CHAPTER I.

## HOSPITAL RELIEF FOR SEAMEN.

THE term "seamen" includes any person employed on board in the care, preservation, or navigation of any vessel, or in the service, on board, of those engaged in such care, preservation, or navigation. 18 St. 485.

SECT. 4802. — Sect. 5 of 1 St. 606, ch. 77, was omitted in the Revision, it never having been carried into effect, and a different mode of supervision having been established by the cited act of 1870. 2 Com. D. 2320. St. March 3, 1875, ch. 130 (18 St. 377), provides that the supervising surgeon-general shall be appointed by the President, and that he shall be paid at the rate of \$4000 per year. St. April 29, 1878, ch. 66 (20 St. 37), "to prevent the introduction of contagious diseases," charges the surgeon-general with the duty of executing its provisions, and makes it the duty of marine-hospital officers to aid in the enforcement of the quarantine laws. See note, § 4585.

SECT. 4803. — St. June 26, 1884, ch. 121, § 15 (23 St. 57), repeals Rev. Stats. §§ 4585–4587, "and all other acts and parts of acts providing for the assessment and collection of a hospital tax for seamen;" the expense of the marine-hospital service to be thereafter borne by the United States out of the receipts for duties on tonnage provided for by that act.

SECT. 4804. — The General Cass, Brown Adm. 339. The cited provision of 1871 seems to have superseded the nearly similar provision of 9 St. 38, ch. 60, § 1, which was omitted in the Revision. 2 Com. D. 2321.

SECT. 4805. — The Secretary of the Treasury may prescribe rates and regulations for the care of sick and disabled seamen of foreign vessels. St. March 3, 1875, ch. 156, § 6 (18 St. 485).

SECT. 4806. — By St. March 3, 1875, ch. 156, § 4 (18 St. 485), the Secretary of the Treasury is authorized to —

"rent or lease such marine-hospital buildings, and the lands appertaining thereto, as he may deem advisable in the interests of the marine-hospital service."

St. Jan. 30, 1885, ch. 43 (23 St. 290), provides that —

"if the Secretary of the Navy shall not be able to maintain properly the whole number of naval hospitals now kept open on the amounts hereby appropriated for the maintenance of and civil establishment at naval hospitals, he shall close those which are least necessary to the service, and provide for the patients now cared for therein at such other naval hospitals as may be most convenient."

SECT. 4813. — See note, § 4766.



## CHAPTER II.

## THE SOLDIERS' HOME.

St. March 3, 1883, ch. 130 (22 St. 564), prescribes regulations for the home; provides for an annual report from the commissioners, an annual inspection by the Inspector-General of the Army, that the inmates shall be furnished with uniforms, that out-door relief may be furnished, and that the funds of the home shall be invested, etc. St. March 3, 1885, ch. 360 (23 St. 510), provides that —

“hereafter there shall annually be submitted to the Secretary of War a detailed statement of the expenses of the Board of Managers of the National Home for Disabled Volunteer Soldiers, who shall submit the same to Congress at the beginning of each session thereof.”

SECT. 4814. — This section and § 4819 recognize two classes of beneficiaries: 1. Soldiers who while in service contributed voluntarily to the support of the home; 2. Soldiers who did not contribute. Those who contributed have a right of membership without surrendering their pensions to the home. Under § 4820 those who did not contribute may become members by making such surrender. *Bowen v. United States*, 14 Ct. Cl. 162; 100 U. S. 508.

SECT. 4817. — 22 St. 398 authorizes the Board of Commissioners of the Soldiers' Home to sell the Harrodsburg Spring property in Kentucky, belonging to the Soldiers' Home. 22 St. 564 prescribes regulations for the Soldiers' Home located at Washington.

SECT. 4818. — 23 St. 168, 398, appropriates \$10,000 for continuing the adjustment of the accounts of the Soldiers' Home under this section, in the office of the Second Comptroller and of the Second Auditor. See also 24 St. 181, 182, 605; 25 St. 266, 267.

SECT. 4819. — See note, § 4814.

SECT. 4820. — Invalid pensioners who have not contributed to the funds of the Soldiers' Home are bound to surrender to it their pensions as long as they enjoy its benefits. *United States v. Bowen*, 100 U. S. 508; 14 Ct. Cl. 162. This section was modified by § 4 of 22 St. 564, noted *supra*, as follows:—

“That any inmate of the Home who is receiving a pension from the government, and who has a child, wife, or parent living, shall be entitled, by filing with the pension agent from whom he receives his money a written direction to that effect, to have his pension, or any part of it, paid to such child, wife, or parent. The pensions of all who now are or shall hereafter become inmates of the Home, except such as shall be assigned as aforesaid, shall be paid to the treasurer of the Home. The money thus derived shall not become a part of the funds of the Home, but shall be held by the treasurer in trust for the pensioner to whom it would otherwise have been paid, and such part of it as shall not sooner have been paid to him shall be paid to him on his discharge from the institution. The board of commissioners may from time to time pay over to any inmate such part of his pension-money as they think best for his interest and consistent with the discipline and good order of the Home, but such pensioner shall not be entitled to demand or have the same so long as he remains an inmate of the Home. In case of the death of any pensioner, any pension money due him and remaining in the hands of the treasurer shall be paid to his legal heirs, if demand is made within three years; otherwise the same shall escheat to the Home.”

## CHAPTER III.

## THE NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS.

SEE 25 St. 341, 450, 975. St. March 3, 1879, ch. 182 (20 St. 390), provides —

“That all purchases of supplies exceeding the sum of \$1,000 at any one time shall be made upon public tender after due advertisement, and that the expenditure for new buildings shall be expressly authorized in writing.”



SECT. 4826. — 24 St. 444 changes the number of managers from nine to ten, one of whom shall be a resident of a State or Territory west of the Rocky Mountains, and provides for a branch home west of the Rocky Mountains.

SECT. 4828. — As to duties of the managers, in relation to estimates, accounts, &c., see 18 St. 343, ch. 129; and 23 St. 510, ch. 360.

SECT. 4829. — St. July 9, 1886, ch. 756 (24 St. 129), makes it the duty of the Secretary of the Treasury to require a deposit of bonds to secure moneys deposited in bank by the treasurer of the Home.

SECT. 4830. — For authority of the managers to locate a branch home in either Arkansas, Colorado, Kansas, Iowa, Minnesota, Missouri, or Nebraska; and to inquire into the expediency of establishing a branch in California, and one in Michigan, see 23 St. 120. 24 St. 444, provides for a branch home west of the Rocky Mountains.

SECT. 4831. — St. March 3, 1875, ch. 129 (18 St. 359), repeals the first sentence of this section, and provides that the Home shall be supported by regular appropriations. Detailed estimates must be made, by St. March 3, 1879, ch. 182 (20 St. 377).

SECT. 4832. — See note, § 4766. The "pension" required to be assigned does not include any period of time other than while the pensioner is an inmate of the Home; nor is the Home authorized to collect arrears of pensions. 16 A. G. Op. 374. St. August 7, 1882, ch. 433 (22 St. 322), provides —

"That all pensions and arrears of pensions payable or to be paid to pensioners who are or may become inmates of the National Home for Disabled Volunteer Soldiers shall be paid to the treasurers of said home, to be applied by such treasurers as provided by law, under the rules and regulations of said home. Said payments shall be made by the pension agent upon a certificate of the proper officer of the home that the pensioner is an inmate thereof on the day to which said pension is drawn. The treasurers of said home, respectively, shall give security, to the satisfaction of the managers of said home, for the payment and application by them of all arrears of pension and pension-moneys they may receive under the aforesaid provision. And § 2 of the act entitled 'An act making appropriations for the payment of invalid and other pensions of the United States for the fiscal year ending June 30, 1882, and for deficiencies, and for other purposes,' approved February 26, 1881, is hereby revived and continued in force."

St. Feb. 26, 1881, ch. 80 (21 St. 350), provided —

"All pensions payable under this act 'to inmates of the home shall be paid to the treasurer of said home, upon security given to the satisfaction of the managers, to be disbursed for the benefit of the pensioners, without deduction for fines or penalties, under regulations to be established by the managers.' . . . Any balance of the pension which may remain at the date of the pensioner's discharge shall be paid over to him; and in case of his death at the home, the same shall be paid to the widow, or children, or in default of either, to his legal representatives."

SECT. 4834. — St. July 9, 1886, ch. 756, § 2 (24 St. 129), provides that thereafter —

"it shall be the duty of the Secretary of the Treasury to require from the president and cashier of all banks used as depositories by the treasurer of the Home a deposit of bonds sufficient in amount to fully secure all moneys pertaining to said Home left on deposit with any such bank."

St. March 3, 1887, ch. 362 (24 St. 539), provides that —

"hereafter the detailed statement of the expenses of the Board of Managers of the National Home for Disabled Volunteer Soldiers shall be reported direct to Congress in the annual report of the Board of Managers. But all of the expenditures of the said Home, including the expenses of the Board of Managers, shall be made subject to the general laws governing the disbursement of public moneys, so far as the same can be made applicable thereto, and shall be audited by the proper accounting officers of the Treasury, under such rules and regulations as may be prescribed by the Secretary of the Treasury: *Provided, further*, That no person shall be eligible to or hold any position or employment in the government or management of any home who is interested in or connected with, directly or indirectly, any brewery, dram-shop, or distillery in the State where such home is located."

SECT. 4837. — St. Feb. 8, 1881, ch. 35 (21 St. 322), strikes out the last four words of this section; inserts "the daily Congressional Record" after "documents" in the eighth line, and adds at the end of the section, —



"The Secretary of the Senate and the Clerk of the House of Representatives shall cause to be sent to the National Home for Disabled Volunteer Soldiers at Dayton, in Ohio, and to the branches at Augusta, in Maine, Milwaukee, in Wisconsin, Hampton in Virginia, and the Soldiers' Home at Knightstown Springs, near Knightstown, in Indiana, each, one copy of each of the following documents: The journals of each House of Congress of each and every session; all laws of Congress; the annual message of the President, with accompanying documents; the daily Congressional Record, and all other documents or books which may be printed and bound by order of either House of Congress;

"And the Public Printer is hereby authorized and directed to furnish to the Secretary of the Senate and the Clerk of the House of Representatives the documents referred to in this section."

SECT. 4839. — The salary of the superintendent was fixed at \$4,000 per annum, by 21 St. 414.

## CHAPTER IV.

### THE GOVERNMENT HOSPITAL FOR THE INSANE.

By St. June 16, 1880, ch. 235 (21 St. 259), admissions are limited to those entitled under this chapter, and under St. March 3, 1875, ch. 156, noted below.

SECT. 4843. — St. March 3, 1875, ch. 156, § 5 (18 St. 486), provides, that insane patients of the marine hospital service shall be admitted into the Government Hospital for the Insane, at a cost of not over \$4.50 a week. St. August 2, 1882, ch. 433 (22 St. 330), provides for the admission of insane inmates of the National Home for Disabled Volunteer Soldiers, and St. July 7, 1884, ch. 332 (23 St. 213), for the admission of insane inmates of the Soldiers' Home.

SECT. 4844. — By St. March 3, 1875, ch. 105 (19 St. 347), indigent insane of the District of Columbia "shall be admitted hereafter only upon order of the executive authority of the District," the District to bear one-half of the expense. See 20 St. 377, ch. 182. St. August 7, 1882, ch. 433 (22 St. 330), provides as to this hospital that not exceeding \$1,000 of the sum appropriated —

"may be expended in defraying the expenses of the removal of patients to their friends: and that hereafter the surplus products and waste material of the hospital may be sold or exchanged for the benefit of the hospital, and proceeds to be used and accounted for the same as its other funds: *Provided*, That in addition to the persons now entitled to admission to said hospital, any inmate of the National Home for Disabled Volunteer Soldiers, who is now or may hereafter become insane shall, upon an order of the president of the board of managers of the said National Home, be admitted to said hospital and treated therein; and if any inmate so admitted from said National Home is or thereafter becomes a pensioner, and has neither wife, minor child, nor parent dependent on him, in whole or in part, for support, his arrears of pension and his pension money accruing during the period he shall remain in said hospital shall be applied to his support in said hospital, and be paid over to the proper officer of said institution for the general uses thereof.

"That § 1 of the act of June 23, 1874, ch. 465, concerning insane convicts, be amended so as to read as follows:

"That upon the application of the Attorney-General the Secretary of the Interior be, and he is hereby, authorized and directed to transfer to the Government Hospital for the Insane in the District of Columbia all persons who, having been charged with offences against the United States, are in the actual custody of its officers, and all persons who have been or shall be convicted of any offense in a court of the United States and are imprisoned in any State prison or penitentiary of any State or Territory, and who during the term of their imprisonment have or shall become and be insane.

"To construct such additional accommodations as may be rendered necessary by the admission of insane persons from the National Home for Disabled Volunteer Soldiers, and approved by the board of managers of the National Home for Disabled Volunteer Soldiers, \$125,000, or so much thereof as may be necessary: *Provided*, That the plans, specifications, and estimates for the same shall be prepared under the supervision of the Architect of the Capitol, and be approved by the Secretary of the Interior; and the entire cost shall not exceed the sum named."



St. July 7, 1884, ch. 332 (23 St. 213), provides that —

“in addition to the persons now entitled to admission to the Government Hospital for the Insane, any inmate of the Soldiers’ Home who is now or may hereafter become insane shall, upon an order of the president of the Board of Commissioners of the Soldiers’ Home, be admitted to said hospital and treated therein; and the expenses of maintaining any such person shall be paid from the Soldiers’ Home fund.”

SECT. 4850. — By 18 St. 116, the office of governor was abolished, and commissioners provided for in his stead.

SECTS. 4851, 4852. — St. June 23, 1874, ch. 465 (18 St. 251), amended by St. Aug. 7, 1882, ch. 433 (22 St. 330), provides for the transfer of certain insane convicts to the Insane Asylum in the District of Columbia, or to a State insane or lunatic asylum; convicts restored to sanity to be returned to prison. See limitation noted under this chapter, *ante*.

## CHAPTER V.

### THE COLUMBIA INSTITUTION FOR THE DEAF AND DUMB.

SECT. 4865. — The cited provisions seemed to supersede or restrict 11 St. 161, ch. 46, § 5, which were omitted from the Revision. 2 Com. D. 2341. St. March 2, 1889, ch. 411 (25 St. 962), provides: —

“That one half of all expenses attending the instruction of deaf and dumb persons admitted to said institution from the District of Columbia, under Rev. Stats. § 4864, shall be paid from the revenues of the District of Columbia and one half out of the Treasury of the United States, and hereafter estimates for such expenses shall each year be submitted in the regular estimates for the expenses of the government of the District of Columbia: *And provided further*, That deaf-mutes, not exceeding sixty in number, admitted to this institution from the several States and Territories, as provided in Rev. Stats. § 4865, shall only have the expenses of their instruction in the collegiate department, exclusive of support, paid from appropriations made for the support of the institution.”

SECT. 4869. — Compare 15 St. 233, ch. 262, § 4.

## CHAPTER VI.

### NATIONAL CEMETERIES.

By 18 St. 46 a public cemetery is authorized to be laid out on the reservation near Salt Lake City, Utah, lots to be set apart for each of the religious denominations there.

SECT. 4872. — To make effective the provision in this section for “exclusive jurisdiction,” it is necessary to obtain the consent of the legislature of the State in which the land lies. 13 A. G. Op. 131; 14 Id. 27. Without such consent the United States “cannot be said to have any *local* jurisdiction over the land whatever.” 14 A. G. Op. 559.

SECT. 4876. — Repealed by St. July 24, 1876, ch. 226 (19 St. 99), which requires the Secretary of War to provide for the care and maintenance of the National Military cemeteries; in which is included Antietam Cemetery, by St. March 2, 1877, ch. 83 (19 St. 269).

SECT. 4877. — St. Feb. 3, 1879, ch. 44 (20 St. 281), authorizes the Secretary of War to erect headstones for soldiers’ graves in private cemeteries, and to keep a record of the names and places of burial of the soldiers. See 25 St. 969.



## TITLE LX.

## PATENTS, TRADE-MARKS, AND COPYRIGHTS

## CHAPTER I.

## PATENTS.

**SECT. 4883.**— See notes, § 629, cl. 9, 481, 3785. 21 St. 509, ch. 148, provides for classified abridgments of all United States letters-patent. By 24 St. 201, 624, and 23 St. 187, 418, the photolithographing and otherwise producing plates and copies for the Official Gazette are to be done in the city of Washington, if it can there be done at reasonable rates, and under the supervision of the Commissioner of Patents, who, under the direction of the Secretary of the Interior, is authorized to make contracts therefor. St. Feb. 18, 1888, ch. 15 (25 St. 40), amends § 4883 by inserting after the words "Secretary of the Interior," where they occur therein, the following words: "or under his direction by one of the Assistant Secretaries of the Interior," so that the said section, as amended, reads as follows:—

"SEC. 4883. All patents shall be issued in the name of the United States of America, under the seal of the Patent Office, and shall be signed by the Secretary of the Interior or under his direction by one of the Assistant Secretaries of the Interior, and counter-signed by the Commissioner of Patents, and they shall be recorded, together with the specifications, in the Patent Office, in books to be kept for that purpose."

St. April 19, 1888, ch. 126 (25 St. 87), provides—

"That all patents for inventions signed by David L. Hawkins, Second Assistant-Secretary of the Interior, or any other Assistant-Secretary of the Interior, shall have the same force, effect, and validity as though the same had been signed by the Secretary of the Interior in person at the date on which they were respectively executed."

A patent without the signature of the Secretary of the Interior is void. If it was not signed by him when a suit was begun upon it, a subsequent signing will not relate back to the time of its issue. A signature affixed after the expiration of the Secretary's term of office is ineffectual. *Marsh v. Nichols*, 15 F. R. 914. The signatures of each of these officers is necessary; but when a signature is accidentally omitted, it may be afterwards added. *Marsh v. Nichols*, 128 U. S. 605, 612. It is doubtful whether evidence is admissible to prove that the "acting commissioner" who signed a patent was not appointed by the President, at least in controversies in which the person who so acted is not a party. Under the patent law of 1836 the chief clerk was "acting commissioner" in the necessary absence of the head of the office, as well as where there was a vacancy *de jure*. *Woodworth v. Hall*, 1 Wood. & M. 389. The sanction of the Secretary of State to the correction of a clerical mistake in letters-patent may be given in writing. The letters themselves need not be re-signed. Such correction relates back to the date of the letters, unless third persons have acquired rights which will be affected by the alteration. *Woodworth v. Hall*, 1 Wood. & M. 389. The defence that a patent was issued unintentionally through a blunder of a subordinate in the patent office cannot avail in a suit brought on the patent. For any such



alleged invalidity the only remedy would be by a direct proceeding by the United States to vacate the patent, because the seal of the United States, and the signatures of the proper officers to the grant must be respected, in the absence of fraud, so long as the United States themselves do not question the grant. *Doughty v. West*, 6 Blatch. 429.

SECT. 4884. — The description or title ought not to be repugnant to the specification, but need only set forth honestly and in few words the nature and design of the patent. *Hogg v. Emerson*, 6 How. 437; 11 Id. 587; 2 Blatch. 1; *Sickles v. Manuf. Co.*, 1 Fisher, 222; 3 Wall. Jr. 186; *Goodyear v. Railroad Co.*, 1 Fisher, 626; 2 Wall. Jr. 356; *Whittemore v. Cutter*, 1 Gall. 429. See note, § 476, *ante*. Down to 1836 the statutes corresponding to this section did not contain the word "executors." In the statute of that year the word was added, but was omitted in the act of 1870, and this omission was held immaterial. The law was not changed by it. Other sections of the Rev. Stats. (§§ 4900, 4916, 4922) use the word "executors," and indicate an intention on the part of Congress that the executor or administrator of a patentee shall take the title to a patent on his death. *Shaw Relief Valve Co. v. New Bedford*, 19 F. R. 753; *Bradley v. Dull*, Id. 913. This clause does not change the rule that a patent right, with all the incidents which arise from its infringement, is personalty, and goes, upon the patentee's death, or the death of his assignee or grantee, to his executor or administrator. *May v. Logan Co.*, 30 F. R. 250. A special act of Congress in favor of a patentee, extending the time, must be considered as engrafted on the general law. *Bloomer v. McQuewan*, 14 How. 539. The word "specification," when used without the word "claim," means description and claim. *Wilson v. Coon*, 18 Blatch. 535.

A liberal construction prevails in favor of a patentee. *Blanchard v. Sprague*, 2 Story, 164; *Turrill v. Railroad Co.*, 1 Wall. 491; *Brown v. Guild*, 23 Id. 181; *Rubber Co. v. Goodyear*, 9 Id. 788; *Hogg v. Emerson*, 6 How. 437; *Seymour v. Osborne*, 11 Wall. 516; *Clark v. Manuf. Co.*, 14 Blatch. 79; *Fitch v. Bragg*, 8 F. R. 588; *Winans v. Denmead*, 15 How. 330. But this is not so where evidently the claim was fraudulently expressed in ambiguous or general terms to cover subsequent inventions, especially where the objectionable claim has been first introduced in a re-issue to cover the subsequent invention of another (*Taylor v. Garretson*, 9 Blatch. 156; 5 Fisher, 116; *Parker v. Sears*, 1 Id. 93); nor in a re-issue. *Hatch v. Moffitt*, 15 F. R. 252; *s. p. Wisner v. Grant*, 7 Id. 922; 5 Ban. & Ard. 217. A patentee is restricted to his claim. For the drawings and specifications are examined only for the purpose of placing a proper construction on the claim. *Pitts v. Wemple*, 2 Fisher, 10; 1 Biss. 87; *Johnson v. McCullough*, 4 Fisher, 170; *Rich v. Close*, Id. 279; 8 Blatch. 41; *Brooks v. Fisk*, 15 How. 212; *Railroad Co. v. Mellon*, 104 U. S. 112. The claim is to be construed with reference to the state of the art at the time of the invention. *Garneau v. Dozier*, 102 U. S. 230; *Loom Co. v. Higgins*, 105 Id. 580; *Goodyear v. Wait*, 5 Blatch. 468; 3 Fisher, 242; *Rogers v. Sargent*, 7 Blatch. 507; *Bate Refrigerating Co. v. Toffey*, 6 F. R. 514; *Jones v. Barker*, 11 Id. 597; *Sprague v. Adriance*, 3 Ban. & Ard. 124. The drawings are regarded as part of the specification, and may be referred to to add anything to the specification or claim not specifically contained therein. *Washburn v. Gould*, 3 Story, 122; 2 Robb, 206; *Banker v. Bostwick*, 3 F. R. 517. The specification governs, and the drawings merely illustrate. *Hogg v. Emerson*, 11 How. 587; 2 Blatch. 1; *Hamilton v. Ives*, 6 Fisher, 244. The drawings cannot supply an omission in a specification or claim. *Tinker v. W. E. M. & R. Manuf. Co.*, 5 Ban. & Ard. 92; 1 F. R. 138. The model may be examined in construing that which is doubtful. *Hoffheins v. Brandt*, 3 Fisher, 218; *Goodyear Dental Co. v. Gardner*, 3 Cliff. 408; 4 Fisher, 224. So also may the affidavit. *Pettibone v. Derringer*, 4 Wash. 215; 1 Robb, 152. In construing a re-issue the specifications in both the original and the re-issue will be examined. *Forsyth v. Clapp*, 6 Fisher, 528; 1 Holmes, 278; *Atlantic Powder Co. v. Mowbray*, 2 Ban. & Ard. 442; *Swain Manuf. Co. v. Ladd*, 102 U. S. 409; 2 Ban. & Ard. 488. If the patent



issued correctly describes the invention, the previous correspondence and previously rejected applications cannot be examined. *Piper v. Brown*, 4 Fisher, 175; *Johnson v. Root*, 1 Id. 351; *Goodyear Dental Co. v. Gardner*, 3 Cliff. 408; 4 Fisher, 224. As to examining testimony for the intent of the parties, see *Evans v. Evans*, 3 Wheat. 454; *Pet. C. C.* 322. For the construction of a patent for a combination, see *Hamilton v. Ives*, 6 Fisher, 244. The disclaimer at the close of a specification estops the patentee from setting up any privilege to the part disclaimed, and the summary is equally binding on him as a limitation to the thing patented. *Whitney v. Emmett*, Bald. 303.

SECT. 4885. — This section prescribes the date on which a patent begins to run, and the actual date of the signatures can be shown. *Marsh v. Nichols*, 128 U. S. 616. If patents are to be passed by the commissioner, they must be allowed by him. The words "passed" and "allowed" are not appropriate to the duties of examiners. The commissioner alone can do this. *Hull v. Commissioner*, 2 MacArthur, 90, 106. The notice of allowance ends the jurisdiction of the examiner. Until that notice has been sent the examiner can reconsider his allowance. *Starrs*, 15 O. G. 1053.

SECT. 4886. — See notes, §§ 4899, 4920. St. March 3, 1883, ch. 143 (22 St. 625), provides:—

"The Secretary of the Interior and the Commissioner of Patents are authorized to grant any officer of the government, except officers and employees of the Patent Office, a patent for any invention of the classes mentioned in Rev. Stats. § 4886, when such invention is used or to be used in the public service, without the payment of any fee: *Provided*, That the applicant in his application shall state that the invention described therein, if patented, may be used by the government or any of its officers or employees in the prosecution of work for the government, or by any other person in the United States, without the payment to him of any royalty thereon, which stipulation shall be included in the patent."

"*Invented or discovered.*" — An invention in mechanics consists not in the discovery of new principles, but in new combinations of old principles. *Tyler v. Deval*, 1 Code Rep. (N.Y.) 30; *Stainthorp v. Humiston*, 1 Fisher, 475. In the following cases the result is more or less evidence of invention: Its beneficial nature (*Hall v. Wiles*, 2 Blatch. 194; *Stimpson v. Woodman*, 3 Fisher, 98; 10 Wall. 117); superiority in utility and effect (*Washburn Manuf. Co. v. Haish*, 4 F. R. 900; *Dunbar v. Field T. Co.*, Id. 543; *Shannon v. Stationery Co.*, 9 Id. 205; *Shedd v. Washington*, Id. 904; *Miller v. Pickering*, 14 Id. 540; *Palmer v. Johnston*, 34 Id. 336) — but if there was no invention its very utility is an aggravation of the wrong done (*Phillips v. Detroit*, 4 Ban. & Ard. 347); its capability of producing a new result (*Smith v. G. D. V. Co.*, 93 U. S. 486; *Loom Co. v. Higgins*, 105 Id. 580; 15 Blatch. 446); its capability of producing a known result in a better mode. *Detroit Lubricator Co. v. Penchard*, 9 F. R. 293; *Wood v. Packer*, 17 Id. 650. But merely making an article better by the use of known equivalents does not involve invention. *Crouch v. Roemer*, 103 U. S. 797; 19 O. G. 1067; *Hatch v. Moffitt*, 15 F. R. 252. Although the article produced is not better than or superior to all others, the invention is patentable, if novel and useful. *Shaw v. Colwell Lead Co.*, 11 F. R. 711. So also its power to render an article salable which was before unsalable, is evidence of invention (*Sargent v. Yale Lock Co.*, 17 O. G. 106; 17 Blatch. 249; 4 Ban. & Ard. 579); and its power to displace other devices previously used for analogous purposes. *Smith v. G. D. V. Co.*, 93 U. S. 486; 1 Ban. & Ard. 201; *Ward v. Plow Co.*, 14 F. R. 691; *Eclipse Windmill Co. v. May*, 17 Id. 344. There must be more skill and ingenuity shown than that possessed by the ordinary mechanic. *Hotchkiss v. Greenwood*, 11 How. 248; *Reed v. Reed*, 12 Blatch. 366; *Dunbar v. Myers*, 94 U. S. 187; *Pearce v. Mulford*, 102 Id. 112; *Morris v. McMillin*, 112 Id. 244. And as the standard of skill in mechanics is constantly being raised, so necessarily is the amount of invention necessary for a patent. *Wilcox v. Bookwalter*, 31 F. R. 224. An accidental making of an article without knowledge how to produce it, and without ability to produce another one, is not invention. *Pelton v. Waters*, 21 Int. Rev. Rec. 125; 1 Ban. & Ard. 599.



*Monce v. Adams*, 12 Blatch. 1. Where an old device or machine in general use, with acknowledged serious defects, which have been long endured, is taken in hand, and by changing its form or structure such defects are removed, and a different and improved result is obtained, there has been an invention. *Asmus v. Alden*, 27 F. R. 684. Mere mechanical skill in construction is not invention. In the sense of the statute, invention implies the finding out, contriving, devising, or creating, by an intellectual process, something which did not exist. *Ransom v. Mayor of New York*, 1 Fisher, 252; *Hotchkiss v. Greenwood*, 11 How. 248; *Potter v. Whitney*, 3 Fisher, 77; 1 Lowell, 87. Making a machine out of iron that has already been made of wood, both producing the same result in the same way, is not inventing such machine, if the result be simply greater cheapness and durability. *Woodman v. Stimpson*, 3 Fisher, 98, 103; 10 Wall. 117; *Hotchkiss v. Greenwood*, 11 How. 248. If a machine has been invented for one purpose, another person than the inventor, who discovers that it is equally good for some other purpose, cannot, because of such discovery, claim an invention for the machine, though he might, perhaps, for an improvement in the art of manufacturing the article for which he discovered the adaptability of the machine to produce. *Woodman v. Stimpson*, *supra*. The law applies no nice or rigid standard to the degree of mental labor and inventive skill required to make a production an invention. If some has been exercised, the degree is not material. *Clark Patent Co. v. Copeland*, 2 Fisher, 221, 227. While the substitution of one known material in lieu of another is not invention, if the result is merely to reduce the price and increase the durability of the product, yet if the product is superior, and possesses capabilities and performs functions different from those produced by the same article, as made from the other materials, and the change is not ascribable to mere mechanical skill but results from inventive effort, the new article is patentable. *Smith v. Goodyear Co.*, 93 U. S. 486. There is no invention in the application of an old process to a new subject, no idea being developed which is new or original. *Brown v. Piper*, 91 U. S. 37.

"*New*." — A distinction must be observed between a new article of commerce and a new article which, as such, is patentable. To render the article new in the sense of the patent law it must be more or less efficacious, or possess new properties by a combination with other ingredients; not from a mere change of form produced by mechanical division. It is only where one of these results follows that the product of the compound can be treated as the result of invention or discovery, and be regarded as a new and useful article. *Glue Co. v. Upton*, 97 U. S. 3. For what constitutes novelty, see *Calkins v. Carriage Co.*, 27 F. R. 296. See also *Shaver v. Manuf. Co.*, 30 Id. 68.

"*Useful*." — This word is used in contradistinction to mischievous or immoral. If the invention is for a proper purpose, whether it be more or less useful is of no public importance. *Lowell v. Lewis*, 1 Mason, 182.

If an invention may be applied to a beneficial use, it is useful, whether its utility is general or limited. *Bedford v. Hunt*, Id. 302.

Useful is in contradistinction to mischievous. *Cox v. Griggs*, 1 Biss. 362. It cannot be held that an invention is useful if it appears that the operator, in using it, is constantly exposed to imminent danger. *Mitchell v. Tilghman*, 19 Wall. 287, 396. A mode of putting up thread which gave the article no additional value, but merely made it sell more readily and for an increased price, is not a useful invention. *Langdon v. DeGroot*, 1 Paine, 283. The degree of utility will not be inquired into. *Wilbur v. Beecher*, 2 Blatch. 132; *Carr v. Rice*, 1 Fisher, 198; *Hoffheims v. Brandt*, 3 Id. 218; *Converse v. Cannon*, 2 Woods, 7; *Gibbs v. Hoefner*, 19 F. R. 323. The thing must be not only new and useful, but also be an invention or discovery. *Thompson v. Boisselier*, 114 U. S. 11; *Hollister v. Manuf. Co.*, 113 Id. 59; *Calkins v. Carriage Co.*, 27 F. R. 296; *Celluloid Manuf. Co. v. Comstock Co.*, Id. 358.

"*Art*." — As used here, and in the Constitution, "art" means a useful art or a bene-



ficial manufacture. *Smith v. Downing*, 1 Fisher, 64. A process, *ex nomine*, is included under the general term "useful art." *Corning v. Burden*, 15 How. 252, 266. A novel process or method of operation that amounts to a successful application of known things to a practical use, is patentable as an art. *Roberts v. Dickey*, 4 Fisher, 532, 538. An art, a process, which is useful, is as much the subject of a patent as a machine, manufacture, or composition of matter. *Telephone Cases*, 126 U. S. 1, 533.

"*Machine.*" — This word includes every mechanical device or combination of mechanical powers and devices to perform some function and produce a certain effect or result. *Corning v. Burden*, 15 How. 252, 267. A new combination, which produces new and useful results, is patentable, though all its constituents were well known and in common use before the combination was made, if the results are a product of the combination, and not a mere aggregate of several results, each the complete product of one of the combined elements. *Williams v. Rome R. Co.*, 15 Blatch. 200, 211; *Hailes v. Van Wormer*, 20 Wall 353. "Machine" includes new combinations as well as new organizations of mechanism. *Wintermute v. Redington*, 1 Fisher, 239, 246. The mere change of one material for another in a machine is not patentable. *Hicks v. Kelsey*, 18 Wall. 670. A patent for an entire process made up of several constituent steps or stages, of which several steps the patentee was not the inventor, does not entitle him to the exclusive use of the constituents singly, but only to their use when arranged in the process. *Mowry v. Whitney*, 14 Wall. 620. As to the difference between a process and a machine, see *Corning v. Burden*, 15 How. 252. There can be no patent for a "mode of operation as exhibited in a machine." *Burr v. Duryee*, 1 Wall. 570.

"*Any new and useful improvement.*" — Late decisions of the Supreme court (*Pennsylvania R. Co. v. Locomotive Co.*, 110 U. S. 490; *Morris v. McMillin*, 112 Id. 244; *Hailes v. Van Wormer*, 20 Wall. 353; *Reckendorfer v. Faber*, 92 U. S. 347; *Pickering v. McCullough*, 104 Id. 310; *Stephenson v. Brooklyn R. Co.*, 114 Id. 157; *Cantrell v. Wallace*, 117 Id. 689), establish: 1st, that a combination is patentable if it produces new and useful results, though all its constituents were well known and in common use before it was made, provided the results are a product of the combination, and not a mere aggregate of several results, each the product of one of the combined elements; 2d, if it produces a different force, effect, or result in the combined forces or processes from that given by their separate parts, and a new result is given by their union; 3d, if it either forms a new machine of distinct character or formation, or produces a result which is not the mere aggregate of separate contributions, but is due to the joint and co-operating action of all the elements; 4th, when the several elements of which it is composed produce by their joint action either a new and useful result, or an old result in a cheaper or otherwise more advantageous way. *Niles Tool Works v. Betts Machine Co.*, 27 F. R. 301, 305. A combination to be patentable must produce a different force, effect, or result in the combined forces or processes from that given by their separate parts. There must be a new result by their union. *Reckendorfer v. Faber*, 92 U. S. 347. In a patentable combination of old elements all the constituents must so enter into it that each qualifies the other forming either a new machine of distinct character or function, or producing a result due to the joint and co-operative action of all the elements, and which is not the mere adding together of separate contributions. *Pickering v. McCullough*, 104 U. S. 310. *Scott Manuf. Co. v. Sayre*, 26 F. R. 153. If a combination, the separate parts of which are old and well known, produces a new and useful result, and required more than mere mechanical skill to produce it, it is patentable. *May v. Fond du Lac*, 27 F. R. 691. Where a patent has been granted for improvements, which after a full and fair trial resulted in unsuccessful experiments, and were finally abandoned, any one who takes such improvements and perfects them is entitled to a patent. *Whitely v. Swayne*, 7 Wall. 685. One who claims an improvement upon a machine must have found out by himself, and created



or constructed an improvement which had not before been found out or produced, and which is beneficial. There must be novelty in its construction, which originated in the mind of him who claims to be the inventor. It is not enough that it is new in the sense that the shape or form in which it is produced shall not have been before known, and that it shall be useful, but it must amount to an invention or discovery on the part of the person who asks that it be patented. Where the mode of construction, the material employed, the form of construction, and the purpose for which the machine was to be used had been described separately in earlier patents, although the entire machine had never been described in any single patent, and to that extent was novel and new, and was of great utility, — it did not require invention to produce it. *Adams v. Bellaire S. Co.*, 28 F. R. 360. See also as to improvements, *McLain v. Ortway*, 42 O. G. 724; *Celluloid Manuf. Co. v. American Co.*, 28 F. R. 195; 26 Id. 692; *Avon v. Railroad Co.*, 34 Id. 1508. The inventor of an improvement in a machine has no claim to the whole art, discovery, or machine which he has improved, but only to the particular device or combination of devices distinguishing his improvement. *Burr v. Duryee*, 1 Wall. 571. See also note, § 4888.

*"Not known or used."* — The words "by others" were added to remove a doubt as to whether use by the patentee, prior to his application, would affect his right. They are not to be taken as signifying that the use must be by more than one person. *Reed v. Cutter*, 1 Story, 590; *Wyeth v. Stone*, Id. 273. These words, considered in connection with the fourth clause of § 4920, "was not the original and first inventor or discoverer of the thing patented," signify knowledge and use existing in a manner accessible to the public. *Gayler v. Wilder*, 10 How. 477. Prior knowledge and use by a single person are within the statute. *Coffin v. Ogden*, 18 Wall. 120. The knowledge of the use of an invention in a foreign country by some persons will not defeat a patent issued to one who did not know of such invention or use. *Doyle v. Spaulding*, 19 F. R. 744. See also note, § 4923.

*"Described in any printed publication."* — Something besides printing is necessary to constitute publication. The theory of the statute is that the work has been made accessible to the public, and that the invention described by it has thereby been given to the public. Publication means put into general circulation, or on sale where the work is accessible to the public. Hence a book cannot be received in evidence to prove a publication, unless there is proof that it has been offered for sale, or has been circulated. *Cottier v. Stimson*, 20 F. R. 906, 910. A previous discovery in a foreign country does not render a patent void, unless such discovery or some substantial part of it has been patented or described in some printed publication. *O'Reilly v. Morse*, 15 How. 62. Drawings alone, unaccompanied by letter-press description, will not invalidate a patent. *Judson v. Cofe*, 1 Fisher, 615; *Reeves v. Keystone Co.*, 5 Id. 456; *New Process Fermentation v. Roch*, 21 F. R. 580, 587. Business circulars which have been sent only to persons engaged in the trade to which they relate, or to persons supposed to be engaged therein, are not publications within the meaning of the statute. Id.; *Seymour v. Osborne*, 11 Wall. 516; *Parsons v. Colgate*, 15 F. R. 600. Publications containing mere suggestions and speculations of scientific writers, who had never tested the value of what they suggested, or demonstrated the truth of their speculations, are not within this section. *Jensen v. Keasbey*, 24 F. R. 144. An American inventor is not protected because he conceived the possibility of accomplishing what was subsequently made known by a foreign publication. His conception must be reduced to practice, and embodied in form. *Webb v. Quintard*, 9 Blatch. 352. If the description given in a foreign publication is as definite as the specifications filed here, the case is within this statute. *Woven Wire Mattress Co. v. Whittlesey*, 8 Biss. 23. The earlier printed and published description must exhibit the later patented invention in such a full and intelligible manner as to enable persons skilled in the art to which the invention is related to comprehend it without assistance from the patent, or to make



it, or repeat the process claimed. *Cohn v. Corset Co.*, 93 U. S. 336; *Seymour v. Osborne*, 11 Wall. 516; *Downton v. Milling Co.*, 108 U. S. 471; *Hood v. Car Spring Co.*, 21 F. R. 67; *Spill v. Celluloid Co.*, Id. 631; *Florsheim v. Schilling*, 26 Id. 256; *United States Manuf. Co. v. Bushing Co.*, 31 Id. 80.

*"And not in public use."*—Under § 7 of St. 1839, if, for more than two years before application for a patent was made, the patented invention was in public use, with or without the consent of the subsequent patentee, the patent was invalidated thereby. *Andrews v. Hovey*, 123 U. S. 267; 124 Id., 694. An allegation in a complaint for the infringement of a patent is insufficient if it only alleges that it was not in public use, or on sale with the inventor's consent. *Blessing v. John Trageser Works*, 34 F. R. 753. The inventor may use his invention for the purpose of testing it, in order by experiment to devise additional means for perfecting it; and as an incident of such use may dispose of the product for profit. But if the use is mainly for the purpose of trade, and the experiment is merely incidental to that, the use is public. *Smith Manuf. Co. v. Sprague*, 123 U. S. 249. A use necessarily open to public view, if made in good faith solely to test the qualities of the invention, and for the purpose of experiment, is not a public use. *Elizabeth v. Pavement Co.*, 97 U. S. 126; *Shaw v. Cooper*, 7 Pet. 292; *Egbert v. Lippman*, 104 U. S. 336; *Smith Manuf. Co. v. Sprague*, 123 Id. 257. A patent cannot be granted when the invention has been in public use for more than two years, either with or without the consent or acquiescence of the inventor. *Manning v. Cape Ann I. & G. Co.*, 108 U. S. 462, 465; *Driven Well Cases*, 16 F. R. 387.

*"On sale for more than two years."*—This clause and the other provisions of this section apply to patents on designs, as well as to other patents. *Theberath v. Celluloid H. T. Co.*, 15 F. R. 246. The knowledge, consent, or allowance of the patentee is immaterial. *Egbert v. Lippman*, 15 Blatch. 295; *aff'd*, 104 U. S. 333. One well defined case of use is sufficient. *McClurg v. Kingsland*, 1 How. 202; *Consolidated Fruit Jar Co. v. Wright*, 94 U. S. 92; *Pitts v. Hall*, 2 Blatch. 229; *Egbert v. Lippman*, 104 U. S. 336. If the inventor gives or sells one article to be used by the donee or vendee without limitation or restriction, or injunction of secrecy, and it is so used, such use is public, even though the use and knowledge of the use are confined to that one person. *Egbert v. Lippman*, 104 U. S. 336. And that use may be by himself only. *Smith Manuf. Co. v. Sprague*, 123 U. S. 257. See also note, § 4923.

*"Abandoned."*—As used in the patent laws "abandonment" signifies a dedication by an inventor of his discovery to the free use of his fellows. It is like the dedication of a public way or other easement, and is to be proved in the same manner by evidence of some acts inconsistent with the intention of the exclusive property in himself. In this respect his acts are to be construed liberally. *Babcock v. Degener*, 1 MacAr. Pat. Cas. 607. An abandonment may be made by express declaration to that effect. *Kendall v. Winsor*, 21 How. 328. See also *Hartshorn v. Barrel Co.*, 119 U. S. 664; *Gandy v. Marble*, 122 Id. 432; *Consolidated Fruit Jar Co. v. Bellair Stamping Co.*, 27 F. R. 377; *Holmes Electric Protective Co. v. Burglar Alarm Co.*, 33 Id. 254; *Eastern Paper Bag Co. v. Paper Bag Co.*, 30 Id. 63. See also note, § 4923.

*"Due proceedings had."*—It seems that the authority to grant a patent depends upon an application made and pending for that purpose. *Railway Register Manuf. Co. v. Broadway R. Co.*, 26 F. R. 522. See *Eagleton Manuf. Co. v. West Manuf. Co.*, in note, § 4896.

SECT. 4887.—*"First patented, or caused to be patented."*—The provisions of this section evidently refer to the fact that the invention has been patented by the inventor himself (*Kendrick v. Emmons*, 9 O. G. 201; 2 Ban. & Ari. 208); and the surreptitious obtaining of letters-patent in a foreign country by some other person cannot deprive the inventor of any rights. Id. It is immaterial whether the foreign patent was granted to the inventor who made the application in this country, or to some other person to whom



he caused it to be patented, and in such a case the citizenship of the party is immaterial. *Edison Co. v. United States Co.*, 35 F. R. 134. This section applies to patents applied for here after the issue of a foreign patent. *French v. Rogers*, 1 Fisher, 133; *American Leather Co. v. Tool Co.*, 1 Holmes, 503; 4 Fisher, 284. This section applies when the foreign patent has been first granted, although the application for a patent was first made in the United States. *Electrical Co. v. Electric Co.*, 21 Blatch. 450; *Bate Co. v. Gillett*, 13 F. R. 553; 31 Id. 809; *Edison Co. v. United States Co.*, 35 Id. 134.

Where application for a patent was made here in May, 1871, letters granted in February, 1872, and in October, 1871, the inventor caused application to be made for an English patent for the same invention, a provisional specification being then filed, and letters were granted in England in April, 1872, and dated as of the day such specification was filed, and the complete specification was filed after the letters issued in England were sealed, it was held that the invention was not "first patented, or caused to be patented" in England, and the term of the domestic patent was not lessened by the antedating of the English patent. *Emerson v. Lippert*, 31 F. R. 911. This section does not apply where the foreign patent is not sealed until after the American patent is granted, although by statute such foreign patent is dated back to the time of the application, and takes effect from that date, which was prior to the granting of the American patent. *Seibert Oil Co. v. Powell Co.*, 35 F. R. 59. The date when the completed specifications were filed and the patent was sealed will be considered the date of the foreign patent. *Chambers v. Duncan*, 9 O. G. 741; 10 Id. 787; *James Cochrane*, 1 Dec. Com. 60; *Robert Mushet*, 2 Id. 106.

"*Public use.*"—The mere fact that a patent has been issued is not of itself sufficient to show public use. *Weston v. White*, 13 Blatch. 364; 2 Ban. & Ard. 321. As to what use is a public use, see notes, §§ 4886, 4920; *Hermann v. Gilmore*, 1 Dec. Com. 23.

"*But every patent,*" &c.—This section does not render invalid an American patent which does not bear the same date as a foreign patent for the same invention, but only limits its term. *Telephone Cases*, 126 U. S. 1, 572, citing *O'Reilly v. Morse*, 15 How. 62, 112; *Siemens v. Sellers*, 123 U. S. 276. Where under a foreign statute the patent can be extended as a matter of right, and is so extended, the American patent expires only at the expiration of such extended term. *Bate Co. v. Hammond*, 129 U. S. 167; overruling *Henry v. Tool Co.*, 3 Ban. & Ard. 501; *Reissner v. Sharp*, 16 Blatch. 383; *Bate Co. v. Gillett*, 13 F. R. 168. But the existence of improvements on the American patent cannot extend the term. *Siemens v. Sellers*, 123 U. S. 283; *Clark v. Wilson*, 24 Blatch. 38. The term of the patent in the United States shall be as long as the remainder of the term for which the patent was granted there, without reference to incidents occurring after the grant. And, therefore, it is immaterial that the foreign patent has lapsed for non-payment of a tax. *Paillard v. Brune*, 29 F. R. 864; *Holmes Co. v. Burglar Alarm Co.*, 21 Id. 458; *Reissner v. Sharp*, 16 Blatch. 383. Where there have been several foreign patents, the American patent runs only for the remaining term of the one first expiring. *United States v. Marble*, 2 Mackey, 12. The provision that a patent granted here on an invention patented abroad, shall expire with the foreign patent having the shortest term, means the shortest term of the patents granted before the patent of this country was issued, not that the latter shall expire with the patent granted abroad which had the shortest time to run when application was made here. *Gramme Electrical Co. v. Arnoux Electric Co.*, 17 F. R. 838. Patents coming within this section are valid for the remaining term of the foreign patent, although they are specified to run for a longer term. *Weston v. White*, 13 Blatch. 364; *Henry v. Tool Co.*, 3 Ban. & Ard. 501; *Reissner v. Sharp*, 16 Blatch. 383; *Du Florez v. Reynolds*, 17 Id. 436; 8 F. R. 434; *Holmes Co. v. Burglar Alarm Co.*, 21 F. R. 458; *Canan v. Manuf. Co.*, 23 Id. 185; *American P. B. Co. v. Laramy*, 28 Id. 141; *Bate Co. v. Hammond*, 129 U. S. 167. A foreign inventor may obtain a valid patent, although his foreign patent is void. *Cornley v. Marckwald*, 24 O. G. 498;



17 F. R. 83. Where the foreign patent is declared void *ab initio*, the American patent is not affected, but runs as if the foreign patent had never been granted. *Bate Co. v. Gillett*, 20 F. R. 192. Where a patent is made up of separate and distinct inventions, each of which is the subject of a foreign patent, and the foreign patent on one either expires, or is forfeited for non-payment of a tax thereon, the patentee may either obtain a re-issue or file a disclaimer. *I. L. Pulvermacher*, 10 O. G. 2. A re-issue should state the date and number of the foreign patent. *C. W. Siemens*, 11 O. G. 1107. A patent including some claims covered by a foreign patent may be issued subject to the limitation arising from the foreign patent, without a division of the application. *Unsworth*, 15 O. G. 882. But if a proper restriction in the grant can be accomplished by a division of the application, such division should be required. *C. W. Siemens*, 11 O. G. 979. An applicant whose invention has been patented abroad must state that fact and give the date of any and all such foreign patents. *Ex parte Bland*, 15 O. G. 828. The duration of a foreign patent in the United States is not affected by the question of its secrecy or publicity in the country where it was issued. *Gramme Electrical Co. v. Arneux Electric Co.*, 17 F. R. 838. This section is not retroactive so as to affect the power of the commissioner under any previous law to extend a foreign patent. *New American File Co. v. Nicholson File Co.*, 8 F. R. 816. Where the domestic and foreign patents are not alike, this section cannot be invoked to carry the date of the former back to the date of a previously granted foreign patent. *Gandy v. Main Belting Co.*, 28 F. R. 570. A domestic patent which is a mere adaptation of a foreign one expires at the same time as the latter. *Clark v. Wilson*, 28 F. R. 95.

SECT. 4888. — This section has two objects: (1) To guard the public against an unintentional infringement of the patent during its continuance; (2) to enable an artist to make the invention by referring to some known and certain authority after the patent has expired. *Evans v. Eaton*, 7 Wheat. 356; *Sullivan v. Redfield*, 1 Paine, 450. This section applies to a patent for an improvement upon a patented article. *Evans v. Eaton*, 7 Wheat. 356. The conditions must be performed regardless of the character of the patent for which application is made. *Mitchell v. Tilghman*, 19 Wall. 287.

"*File . . . a written description*," &c. — This provision is mandatory. If the description is vague and uncertain it may be aided by the drawings; but when it is silent in regard to a feature of the invention, and places the novelty upon a different and described feature, the drawings will not aid the entire omission. Neither will they aid the non-description. *Gunn v. Savage*, 30 F. R. 366. The specification must be so full and accurate that a person skilled in the art or science to which it is most nearly related could derive such information from it as would enable him to make the invention for which a patent is asked. *Seymour v. Osborne*, 11 Wall. 516; *Loom Co. v. Higgins*, 105 U. S. 580; *Lamb v. Hamblen*, 11 F. R. 722. That which is within the ordinary knowledge of any workman need not be described. *Pearce v. Mulford*, 102 U. S. 112. An inventor need not have reduced his invention to practical use before the patent is obtained, but he must be able to furnish the specifications and models required by law. *Wheeler v. Clipper Co.*, 6 Fisher, 1; 10 Blatch. 181. The performance of the requirements of this section are conditions precedent to the right of the commissioner to grant a patent. *New York v. Ransom*, 23 How. 487; *Latta v. Shawk*, 1 Fisher, 465; 1 Bond, 256; *Grant v. Raymond*, 6 Pet. 218; *Seymour v. Osborne*, 11 Wall. 540. The skill is that of practical workmen of ordinary skill in the particular business. *Page v. Ferry*, 1 Fisher, 298; *Smith v. O'Connor*, 6 Id. 469; 2 Sawyer, 461; *Mabie v. Haskell*, 2 Cliff. 507; *Mowry v. Whitney*, 14 Wall. 620.

The patentee must always describe the manner of employment to make it useful, where that is at all doubtful. *Eddy v. Dennis*, 95 U. S. 560; 4 Fisher, 423. A mistake in describing the action of some part of a device which could be easily discovered by a mechanic constructing the invention, is immaterial (*Singer v. Walmsby*, 1 Fisher, 558); or an



omission of a common and obvious part. *Union Paper Bag Co. v. Nixon*, 6 Fisher, 402; *Stillwell Manuf. Co. v. Gas Co.*, 7 O. G. 829; 1 Ban. & Ard. 610. As to the amount of detail necessary, see *Page v. Ferry*, 1 Fisher, 298; *Monce v. Adams*, 12 Blatch. 1; *Pearce v. Mulford*, 102 U. S. 112; *Brooks v. Jenkins*, 3 McLean, 432; *Mowry v. Whitney*, 14 Wall. 434. The scientific principle on which the operation depends need not be set forth. *Andrews v. Cross*, 19 Blatch. 294; 8 F. R. 269. The specification must not be such that the construction of the machine demands the solution of a problem. *Loom Co. v. Higgins*, 105 U. S. 580. In an invention for producing a useful result by a certain means, the means must be the necessary and essential means, and not mere adjuncts which can be used or abandoned at pleasure. *Russell v. Dodge*, 93 U. S. 460. A reference to the specification is often necessary to restrain the too great generality, or enlarge the literal narrowness of the claim. *Brown v. Guild*, 23 Wall. 181. If a fixed rule is given, a specification may declare, without being defective, that the rule may to some extent be safely departed from. *Tilghman v. Werk*, 2 Fisher, 229; 1 Bond, 511.

The inventor must describe the best way of making the article he knows (*Magic Ruffle Co. v. Douglas*, 2 Fisher, 330; *Page v. Ferry*, 1 Id. 298); but he need not suggest all the possible modes in which his design can be carried out. He must state the modes he considers best, and may add that other mere formal variations are included. *Carver v. Manuf. Co.*, 2 Story, 432; *Dibble v. Augur*, 7 Blatch. 86. A failure of a *bona fide* attempt to describe the best mode is not fatal. *Magic Ruffle Co. v. Douglass*, 2 Fisher, 330. The patentee need not specify the kind of power to be employed, or its method of application. *Carr v. Rice*, 1 Fisher, 198; *Lippincott v. Kelly*, 1 West. L. J. 513. And if no particular means are named for applying power, he may use any known to mechanics skilled in machinery of that particular kind, and not requiring invention to prepare or apply it. *Carr v. Rice*, 1 Fisher, 198; *Waterbury Brass Co. v. Miller*, 5 Id. 48; 9 Blatch. 77. The particular material need not be named. *Brooks v. Bicknell*, 3 McLean, 250; *Aiken v. Bemis*, 3 Wood. & M. 348; *Washing Machine Co. v. Lincoln*, 4 Fisher, 379.

A direction to use a "small quantity" in making a compound, is in certain cases sufficient where no experimenting is required. *Bowker v. Dows*, 15 O. G. 510; 3 Ban. & Ard. 518. It is sufficient to give a general rule for using the ingredients. *Wood v. Underhill*, 5 How. 1; *Goodyear v. Wait*, 3 Fisher, 242. But specifications giving only the names of the substances and stating the relative proportion vaguely or ambiguously are fatal. *Jenkins v. Walker*, 5 Fisher, 347; 1 Holmes, 120. And when no general rule can be given, but experiment is necessary, no valid patent can issue. *Wood v. Underhill*, 5 How. 1. The patentee need not limit himself to the precise ingredients used. *Ryan v. Goodwin*, 3 Sumner, 514; *Tyler v. Boston*, 7 Wall. 327. Specifications for a patent for the discovery of a new substance by means of a chemical combination of known materials, must state the component parts of the new substance with clearness and precision, and must not leave them to be found out by "experiment." *Tyler v. Boston*, 7 Wall. 330.

The patentee need not state what is new and what is old, but need merely describe what he claims as his own invention. *Brown v. Guild*, 23 Wall. 181. A practical mechanic is presumed to be acquainted with the construction of the machine on which the improvement is made. *Ives v. Hamilton*, 92 U. S. 426. In a patent for an improvement of a machine, a general reference to the machine improved is sufficient without a particular description of it. *Many v. Jager*, 1 Blatch. 372; *Brooks v. Bicknell*, 3 McLean, 250. A combination is sufficiently described if the devices of which it is composed are named, the mode of operation given, and the new and useful result properly pointed out. *Seymour v. Osborne*, 3 Fisher, 555; 11 Wall. 516; *Brown v. Guild*, 23 Id. 181; *Parks v. Booth*, 102 U. S. 96.

"And he shall particularly," &c. — Whatever the inventor clearly points out as his invention, and whatever his application shows that the inventor intends to claim as his,



is a part of his claim, when found in immediate connection with the specifications of his claim, whether such part precedes or follows the words "I claim," and whether or not any formal words of claim are used. *La Rue v. Electric Co.*, 24 Blatch. 23. When a specification by ambiguity and needless multiplication of nebulous claims is calculated to deceive and mislead the public, the patent is void. *Carlton v. Boker*, 17 Wall. 472. Ambiguous words such as "substantially as and for the purposes set forth," used as a limiting phrase, are insufficient, unless so placed as to be specially significant. *John Sperry*, 2 O. G. 387; *The Collins Co.*, Id. 617; *Orrin Rice*, 5 Id. 522. The words "or equivalent devices as described" may be used in a claim. *W. P. Walton*, 10 O. G. 165. But the words "equivalent" or "equivalents" in a claim are not proper if equivocal. *Daniel F. Haasz*, 4 O. G. 610. An alternative claim is bad. *Reid v. Roebuck*, 15 O. G. 882; *McDougall*, 18 Id. 130. As to when such a claim is good, see *Union Paper Bag Co. v. Nixon*, 6 Fisher, 402; 4 O. G. 31.

"*The specification shall be signed*," &c. — A patent issued on an application signed in blank by the applicant, and afterwards filled up by his attorney, is void. *Benton*, 23 O. G. 341.

SECT. 4889. — The requirement concerning drawings is not a condition precedent. It refers to the time of the issue of the patent, not the time the application is filed. *French v. Rogers*, 1 Fisher, 133. The drawings are sufficient if they and the specifications enable a skilled mechanic to make the invention patented. *American Leather Co. v. American Tool Co.*, 1 Holmes, 503. The drawings become a part of the patent. *Hogg v. Emerson*, 6 How. 437; *Washburn v. Gould*, 3 Story, 122. The references may be written on the drawings. *Hogg v. Emerson*, 2 Blatch. 1; 6 How. 437; 11 Id. 587. A drawing must be furnished when the case admits of it, whether useful or necessary, or not. *Chase*, 16 O. G. 809. As to drawings, see also *E. L. Parker*, 3 Dec. Com. 293; *Christopher C. Tracy*, 8 O. G. 144; *Edward J. Kemp*, 15 Id. 775; *Carter*, 16 Id. 809; *Rulof Dodge*, 2 Dec. Com. 149.

SECT. 4890. — The failure to furnish a sample of the composition for which a patent is desired does not affect the validity of the letters. *Tarr v. Folsom*, 1 Holmes, 312.

The original act provided that the application should be accompanied by a drawing, where the nature of the case admits of drawings; or with specimens of "ingredients and of the composition of matter, sufficient in quantity for the purpose of experiment, where the invention or discovery is of a composition of matter." It was ruled that whether the nature of the case admitted of specimens was a question solely for the Patent Office, and where none were required, it was equivalent to a determination that the case did not admit of any. And, in any event, the failure to furnish them was not a ground of defence to a patent. *Anilin v. Cochrane*, 16 Blatch. 155. A model will be required in every case where the nature of the invention admits of one, except the applications upon designs. *John Murdock*, 6 O. G. 506. A model will not be required unless useful as an aid in examining into the state of the art, or the construction of the specification and drawing. *Jove*, 17 O. G. 801. The model must correspond with the drawing and specification. *James W. Schoonmaker*, 13 O. G. 595. A model of an old machine in an application for an improvement need not be furnished if the machine was well known, or a description of it readily accessible. *Christopher C. Tracy*, 8 O. G. 144; *Edward J. Kemp*, 15 Id. 775. An applicant for a patent for a combination must furnish a model. *Rulof Dodge*, 2 Dec. Com. 149.

SECT. 4892. — A patent which is not supported by the oath of the inventor, but applied for by one who is not the inventor, is unauthorized by law and void, and whether taken out in the name of the applicant, or of any assignee of his, confers no rights as against the public. *Rev. Stats. §§ 4886, 4888, 4892, 4895, 4896, 4920*; *United States v. Telephone Co.*, 128 U. S. 672. The patent is not avoided because the oath required to be



made by the applicant is not taken. *Whittemore v. Cutter*, 1 Gall. 429; *Crompton v. Belknap Mills*, 3 Fisher, 536. The decision of the commissioner that the specifications have been duly sworn to is not open for review in a proceeding to set aside the patent by *scire facias*, or by bill, or information. *Hoe v. Cottrell*, 17 Blatch. 546, 549; 1 F. R. 597. A patent issued on a supplementary application under the act of 1836 recited that the patentee had made oath to his application. Held, that in the absence of fraud this was conclusive, as against one who had infringed the patent, that the required oath had been taken by the patentee. *Hancock Inspirator Co. v. Jenks*, 21 F. R. 911. The oath is required so that the public may know what they are prohibited from doing during the existence of the patent, and what they are to have when it is terminated, as a consideration for the grant. *Brooks v. Fiske*, 15 How. 212, 214. If the letters-patent recite that the required oath was taken before they were granted, in the absence of fraud this is conclusive. *Seymour v. Osborne*, 11 Wall. 516. The omission of the day and month in the jurat is immaterial. *French v. Rogers*, 1 Fisher, 133. A patent granted on an application amended after the inventor's death, without any additional oath by his executor or administrator, is void. *Eagleton Manuf. Co. v. Manuf. Co.*, 17 O. G. 1504; 18 Blatch. 218; 2 F. R. 774. An applicant cannot be required to make oath that the invention was not known or used prior to his application. *Rowan*, 22 O. G. 1037. As to a waiver of the objection that a specification was made out on papers signed and sworn to in blank, by the substitution of a specification properly described and sworn to, see *De La Mer v. Gaurens*, 1 Dec. Com. 94. A new oath must accompany the divisional portion of an application the same as if it were an original application. *James Heginbotham*, 8 O. G. 237. An affidavit taken before a burgomaster is not sufficient. *Warnant v. Warnant*, 17 O. G. 265. The omission to take the affidavit before a proper officer is not supplied by an affidavit to a preliminary statement. *Warnant v. Warnant*, 17 O. G. 265. Where the applicant signs a petition declaring that he invented it, but not that he believed himself to be the original and first inventor, but the vice-consul certified that the applicant personally appeared before him, and made oath that he verily believed himself to be such inventor, and the Patent Office grants a patent, it is *prima facie* valid. *De Florez v. Reynolds*, 14 Blatch. 506.

SECT. 4893. — "Fees," in the second line, also in the third line of § 4902, and the second line of § 4925, is substituted for "duty" in the cited act. 2 Com. D. 2356, 2360. The statute does not say by what particular officer the examination shall be made. He is not bound to accept the report of the examiner-in-chief; but if it appears from the result of the examination reported to the commissioner that the alleged invention is neither novel nor meritorious, he is bound not to issue a patent. *Hull v. Commissioner*, 2 MacArthur, 90; s. p. *Stephen Hull*, 1 Dec. Com. 68; *Moody v. Hudson*, Id. 108; *Morris v. Watson*, 2 Id. 71; *William S. Smoot*, 11 O. G. 1010. The commissioner with the approval of the Secretary of the Interior has power to institute proceedings to inquire into all allegations of prior public use, but in such cases he must give the applicant an opportunity to cross-examine the witness. *Re Alteneck*, 23 O. G. 269. He may for good cause refuse to affix the seal to a patent, even after he and the Secretary of the Interior have signed it. *Franklin B. Hunt*, 13 O. G. 771; *Disston v. Traut*, 1 Id. 305. The decision of the commissioner in allowing and issuing patents gives a *prima facie* right only. The validity of patents is subject to examination by the courts. *Reckendorfer v. Faber*, 92 U. S. 347. See also §§ 4909, 4910, 4911, 4915; *Butterworth v. Hoe*, 112 U. S. 59.

SECT. 4894. — "Application" in the second line is here substituted for "petition" in the cited act. 2 Com. D. 2356. The word "abandonment" refers to the application, not the invention. It does not bar a subsequent application for the same invention. *Lindsay v. Stein*, 10 F. R. 907; *William H. Golding*, 8 O. G. 141; *G. B. Sexton*, 9 Id. 251. It is a sufficient reason for not prosecuting an application that the inventor



was incapacitated by mental disease. *Ballard v. Pittsburgh*, 12 F. R. 783. This section is not a bar to the granting of a patent where there has been a delay of two years or more. The question whether such delay was unavoidable is for the commissioner, and if he is satisfied that it was, the application is not to be considered abandoned, and his judgment is conclusive. *M'Millin v. Barclay*, 5 Fisher, 189; *Smith v. Dimond*, 20 O. G. 742. An application is abandoned by two years' inaction after notice of the rejection of the application (*W. D. Leavitt*, 3 O. G. 212; see *Weitling v. Cabell*, 2 Id. 223); or after an appeal (*W. E. Woodbridge*, 15 O. G. 564); and an appeal must be taken within two years. *Reynolds*, 24 O. G. 993. See *Bell v. Daniels*, 1 Bond, 212. Failure to file a new application within two years after one has been withdrawn creates a reasonable presumption that the applicant has no intention of renewing it. *Hamilton v. Foster*, 1 Dec. Com. 30; *John W. Orr*, Id. 33; *Cryer*, 17 Id. 452. This section applies to bills in equity under § 4915. *Gandy v. Marble*, 122 U. S. 432. A second application filed within the two years is regarded as a continuation of the first, so that public use to be a bar must have taken place for two years before the first application. *S. Howes*, 1 O. G. 227. The pressure of other pursuits is no excuse. *Gray v. Hale*, 3 Dec. Com. 129. Where within the two years no steps are taken except to enter a formal abandonment and request a return of the model, it must be considered abandoned. *Freeham v. Graham*, 3 O. G. 211; *Lee v. Smith*, 15 Id. 58. The official stamp on a paper is the only reliable evidence of the date of a paper requesting further action. *Henry H. Blake*, 3 O. G. 2. The day of the last action is excluded in reckoning the two years. *Musser*, 16 O. G. 858. Where a claim has been rejected as amended, a mere request for a reconsideration is not taking action within the two years. *Barton H. Jenks*, 14 O. G. 747. This does not apply to an application for a reissue. *N. H. Galusha*, 3 O. G. 321.

SECT. 4895. — This section does not provide for the recording of an assignment of an unpatented invention on which the assignee is not to take the patent; and its record is not constructive notice of its contents to one who subsequently deals with a party in regard to it. *Wright v. Randel*, 19 Blatch. 495; 8 F. R. 591. Section 6 of the act of 1837 was satisfied if an assignment of an invention, made before a patent issued, was recorded before the patent was granted. *Gay v. Cornell*, 1 Blatch. 506. One who with knowledge of an unrecorded assignment of interest in a patent takes an assignment from the inventor, and procures the patent to be issued to himself, holds such patent in trust for the first assignee, and can be compelled to convey the same. *Pontiac Boot Co. v. Shoe Co.*, 31 F. R. 286. This section originated in § 6 of the act of 1837, and was reproduced here from § 33 of the law of 1870. Prior to the first mentioned act, a patent could only issue to the inventor. In one sense the assignee of the inventor can be no other than the person or corporation to whom the inventor or discoverer has executed an assignment. But the language of the section is as fully satisfied when the patent is issued to the inventor's assignee as it is when it is issued to the assignee's assignee. The latter is an assignee of the patent, but not of the inventor. A patent may issue to the person who, by the records of the office, is the assignee of the patent, although he is not strictly the assignee of the inventor. The purpose of the section is to authorize the issuance of a patent to the person who is shown by the records to have the title to the invention. This purpose is reached when the patent runs to the ultimate assignee of the invention, or to the inventor or his assignee, if, by virtue of a recorded assignment, the grant inures as soon as the patent issues to the ultimate assignee. *Consolidated Electric Light Co. v. Edison Electric Light Co.*, 25 F. R. 719; *Selden v. Stockwell Gas Burner Co.*, 9 Id. 390; 19 Blatch. 544; *Consolidated Light Co. v. McKeesport Light Co.*, 34 F. R. 335. A case is within the exception as to the signature of the inventor or discoverer if he was divested of his interest in the patent before July 8, 1870, though the assignee who makes the application did not acquire his until a later period. *Selden v. Stockwell Self-Lighting Gas Burner Co.*, 19



Blatch. 544. A patent cannot be granted to an assignee when the inventor himself would not be entitled to a patent. *Tatham v. Loring*, 5 N. Y. Leg. Obs. 207. The record governs the commissioner as to whom a patent shall issue where assignments have been made. *Thomas A. Edison*, 7 O. G. 423; *Edwin L. Paine*, 13 Id. 407. An assignment of a patent right, made and recorded in the Patent Office before the patent issued, which purported to convey all the inchoate right the assignor then possessed, as well as the legal title he was about to obtain, transfers the right to the assignee, although a patent was afterwards issued to the assignor. *Gayler v. Wilder*, 10 How. 477. A conveyance by a party of "all his property and estate, whatsoever and wheresoever, of every kind and description," carries any patent rights and extensions the assignor may own. *Railroad Co. v. Trimble*, 10 Wall. 367. An agreement to assign a patent, if the same is renewed, is valid, and if the patent is renewed conveys an equitable title. *Hartshorn v. Day*, 19 How. 211. An assignee, when called on for an accounting, cannot set up that the assignor was not the first inventor. *Kinsman v. Parkhurst*, 18 How. 289.

SECT. 4896. — *In trust for the heirs.* — A patent issued to an executor is valid although it does not express that it is in trust. The statute creates the trust, and the silence of the patent does not affect it. *Northwestern Fire Ex. Co. v. Philadelphia Fire Ex. Co.*, 1 Ban. & Ard. 177; *Stimpson v. Rogers*, 4 Blatch. 333. Foreign letters of administration are not good evidence that a person is executor or administrator. *Robert Ransome's Ex'r*, 2 Dec. Com. 143. An executor need not file a new application, but may be made a party to the pending application. *Rice v. Burt*, 16 O. G. 1050. While the legal title to the invention is in the administrator, he holds it subject to any equities existing against the inventor in his lifetime. *Northwestern Fire Ex. Co. v. Philadelphia Fire Ex. Co.*, 1 Ban. & Ard. 177. Where there has been an amendment of the specifications after the death of the inventor, and the patent shows that it was granted on his petition, a renewed application must be made in the name of the executor or administrator. *Eagleton Manuf. Co. v. West Manuf. Co.*, 111 U. S. 490; 18 Blatch. 218. On a patent granted to A. B., executor, he can maintain suits in all respects as if he had been designated as trustee instead of executor. *Rubber Co. v. Goodyear*, 9 Wall. 788. An objection to the authority of an executor to maintain a suit should be by plea in abatement. Id.

SECT. 4897. — A part of the cited provision, relating to applications rejected or withdrawn prior to the passage of that act, was here omitted as having become inoperative by lapse of time with respect to future applications. 2 Com. D. 2358. The action of the commissioner in granting a patent under this section is not conclusive as to the abandonment. A patent granted hereunder is as impeachable as one granted under § 4886. The effect of this section was to change the rule of the Patent Office, which had made the question of abandonment one of law. *Planing Machine Co. v. Keith*, 101 U. S. 479. The provision that "abandonment shall be considered as a question of fact" prevents the decision of the commissioner from being final. It may be reviewed in a suit on the patent. *United States Rifle Co. v. Whitney Arms Co.*, 14 Blatch. 94; 118 U. S. 22. An application cannot be renewed if the motion therefor is made more than two years after the allowance of the patent. *Hardy*, 12 O. G. 1075. But an inventor can file a second application after the two years. *Livingston*, 20 O. G. 1747.

The filing of a petition for the renewal of a rejected application does not of itself renew the case, but the petition must be accompanied by a demand for the action appropriate to the next stage of proceeding. *Millsbaugh*, 2 Dec. Com. 112. As to a renewal of claim for an article which has been rejected, where application was made for an article and a process, see *Arkell*, 11 O. G. 1111; *C. B. Cottrell*, 9 Id. 420. Where new applications, such as have before been filed and abandoned, are filed, the proper course is to refuse to consider them. *Andrew Mills*, 7 O. G. 961; *George Crompton*, 9 Id. 5; *Davies v. Hartman*, Id. 351.



SECT. 4898. — *Williams v. Star Sand Co.*, 35 F. R. 371. Section 11 of the act of 1836 declared that a patent should be assignable, either as to the whole interest or any undivided part thereof by any instrument in writing; and that the assignment should be recorded within three months after its execution. The assignment under this section, where it was not recorded, was construed to be void as against persons who held a subsequent assignment, which was recorded and taken *bona fide*. The language of the section now in the statutes is not materially different from that of the section referred to. *Turnbull v. Weir Plow Co.*, 6 Biss. 225. Three cases only of recording assignments are here provided for: 1st, an assignment of the whole patent; 2nd, an assignment of any undivided part thereof; 3d, a grant or conveyance of the exclusive right under the patent within any specified part of the United States. *Brooks v. Byam*, 2 Story, 525; *Blanchard v. Eldridge*, 1 Wall. Jr. 337; *Stevens v. Head*, 9 Vt. 174. There are three classes of persons in whom the patentee can vest an interest of some kind in the patent, — an assignee, a grantee of an exclusive sectional right, and a licensee. *Potter v. Holland*, 1 Fisher, 327; 4 Blatch. 206; *Gayler v. Wilder*, 10 How. 477; *Theberath v. Manuf. Co.*, 5 Ban. & Ad. 577; 3 F. R. 143. The ability to make the assignment or the aids to disability depend upon the laws of the State where it is executed. *Fetter v. Newhall*, 17 F. R. 841. A joint owner of a patent may sell and assign his own share or right in the patent. *May v. Chaffee*, 2 Dillon, 385. Where a consolidation of one corporation with another does not under the statutes work their complete extinction, one of them may afterwards, by their old president and secretary, make a valid conveyance of a patent to the consolidated corporation. *Edison Co. v. New Haven Co.*, 35 F. R. 233. No one is an assignee unless the whole property in the patent, or an undivided part of such property, has been conveyed to him. *Potter v. Holland*, 4 Blatch. 206; *Whittemore v. Cutter*, 1 Gall. 429. A purchaser from an assignee of a right to manufacture, sell, and use, an instrument, &c., within a certain district, has a right to use such purchased article anywhere. *Adams v. Burke*, 17 Wall. 453; *McKay v. Wooster*, 2 Sawyer, 373; *May v. Chaffee*, 2 Dillon, 385. To enable the assignee to sue in his own name, he must have a monopoly of the specified territory, to the exclusion of the patentee himself, as otherwise it is a mere license. *Gayler v. Wilder*, 10 How. 494. The exclusive right under a patent to a specified part of the United States means an exclusive right to do everything under the patent in such specified part which the patentee could do, and is the same as the exclusive right under the patent "to make and use, and to grant to others to make and use, the thing patented within and throughout such specified part." *Nelson v. McMann*, 16 Blatch. 139.

This section does not prevent the obtaining of an equitable title thereto or interest therein by parol. *Burr v. La Vergne*, 7 N. East. Rep. 366; 102 N. Y. 415. An agreement relating to an inchoate invention not perfected or patentable at the time is not within this section. *Id.* An assignment of an expired patent is good as a power of attorney to collect for infringements. *Bell v. McCullough*, 1 Bond, 194. Acknowledgment of an assignment before a notary public dispenses with proof of the signature of the assigner. *N. Y. Pharmica Ass'n v. Tilden*, 14 F. R. 740. An assignment of an interest in an invention is a contract to be construed as other contracts. *Nicolson Co. v. Jenkins*, 14 Wall. 452. A mere assignment under a State insolvent law is insufficient to vest the title in the assignee. *Ashcroft v. Walworth*, 5 Fisher, 528; 1 Holmes, 152. As to assignments before the patent is issued, see *Gayler v. Wilder*, 10 How. 477; *Rathbone v. Orr*, 5 McLean, 131; *Hammond v. Organ Co.*, 1 Holmes, 296; 92 U. S. 724; *Wright v. Randal*, 19 Blatch. 495; 8 F. R. 591; *Gay v. Cornell*, 1 Blatch. 506; *Littlefield v. Perry*, 21 Wall. 205; *U. S. Stamping Co. v. Jewett*, 18 Blatch. 409; 7 F. R. 869. An assignment of an invention, before or after a patent is obtained, carries with it the right of a renewal in the absence of something in the instrument indicating a different intention. *Hendrie v. Sayles*, 98 U. S. 546. But an assignment of an existing patent does not include more



than the term specified in the patent, in the absence of apt words expressing an intention to include more. *Id.* The assignment need not be under seal. *Gottfried v. Miller*, 104 U. S. 521; 10 F. R. 471. An agreement valid without recording need not be in writing; *e. g.*, a contract by an inventor to take a patent in trust for himself and another. *Blake-ney v. Goode*, 30 Ohio St. 350. A verbal assignment by a licensed agent of his right to sell is valid. *Springfield v. Drake*, 58 N. H. 19.

Recording an assignment is not a prerequisite to its validity, as between the parties to it. *Brooks v. Byam*, 2 Story, 525; *Turnbull v. Weir Plow Co.*, 6 Biss. 225; *Pitts v. Whitman*, *Id.* 609; *Perry v. Corning*, 7 Blatch. 195. As between the parties, an assignment is valid if recorded after the expiration of three months. *Olcott v. Hawkins*, 2 Am. L. J. 317. A license need not be recorded. *Brooks v. Byam*, 2 Story, 525; *Chambers v. Smith*, 5 Fisher, 12; *Consolidated Fruit Jar Co. v. Whitney*, 2 Ban. & Ard. 310. See also as to licenses, *Continental Co. v. Empire Co.*, 4 Fisher, 428; 8 Blatch. 295; *Hamilton v. Kingsbury*, 17 *Id.* 460; 4 F. R. 428. An assignment of a mere right of action to recover damages after a patent has expired need not be recorded. *Gear v. Fitch*, 16 O. G. 1231; 3 Ban. & Ard. 373. An unrecorded assignment in bankruptcy passed the bankrupt's interest in a patent. *Prime v. Brandon Manuf. Co.*, 16 Blatch. 453. Unrecorded assignments are valid as against wrong-doers. *Pitts v. Whitman*, 2 Story, 609; *Boyd v. McAlpin*, 3 McLean, 427; *Case v. Redfield*, 4 *Id.* 526. A purchaser must take his risk of any assignment made within three months of his own purchase. *Gibson v. Cook*, 2 Blatch. 144. This section is confined to patents issued; and a record of an assignment of an unpatented invention is not constructive notice to a purchaser. *Wright v. Randel*, 21 O. G. 493; 19 Blatch. 495; 8 F. R. 591. A party claiming under an instrument not required to be recorded, as against a subsequent purchaser from one having a record title, has the burden of proof to show that the purchaser had notice. *Id.* As to notice, see *Prime v. Brandon Manuf. Co.*, 16 Blatch. 453; 4 Ban. & Ard. 379; *Mitchell v. Hawley*, 16 Wall. 544; *Continental Co. v. Empire Co.*, 4 Fisher, 428; 8 Blatch. 295; *Peck v. Bacon*, 18 Conn. 377; *Steam Cutter Co. v. Sheldon*, 10 Blatch. 1.

SECT. 4899. — *Brooklyn Watch Case Co. v. Leach*, 35 F. R. 2. This section has two objects: 1. To protect the person who has used the thing patented, by having purchased, constructed, or made the machine to which the invention applied, from any liability to the patentee or his assignee; 2. To protect the rights granted to the patentee against infringement. *McClurg v. Kingsland*, 1 How. 208. This section must be construed in connection with § 4886. While the latter makes void every patent where it is shown that the invention was in public use or on sale for two years before application for a patent was made, this section, allowing the patent to stand, excepts from liability to the inventor all persons who have used for less than two years any patented machine or article that has been purchased or constructed with the knowledge and consent of the inventor prior to his application. *Duffy v. Reynolds*, 24 F. R. 855. The right to use is limited to the machines or articles which were constructed before the patentee made application for a patent. *Brickill v. Mayor*, 18 Blatch. 273. While the patentee was employed by the defendants at a weekly compensation, he made experiments at their expense which resulted in the discovery of an improved method of casting iron rollers. He continued to use his new method of casting such rollers for them for four months, at increased wages, before he applied for a patent, and proposed to his employers to purchase his right and apply for letters. They did not accept his proposition; and he made no demand upon them for the use of his improvement, and did not give them notice not to use it until after a misunderstanding arose between them. It was held that the facts showed consent and allowance of the use, and that the employers were not liable therefor. *McClurg v. Kingsland*, 1 How. 202. See *Chabot v. American Button-hole Co.*, 6 Fisher, 71. This section, though it has usually been applied to the case of employer and workman, is not limited



thereto. It applies where a member of a firm invents a machine and at the joint expense alters it, and permits the use of it by the firm. The use so permitted vests a right to its continuance, and upon a dissolution of the firm each of its members, to the extent of his interest in the assets of the partnership, has a right to use the machines. *Wade v. Metcalf*, 16 F. R. 130. It seems that a use obtained by fraud is not within this section; and the right to use and vend must be limited to a vendee of the inventor or his grantee. *Hovey v. Stevens*, 1 Wood. & M. 290, 301. A person surreptitiously gaining knowledge of an invention and using it has no right to use it after a patent is obtained. *Kendall v. Winsor*, 21 How. 322.

SECT. 4900. — Where the provisions of this section concerning stamping or labelling patented articles are not complied with, an infringer is not liable for infringements made in ignorance of the fact that the article was patented, notwithstanding he completed the manufacture of a number of machines in which he used the device patented after he had notice that it was patented. He is only liable for infringements made after notice. *Allen v. Deacon*, 21 F. R. 122. An objection was made to a motion for an injunction to restrain an infringement on the ground that the bill did not allege that the articles made under the patent were marked. The objection was overruled because it did not appear by the bill or otherwise that the plaintiff had made or sold any articles under the patent; if that fact was shown, it would be for the defendant to show that the statute had not been complied with, and the plaintiff would have the *onus* to show that the defendant had been notified, before he ceased to infringe upon the plaintiff's rights, that he was infringing. The penalty imposed only withdraws the right to recover damages. The right to an injunction is not affected. *Goodyear v. Allen*, 6 Blatch. 33. The objection that this section has not been complied with must be taken by the answer if it is desired to raise it on the hearing or before the master. *Rubber Co. v. Goodyear*, 9 Wall. 788. Unless the plaintiff proves that his patented article was stamped, or that he gave the defendant notice as required, he can recover no more than nominal damages. *McComb v. Brodie*, 1 Woods. 153. The fact that the expense of marking the article would have exhausted the patentee's profit, so long as it was not impossible to mark it, does not excuse a non-compliance with this section. *Putnam v. Ludhoff*, 1 Ban. & Ard. 198. The defence created by this statute does not apply where the defendant has manufactured the articles and neglected to stamp or mark them. *Herring v. Gage*, 15 Blatch. 124. When the size of the article makes it difficult to stamp upon it the required words, the statute is satisfied by placing a stamp or label containing them upon the packages in which the articles are shipped. *Sessions v. Romadka*, 21 F. R. 124. Where verbal notice was given one who infringed a patent, and a copy of the letters-patent was at the same time shown him, it was held that the statute was complied with. *New York Pharmica Assn. v. Tilden*, 14 F. R. 740.

SECT. 4901. — This statute, being penal, must be strictly construed, and does not apply where the article to which the word "patent" was affixed, was not patentable because its manufacture imported no novelty, nor the exercise of any inventive talent. *United States v. Morris*, 2 Bond. 23. *Contra*, *Olipphant v. Salem Flouring Mills Co.*, 5 Sawyer. 128. There is no liability unless the person who marked the unpatented article did so with knowledge that he had no right to do it, and with the purpose of deceiving the public. It is for the jury to find as to the intent. *Walker v. Hawxhurst*, 5 Blatch. 494. The statute is designed to guard the right of the public to use unpatented articles. To constitute the offence it must be found that the word "patent" was affixed, that the article was not patented, and that the intent in marking it was to deceive the public. The words "Newell's patent, 1852," is within the law. The article need not be sold, to constitute the offence. If the prohibited word is attached to articles without any intent to use them or to deceive, the purpose is innocent. One who has instructed his workmen to mark arti-



cles with the word "patent," intending to deceive, is not relieved from liability because he subsequently changes his mind without countermanding his order. *Nichols v. Newell*, 1 Fisher, 647. Where an article was stamped with the mark of two different patents, obtained by different patentees, one of whom had consented that defendant might affix his mark thereto, and the other patentee had not given such consent, the case was held not within subdivision three, which applies only to unpatented articles. *French v. Foley*, 11 F. R. 801. If the patents marked on the article issued have all expired, and there is no patent in force upon it or any part of it, there is no offence. *Wilson v. Singer Manuf. Co.*, 12 F. R. 57; s. c. 9 Biss. 173. The offence created by this subdivision is that of stamping. Taking the articles stamped into another district with intent to sell them is not prohibited, and cannot be construed as a repetition or continuance of the act of stamping in the district in which they are removed. *Pentlarge v. Kirby*, 19 F. R. 501. If the superintendent of a corporation knew, or should have known, that the articles he stamped were not patented, the corporation is liable for his act in stamping them. But if he honestly believe they were patented, it is not liable. *Tompkins v. Butterfield*, 25 F. R. 556. It need not be alleged or proved that the articles falsely stamped were patentable. If they were not, and the public would not be deceived by the marking, the defendant may show the facts. *Winne v. Snow*, 19 F. R. 507. Subdivision two of this section does not include the case of a patented article stamped with the mark of one who has no patent which includes or affects the article stamped, but who has a patent for a different article. The language cannot be added to by inserting after the words "the patentee" the words "of the same or any other similar article." *French v. Foley*, 11 F. R. 801. It is not required that the pleading allege that the stamping was done on a designated day. An allegation that it was done "in or about June, 1886," is sufficient on demurrer, if it is good according to the practice of the State in which the action was brought. *Fish v. Manning*, 31 F. R. 340. It must be alleged that the defendant had no patent; that the stamped article contained the patented improvement, and that the stamping was done without the consent of the plaintiff's assigns or representatives. *Id.* Suits to recover the penalty must be brought in the name of the informer. *United States v. Morris*, 2 Bond, 23. Where a suit was brought in the name of the informer for his own benefit and that of the United States, the latter was not considered a party, and a demurrer for misjoinder of parties was overruled. *Winne v. Snow*, 19 F. R. 507. Suit may be brought by one who is not specially damaged by the defendant's acts. *Id.* An action to recover the penalty can be maintained nowhere else than in the district where the stamping was done. The provision of § 732 that suits for penalties and forfeitures may be brought wherever the defendant may be found does not apply to actions under this section. *Pentlarge v. Kirby*, 19 F. R. 501. Jurisdiction depends upon the place where the offence is committed; not upon the residence of the parties to the action. *Winne v. Snow*, 19 F. R. 507. Service made upon the managing agent of a foreign corporation in a district where the stamping was done, confers jurisdiction, such service being allowed by the laws of the State in which it was made. *Hat-Sweat Manuf. Co. v. Davis S. M. Co.*, 31 F. R. 294. A penalty of more than one hundred dollars cannot be imposed. It may be recovered in an action of debt. *Stimpson v. Pond*, 2 Curtis, 502. The jury may assess as damages not less than one hundred dollars, and as much more as it sees fit. *Nichols v. Newell*, 1 Fisher, 647. It is assumed without discussion that the penalty is the amount specified for each offence. *Tompkins v. Butterfield*, 25 F. R. 556. The jury need not be satisfied beyond a reasonable doubt that the defendant attached the word "patented" to an unpatented article. If they are reasonably satisfied it is sufficient. *Hawloetz v. Kass*, 25 F. R. 765. *Contra*, *Nichols v. Newell*, 1 Fisher, 647; *Tompkins v. Butterfield*, 25 F. R. 556, 558.

SECT. 4902. — See note, § 4893. The provision concerning the filing of a caveat is for the benefit of the inventor, but he need not file it to preserve his right. If he files it



he is thereby entitled to have notice of any interfering application. *Heath v. Hildreth*, 1 MacArthur, 12, 25. Sections 12 and 15 of the act of 1836 protected the first inventor if he had complied with them, although he was not the first to adapt his invention to practical use. *Phelps v. Brown*, 4 Blatch. 362. A caveat gives notice of the caveator's claim as inventor, and prevents the issue of a patent to another person for the same invention. *Allen v. Hunter*, 6 McLean, 303; *Bell v. Daniels*, 1 Bond, 212. See also *Weston v. White*, 13 Blatch. 447; *Johnson v. Root*, 1 Fisher, 351; *American Pavement Co. v. Elizabeth*, 6 Id. 424; *Cochrane v. Waterman*, Cranch, Pat. Dec. 121; *New York R. & P. Co. v. Sibley*, 15 F. R. 386; *Hoe v. Kahler*, 12 Id. 111; *G. A. Gray*, 12 O. G. 396; *Lewis Hillebrand*, 2 Dec. Com. 145; *Wheeler v. Peters*, Id. 141; *J. Essex*, 9 O. G. 497; *J. Kenny, Sr.*, 1 Dec. Com. 97.

SECT. 4903. — An amended application cannot be sustained if it embodies any material addition to, or variation from the original, so far as the addition or variation is concerned. *Railroad Co. v. Sayles*, 97 U. S. 554. Where the drawings and models exhibit matters set out in the amended specifications, it is proper to include them; and the privilege of amending the specifications to this extent continues so long as the application is pending. *Singer v. Braunsdorf*, 7 Blatch. 521. See also *Godfrey v. Eames*, 1 Wall. 317; *Suffolk Co. v. Hayden*, 4 Fisher, 86; 3 Wall. 315.

SECT. 4904. — *Dickerson v. La Vergne Machine Co.*, 35 F. R. 143. There is nothing in this section which limits the power of the commissioner to declaring one interference. Hence, he has the same power on a reissue as he has in the case of an original application. *Potter v. Dixon*, 5 Blatch. 160. The interference contemplated by this section is with respect to matters which are patentable. The claims of the applicants must be limited to the matter set out in their specifications. *Bain v. Morse*, 1 MacArthur, 90; *Jones v. Wetherill*, Id. 409. The final decision of the commissioner under this section is obligatory on the parties until further proceedings are instituted in equity. *Peek v. Collins*, 70 N. Y. 381; 103 U. S. 660.

SECT. 4905. — The twelfth section of the act of 1839 authorized the establishment of such rules as were "just and reasonable." It was said that in using these words it must be presumed that the legislature had in mind established principles and precedents in like cases; that neither upon principle nor authority was it just or reasonable that the evidence in a contested proceeding should be taken before a magistrate, who was then of counsel for one of the parties. Depositions thus taken were held to be inadmissible. *Nichols v. Harris*, 1 McArthur, 302.

SECT. 4909. — See *Bigelow v. Thatcher*, 2 McArthur, 24.

SECT. 4910. — The words "fee prescribed" are substituted here, and also in the tenth line of § 4929, for "duty required by law" in the cited act. 2 Com. D. 2362.

SECT. 4911. — *Gandy v. Marble*, 122 U. S. 440. The appeal provided for by this section is not the exercise of ordinary jurisdiction at law or in equity, on the part of the court to which the appeal lies. It is one step in the statutory proceeding under the patent laws whereby that court is interposed in aid of the Patent Office, though not subject to it. The adjudication made, though it may not bind those who choose to contest the validity of a patent in courts of general jurisdiction, is conclusive upon the Patent Office. The commissioner cannot question it, neither can the department of which he is an officer. *Butterworth v. Hoe*, 112 U. S. 50, 60. Before a bill can be filed under § 4915, the complainant must have exhausted his remedies under this section. *Kirk v. Comm'r*, 5 Mackey, 229. An appeal lies from the decision of the commissioner that the applicant is not the original and first inventor. *Comm'r v. Whiteley*, 4 Wall. 522.

SECT. 4914. — The court is limited to the reasons of appeal. *Arnold v. Bishop*, Cranch, Pat. Dec. 103; *Smith v. Flickenger*, Cranch, Pat. Dec. 116. It can revise the decision only on the grounds on which the application was rejected. *Ex parte Conklin*,



1 MacArthur, 375. An officer or counsel of the Patent Office may appear and argue the appeal. *Perry v. Cornell*, Cranch, Pat. Dec. 132. A decision in an interference case is conclusive only between the parties. *Perry v. Starrett*, 3 Ban. & Ard. 485; *Shuter v. Davis*, 16 F. R. 564; *Holliday v. Pickhardt*, 12 Id. 147; *Perry v. Perry*, 14 O. G. 599.

SECT. 4915. — The power of the commissioner to refuse patents is expressly recognized in this section. A different class of cases is provided for herein than is contemplated by §§ 4910 and 4911. *Hull v. Commissioner*, 2 MacArthur, 90, 106. Because this section supplies a remedy if the commissioner refuses a patent, the remedy by *mandamus* is not available. *Id.* No court is bound by the decision of the Patent Office granting a patent when immediate steps are taken to test its validity in an action instituted for that purpose; and in an interference case, when the issue is decided, the rights of the defeated party are not prejudiced if he avails himself of his right to transfer the controversy to the courts. *Minneapolis H. Works v. McCormick H. M. Co.*, 28 F. R. 565. Acquiescence in the action of the Patent Office binds the party. *Greenwood v. Bracher*, 1 F. R. 856; *Peck Co. v. Lindsay*, 2 Id. 688. The remedy given by this section applies only when the commissioner decides to reject an application for a patent on the ground that the applicant is not entitled to it on the merits. It is not a technical appeal from the Patent Office like that authorized by § 4911. *Butterworth v. Hoe*, 112 U. S. 50, 61; *Whipple v. Miner*, 15 F. R. 117; *Butler v. Shaw*, 21 Id. 321. The provision of § 739, Rev. Stats., that no suit shall be brought in a circuit or district court against an inhabitant of the United States by original process in any other district than that in which he is an inhabitant, or in which he may be found at the time of serving the writ, applies to suits in equity under this section. A written acceptance by the commissioner of patents of service of a *subpoena* issued by a court in Vermont on a bill in equity filed therein, "to have the same effect as if duly served on me by a proper officer," has no other effect than would the service mentioned, and waives nothing. *Butterworth v. Hill*, 114 U. S. 128. See *Vermont Farm Machine Co. v. Marble*, 20 F. R. 117. No appeal lies to the supreme court of the District of Columbia from the decision of the commissioner upon an interference. The only remedy is by bill in equity. *Butler v. Shaw*, 21 F. R. 321. This clause is limited to cases in which the only opposing party is the commissioner of patents, and in which the costs, if not paid by the applicant, would fall upon the government. Whenever there are opposing parties, costs should be given the party who has prevailed. *Butler v. Shaw*, 21 F. R. 321. The commissioner of patents is not a necessary party to a bill filed under this section by one who has applied for a patent, where there is a party opposing the bill. If the patentee has transferred his interest in his patent the commissioner is a necessary party defendant. *Graham v. Teter*, 25 F. R. 555. See also *Ex parte Squire*, 12 O. G. 1025; 3 Ban. & Ard. 133; *Runstetler v. Atkinson*, 23 O. G. 940; *Greeley v. Com.*, 6 Fisher, 675; 1 Holmes, 284; *Ex parte Arkell*, 15 Blatch. 437.

SECT. 4916. — For the object of this section, see *Powder Co. v. Powder Co.*, 98 U. S. 138; *Blake v. Stafford*, 3 Fisher, 294; 6 Blatch. 195; *Doughty v. West*, 3 Fisher, 580; 6 Blatch. 429; *Poppenhusen v. Falke*, 2 Fisher, 181; 4 Blatch. 493. A patentee may surrender a reissue, invalid because not for same invention as the original patent, and obtain a second reissue. *American D. R. B. Co. v. Machine Co.*, 14 Blatch. 119; *American D. R. Co. v. Sheldon*, 17 Id. 208; *Selden v. Burner Co.*, 19 Id. 544; *Gibson v. Harris*, 1 Id. 167; *Wilson v. Rousseau*, 4 How. 646; s. p., as to any number of reissues, *French v. Rogers*, 1 Fisher, 133; *Morse v. Bain*, 9 West. L. J. 106. A reissue is not confined to the original assignee, but may be made also to any assignee. *Swift v. Whisen*, 3 Fisher, 343; 2 Bond, 115. A grantee of an exclusive territorial right need not join in a surrender (*Meyer v. Bailey*, 2 Ban. & Ard. 73; *Comm'r v. Whiteley*, 4 Wall. 522); nor need a mere licensee. *Potter v. Holland*, 1 Fisher, 327; 4 Blatch. 206; *Forbes v. Barstow Stove Co.*, 2 Cliff. 379. Third persons hold under the old patent, notwithstanding the



surrender and reissue. *Potter v. Holland*, 1 Fisher, 327; 4 Blatch. 206; *Washburn v. Gould*, 3 Story, 122; *McBurney v. Goodyear*, 11 Cush. 569; *Wilson v. Rousseau*, 4 How. 646. On an assignment of an undivided part of the whole, all part-owners must join in the surrender or subsequently ratify it. *Potter v. Holland*, 1 Fisher, 382; 4 Blatch. 206. But after an assignment of his whole interest the original patentee need not join in a surrender. *Swift v. Whisen*, 3 Fisher, 343; 2 Bond, 115. A surrender is an abandonment, and the patentee takes the risk of getting a reissue or losing all. *Peck v. Collins*, 103 U. S. 660. A surrender is not required by the statute to be in writing. *Dental Vulcanite Co. v. Wetherbee*, 3 Fisher, 87; 2 Cliff. 555. An applicant, who has filed his application with the acting commissioner and paid the requisite fees, has a right to consider it properly before the commissioner. *Comm'r v. Whiteley*, 4 Wall. 522. A reissue is void if there is no oath to the specification. *Whitely v. Swayne*, 4 Fisher, 117; 7 Wall. 685. The applicant for a reissue is not required to make an oath concerning the invalidity of his original patent. *Hartshorn v. Eagle Shade Roller Co.*, 18 F. R. 90. An oath that an original patent "is not fully valid and available" to the patentee is not in compliance with the statute, and does not authorize the commissioner to grant a reissue. *Whitely v. Swayne*, 4 Fisher, 117; *Poage v. McGowan*, 15 F. R. 398. See § 4892. The affidavit need not contain the exact words of the statute. The language that the original patent was not fully valid and available to the patentee is enough. *Gold & Stock Tel. Co. v. Wiley*, 17 F. R. 234.

*"Inoperative or invalid."* — These words mean inoperative or invalid in whole or in part. *Hartshorn v. Eagle Shade Roller Co.*, 18 F. R. 90.

*"Defective or insufficient specification."* — The word "specification" used without the word "claim" includes both description and claim. *Wilson v. Coon*, 18 Blatch. 552; 6 F. R. 611; *Smith v. Merriam*, 6 F. R. 713.

Where a patent has been obtained by an alien who made oath, ignorantly or inadvertently, that he is a citizen, it is void. Such a case is not within this section, and the commissioner has no authority to receive a surrender of the old patent and grant a reissue. *Mini v. Adams*, 3 Wall. Jr. 20.

As here used, "specification" means the entire paper referred to in § 4888, namely, the written description of the invention and of the manner and process of making, constructing, compounding, and using it, and the claims made. Hence a reissue is allowable when the specification is defective or insufficient in regard to either the description or the claim, or to both, to such an extent as to render the patent inoperative or invalid, if the error arose in the manner mentioned in this section. *Wilson v. Coon*, 18 Blatch. 552. Even when the original patent contains a satisfactory specification of the invention, if the specification of the claim is not sufficient to protect the invention, the defect may be remedied by a reissue. *Anilin v. Higgin*, 15 Blatch. 290. A patent may sometimes be enlarged in a clear case of mistake, not error of judgment. *Swain Manuf. Co. v. Ladd*, 102 U. S. 409. A party who has surrendered his patent as inoperative or invalid cannot maintain an action upon it while it is in the hands of the commissioner of patents. *Burrell v. Hackley*, 35 F. R. 833. An inventor in a renewed patent can omit a part of his original invention. *Carver v. Manuf. Co.*, 2 Story, 439. The allowance of an amendment by the commissioner is at least *prima facie* proof that the error occurred through inadvertence, &c., and that the amended specification related to the same patent. *Woodworth v. Edwards*, 3 Wood. & M. 129. An application for a reissue may, with the consent of the commissioner, be withdrawn at any time before the proceedings are fully completed and duly recorded, where there is no prejudicial interference with the rights of third persons. *Forbes v. Barstow Stove Co.*, 2 Cliff. 385.

*"Inadvertence, accident, or mistake."* — The patentee must show particularly wherein he was inadvertent or mistaken, or what the accident was. On appeal from the decision of



the commissioner refusing a reissue, the supreme court of the District of Columbia will require the same evidence of inadvertence, &c., as should have been produced before him. *Re Conklin*, 1 MacArthur, 375. Where the application for a patent was denied on the ground that some of the claims made were anticipated by an earlier invention, there is no such mistake or inadvertence as entitles the assignee of the patentee to a reissue. *Putnam v. Hutchinson*, 12 F. R. 127. Where the original papers showed that the patentee considered as an important element in his claim a specification which was stricken from his application at the suggestion of examiners in the Patent Office by his solicitors, who did not understand its value, this was held to be a case of inadvertence, accident, or mistake. *Stutz v. Armstrong*, 20 F. R. 843, 845. If the original application is capable of two constructions, and its sufficiency is doubtful, a reissue will be sustained. *Western Union Tel. Co. v. Baltimore Tel. Co.*, 25 F. R. 30. If a claim made in the original application was abandoned, it cannot be inserted in a reissue. *Wicks v. Stevens*, 2 Woods, 310. An error of judgment or wrong conclusion upon facts is not within the words inadvertence, accident, or mistake. *Yale Lock Manuf. Co. v. James*, 20 F. R. 903. A reissued specification, which contained all but two of the claims which appeared in the original and additional claims, but not in the latter, was held not to come within the clause concerning inadvertence. *Kells v. McKenzie*, 9 F. R. 284. Where the original claim clearly and accurately defined the patent granted upon it, and the latter was sufficient to include everything set out in the former, there was held to be no inadvertence, accident, or mistake. *Wooster v. Handy*, 21 F. R. 51. If the fact that the original claims were too narrow to protect the patentee was discoverable when the patent was issued, there is no such inadvertence, accident, or mistake as authorizes a reissue with enlarged claims nearly five years later. *Streit v. Lauter*, 11 F. R. 309. If a claim has been rejected by the commissioner when he acted on the original application, and the patentee has acquiesced therein, and the patent has been reissued without the claim, there is no inadvertence, accident, or mistake which authorizes a reissue. *Boland v. Thompson*, 26 F. R. 633. The mistake contemplated by the statute is in the presentation of the original claim, not in the mode of prosecuting the application after the commissioner has acted upon it. *Arnheim v. Finster*, 24 F. R. 276; 26 Id. 277. A reissue is void when it appears on the face of the instrument, or by contemporary records, that no accident, inadvertence, or mistake could have occurred. *James v. Campbell*, 104 U. S. 356. Where the claim, as found in the patent, is less broad than the invention as originally described and claimed by the inventor, through the mistake of the commissioner, the latter has authority, and should grant a reissue with an amended specification and a broader claim. *Morey v. Lockwood*, 8 Wall. 230.

The decision of the commissioner that the original patent was inoperative or invalid is final. *Selden v. Stockwell Self-Lighting Gas Burner Co.*, 19 Blatch. 544; *Seymour v. Osborne*, 11 Wall. 516. If the commissioner has accepted a surrender of an original patent and issued a new one, his decision, in a suit for infringement, is final and conclusive, unless the face of the patent shows that there is such repugnancy between the old patent and the new one that it must be held, as a rule of legal construction, that the latter is not for the same invention as that covered by the former. *Seymour v. Osborne*, *supra*. The statute is express to the effect that the reissued letters must be for the same invention as the original ones, and when it appears from an inspection of the two instruments that this is not the case, the later one is invalid. *Id.* The commissioner's decision is not final when he grants a reissue in a case where he had no authority to act, or exceeds his authority. *Giant P. Co. v. Powder Co.*, 98 U. S. 126; 4 F. R. 720; *Flower v. Rayner*, 5 Id. 793. The decision of the commissioner, even in the absence of fraud, is not conclusive on the question whether the improvements set out in the reissue are a substantial part of the invention secured in the original. *Cahart v.*



Austin, 2 Cliff. 528. The reissue must be for the same invention. *Seymour v. Osborne*, 11 Wall. 516; *Russell v. Dodge*, 93 U. S. 460; *Johnson v. R. R. Co.*, 105 Id. 533; *Gaidet v. Brooklyn*, Id. 550; *Gosling v. Roberts*, 106 Id. 31. The sole right to surrender is given only to (1) the patentee, if he is alive and has made no assignment of the original patent; (2) to the executor or administrator of the patentee, where there has been no such assignment; (3) to the assignee, where there has been such assignment. *Potter v. Holland*, 1 Fisher, 382; 4 Blatch. 206; *Smith v. Mercer*, 5 Penn. L. J. 529. The commissioner is to decide whether the party is an assignee, and if so, whether he is assignee of a proper interest under this section. *Comm'r v. Whiteley*, 4 Wall. 522. For a declaration where there had been reissues, see *Read v. Bowman*, 2 Wall. 591.

An assignment carries the whole property in the patent, or an undivided part of such property. An assignee is one to whom has been transferred the whole interest of the original patent, or any undivided part of such interest, in every part of the United States. *Potter v. Holland*, 4 Blatch. 206. The words "assignee" and "grantee," in the act of 1836, are not synonymous. The latter is one to whom has been transferred the exclusive right, under the patent, to make and use, and to grant to others the right to make and use, the patented article, within and throughout a designated portion of the United States. Neither a grantee nor a licensee need join in the surrender of a patent or any interest they may have in it. Id. Under § 13 of the act of 1836, providing that, in case of the patentee's death "or any assignment by him made of the original patent," the right to a reissue should vest in his executors, administrators, or assigns, it was ruled that, where, by the patentee's death, the patent devolved upon his executor and he had assigned it, the assignee might take a reissue in his own name and for his own benefit. *Carew v. Boston Elastic Fabric Co.*, 1 Holmes, 45. The provision of said § 13 for the issue of a new patent "for the residue of the period then unexpired for which the original patent was granted," did not limit the power of the commissioner in receiving a surrender and issuing a new patent to the term of the original patent. *Wilson v. Rousseau*, 4 How. 646. The residue referred to in the clause quoted is the residue of the time left after a patent has been extended, which makes it a patent for twenty-one years. Such extended patent is to be regarded as the "original patent" within the intent of that section. *Gibson v. Harris*, 1 Blatch. 167. See also *Woodworth v. Stone*, 3 Story, 249; *Whiteley v. Fisher*, 4 Fisher, 248. Under the law in force in 1866 a surrender of letters-patent rendered them absolutely void. It seems, under this section, that the effect of an adverse decision on the patentee's title to the invention would be as fatal to the original letters as to his right to a reissue. *Peck v. Collins*, 103 U. S. 660.

The principal purpose of the statute authorizing a reissue of patents seems to have been to enable a patentee to describe his invention more clearly, plainly, and specifically, so that he might fully comply with the law. The reissue of a patent for the purpose of making a claim broader than it was originally, seems not to have been contemplated by Congress. It clearly was not the special purpose to authorize surrenders for that end although, under the language used, such a reissue may be made where it clearly appears that an actual mistake has inadvertently been made. But this should be done only when an actual mistake has occurred; not because there has been a mere error of judgment, but a real *bona fide* mistake, such as a court of chancery would correct. In such a case the patentee must act promptly, or the reissue will be declared illegal and void. *Miller v. Brass Co.*, 104 U. S. 350. When a patent fully and clearly describes and claims a specific invention, complete in itself, so that it cannot be said to be inoperative or invalid because of a defective or insufficient specification, a reissue cannot be sustained if it expands and generalizes the claim so as to make it embrace an invention not described in the original patent. *James v. Campbell*, 114 U. S. 356. A reissue can only be granted for the invention which was originally patented. *Manufacturing Co. v. Ladd*, 102 U. S. 408. A claim



can only be enlarged when a clear mistake has been made. *Meyer v. Maxheimer*, 9 F. R. 99; *Mahn v. Harwood*, 112 U. S. 354. Whether there has been such a mistake is, generally, a question of fact for the commissioner; but whether application has been made in a reasonable time is a question of law. *Mahn v. Harwood*, *supra*. If a patent has been declared void because too much was claimed, the defect may be remedied by a reissue. *Mathews v. Flower*, 25 F. R. 830.

"*Every patent so reissued*," &c. Pending suits for an infringement fall on a surrender (*Moffitt v. Garr*, 1 Black, 273); but money recovered or paid under a patent previous to its surrender cannot be recovered back afterwards. *Id.* The patent issued on the surrender of the first being a continuation of the first, the law at the time of issuing the original governs. *Shaw v. Cooper*, 2 Pet. 292. The patentee can claim on a reissue whatever clearly appears to have been a part of his original invention as described or shown in his original specifications, drawings, or models. *Battin v. Taggart*, 17 How. 74; *Gallahue v. Butterfield*, 10 Blatch. 232; *Wheeler v. Clipper Co.*, 6 Fisher, 1; *Seymour v. Osborne*, 11 Wall. 544; *Calkins v. Bertraud*, 6 Biss. 494; *Russell v. Dodge*, 93 U. S. 460.

If the claims made for the original patent were valid, the reissue may vary them in order to cover the actual invention. After a reissue has been granted, it is conclusively presumed that the original claims were made through inadvertence, accident, or mistake. *Smith v. Merriam*, 6 F. R. 713. New claims, founded on the original invention as disclosed by the specifications, may be inserted in the reissue, if the claimant uses diligence in making his application. *Combined Patents Can Co. v. Lloyd*, 11 F. R. 149.

"*No new matter*," &c. Even before this act, where new matter was introduced into the description in such a manner as to enlarge the claim, and cause the patent to be not for the same invention, the reissue was invalid to the extent that it was not for the same invention. *Cartridge Co. v. Cartridge Co.*, 112 U. S. 641. The invalidity of a new claim in a reissue does not impair the validity of a claim in it which is only a repetition and separate statement of a claim in the original patent. *Gage v. Lewis*, 107 U. S. 640; *Yale Lock Co. v. Sargent*, 117 Id. 553. One void claim, if made by mistake or inadvertence, and without any wilful default or intent to defraud or mislead the public, does not vitiate the entire patent. *Carlton v. Bokee*, 17 Wall. 472. General claims, inserted in a reissued patent, will be carefully scrutinized, and cannot extend the rights of the patentee beyond what is shown by the history of the art to have been really his invention. *Carlton v. Bokee*, 17 Wall. 463. New matter must not be introduced in a reissue. "New" means not merely the introduction of a new ingredient in a patented composition, but any change in the original specification and claim whereby a new and substantially different composition and results are secured. *Salamander Co. v. Haven*, 3 Dillon, 135, *Powder Co. v. Powder Works*, 98 U. S. 126, 138. In the case of a chemical patent reissued, it is necessary that the subject-matter should be found described in the original patent. *Tarr v. Webb*, 10 Blatch. 96. The prohibition against the introduction of new matter applies though the matter was invented by the patentee and was inadvertently omitted from the original papers. *Atwater Manuf. Co. v. Beecher Manuf. Co.*, 8 F. R. 608. Anything clearly embraced in the original papers is not new matter. After a reissue has been granted it will not be set aside unless it clearly appears that new matter has been introduced. *Dederick v. Cassell*, 9 F. R. 306. A reissue which describes a combination of elements of the original patent other than that contained therein, is new matter. *Gill v. Wells*, 22 Wall. 1.

"*Amendments may be made upon proof*," &c. — This clause relates only to the evidence which may be employed by the commissioner in ascertaining the defects of the specification, and does not authorize him to grant a reissue for a different invention, or to determine that one invention is the same as a different one, or that two inventions, which are distinct, constitute but one. It does not enlarge the powers of the commissioner concern-



ing the invention for which a reissue may be granted. *Powder Co. v. Powder Works*, 28 U. S. 126. If the patent does not relate to a machine, a defective specification may be made more definite and certain so as to include the claim made, or the claim may be so modified as to correspond with the specification. But no other modifications can be made. *Giant Powder Co. v. California Powder Works*, 3 Sawyer, 448.

SECT. 4917. — The word "fee" in the seventh line is here substituted for "duty" in the cited act. 2 Com. D. 2364. A reissued patent is within the scope of this section and § 4922. *Gage v. Herring*, 107 U. S. 640, 646; *Yale Lock Co. v. Sargent*, 117 Id. 503. These sections are parts of one law, having a general purpose, and both relating to the case of a patentee who, through inadvertence, accident, or mistake, and without a purpose to deceive or defraud, has included, in his claims and in his patent, inventions to which he is clearly not entitled, and which are distinguishable from those to which he is entitled. The object of this section is to authorize him to file a disclaimer of the part to which he is not entitled. The purpose of § 4922 is to legalize suits on the patent therein mentioned, and to the extent to which the patentee can rightfully claim the invention. *Hailes v. Albany Stove Co.*, 123 U. S. 582. A disclaimer can only be made by a patentee who has claimed more than he should have claimed, and he can disclaim only such parts of the thing patented as he does not choose to claim or hold by virtue of his patent. In disclaiming, or limiting a claim, descriptive matter on which the disclaimed claim was based might be erased; but if there was merely a defective or insufficient description, it could only be corrected by a reissue. *Union Metallic Cartridge Co. v. United States Cartridge Co.*, 112 U. S. 624. A disclaimer can only be used for the purpose of surrendering a separate claim, or some distinct and separable matter which can be excised without mutilating or changing what is left. *Hailes v. Albany Stove Co.*, 123 U. S. 582.

*"Inadvertence, accident, or mistake."* — Inadvertences and mistakes of law are included as well as those of fact. *Wyeth v. Stone*, 1 Story, 273. See § 4916.

*"Provided the same is a material," &c.* — A disclaimer is necessary only where the thing claimed without right is a material and substantial part of the thing invented. *Hall v. Wiles*, 2 Blatch. 194. If the invention remaining after the disclaimer is not a material part of the thing patented, the patent is void. *Root v. Manuf. Co.*, 17 Blatch. 478; 4 F. R. 423. A disclaimer cannot be filed where the patent is for a combination. *Batten v. Clayton*, 2 Whart. Dig. 363; *Vance v. Campbell*, 1 Fisher, 483; 1 Blackf. 427.

*"But no such disclaimer," &c.* — This is to be construed with § 4922, and on a disclaimer filed after suit is brought there can be a recovery without costs. *Smith v. Nichols*, 21 Wall. 112; *Gage v. Herring*, 14 Blatch. 293; *Tuck v. Bramhill*, 6 Id. 104; *Guyon v. Serrell*, 1 Id. 244; *Hall v. Wiles*, 2 Id. 194, 198; *contra*, *Reed v. Cutter*, 1 Story, 598, 600; *Wyeth v. Stone*, Id. 273, 294. A disclaimer does not operate in favor of an assignee not joining with the patentee in the disclaimer in any suit at law or in equity. *Wyeth v. Stone*, 1 Story, 273; *Myers v. Frame*, 4 Fisher, 493; 8 Blatch. 446. The time runs from the moment when the party knew he was not the first inventor, or when a court has so declared it. *Singer v. Walmsley*, 1 Fisher, 558. But where the commissioner has pronounced it valid, and also a circuit court, the time does not run until the Supreme Court has passed upon it adversely. *O'Reilly v. Morse*, 15 How. 62; *Seymour v. McCormick*, 19 Id. 96; *Potter v. Whitney*, 1 Lowell, 87. Unreasonable neglect or delay cuts off the right of action. *Brooks v. Jenkins*, 3 McLean, 432; *Hall v. Wiles*, 2 Blatch. 194; *Winans v. Railroad Co.*, 1 Fisher, 213; 21 How. 88. The question of unreasonableness is for the court. *Singer v. Walmsley*, 1 Fisher, 558; *Seymour v. McCormick*, 19 How. 96; *contra*, *Brooks v. Jenkins*, 3 McLean, 432; *Lippincott v. Kelley*, 1 West. L. R. 513.

The word "claimant" is an evident error for "disclaimant," the latter being used in § 7 of the act of 1837, which was the earliest statute which provided for a disclaimer. *Union Metallic Cartridge Co. v. United States Cartridge Co.*, 112 U. S. 624.



SECT. 4918. — “*Interfering patents.*” — Patents do not interfere when they distinctly differ, and neither covers the same things as the other. *Pentlarge v. New York Bung Co.*, 20 F. R. 314. If inventions produce the same result in substantially the same way, the patents on them are interfering patents. *Garratt v. Seibert*, 98 U. S. 72, 77; *May v. Fond du Lac*, 27 F. R. 691. One who avails himself of a patented invention without varying it so as to make a new invention or discovery of it, infringes upon it. *May v. Fond du Lac*, *supra*. Two patents interfere when they claim the same invention in whole or in part. *Gold Co. v. Ore Co.*, 3 Fisher, 489; 6 Blatch. 307; *Garratt v. Seibert*, 98 U. S. 75; *Putnam v. Hutchinson*, 12 F. R. 131; *Celluloid Manuf. Co. v. Goodyear Co.*, 13 Blatch. 375.

“*Any person interested,*” &c. — The complainant must have obtained a patent. *Hoeltge v. Hoeller*, 2 Bond, 386; *Mason v. Rowley*, 3 A. L. T. (N. S.) 8. An assignee may file a bill in his own name. *Gay v. Cornell*, 1 Blatch. 506; *Gold Co. v. Ore Co.*, 3 Fisher, 489; 6 Blatch. 307.

The court has general equity power, and can grant an injunction. *Potter v. Dixon*, 2 Fisher, 381; 5 Blatch. 160.

“*On notice.*” — This section does not provide for the service of notice upon parties who are not residents of the district in which proceedings under it have been instituted. *Liggett Tobacco Co. v. Miller*, 1 McCrary, 31. The notice provided for means nothing more than the *subpœna* and other process authorized by chancery rules and practice. *Id.*

“*May adjudge and declare,*” &c. — The only question which can be determined in a proceeding under this section is that of priority and interference. The implication arising from the above-quoted clause is that no other question can be determined. Hence, where the plaintiff asks that the defendant's patent be declared void, because it is later than his, and for the same invention, a plea in bar by the defendant which admits both these facts, but alleges facts which render the plaintiff's patent void, because the article covered by it is not novel, raises a question which is not material in the proceeding. *Pentlarge v. Pentlarge*, 19 F. R. 817; 22 *Id.* 412. The sole question open in a proceeding under this section is that of priority between the interfering patents. *Lockwood v. Cleaveland*, 20 F. R. 164; *American Clay Bird Co. v. Ligowski Clay Pigeon Co.*, 31 *Id.* 466. This section gives a court of equity power to decide between interfering patents without any exception or limitation. Hence the decision of the Patent Office in favor of one of the parties is not *res judicata* upon the question of priority. *Hubel v. Tucker*, 24 F. R. 701; 23 Blatch. 297; *Union Paper Bag Machine Co. v. Crane*, 1 Holmes, 429. A judgment or decree cannot be accepted as determining the question of interference unless it is direct and affirmative in terms and in the words of the statute. *Tyler v. Hyde*, 2 Blatch. 308. Where, after proper averments, a bill under this section prayed for an adjudication concerning conflicting patents, and alleged an infringement of the plaintiff's patent by the defendant, and asked for an accounting and damages, it was held that a demurrer would not lie because of the misjoinder of causes of action. *Leach v. Chandler*, 18 F. R. 262. This section vests in the circuit court power to adjudge either of the interfering patents void in whole or in part, and, upon proper issues and proof, to decree that both are void. *Foster v. Lindsay*, 3 Dillon, 126.

This section cannot be invoked unless it is claimed that the interfering patent is for substantially the same invention as the other; that the party who seeks its aid is the real inventor, and that the defendant has interfered with his rights. *Celluloid Manuf. Co. v. Goodyear Dental V. Co.*, 13 Blatch. 375, 387. A defendant can obtain affirmative relief if he has made proper averments, without filing a cross-bill. *Lockwood v. Cleaveland*, 6 F. R. 721. The court may decree that the defendant's patent is void, although the plaintiff is not entitled to a decree for infringement, if the patent set up by his bill is void



because anticipated by previous patents issued to him. *American Clay Bnd Co. v. Ligowski Clay Pigeon Co.*, 31 F. R. 466.

SECT. 4919. — The rights granted by the patent laws do not extend to a foreign vessel which rightfully enters an American port; and the use of a patented invention in the construction, fitting out, or equipment of such a vessel while she is entering or leaving a port of the United States, is not an infringement of the rights of an American patentee, if such invention was placed upon her in a foreign port, and was authorized by the laws of the country to which she belongs. *Brown v. Duchesne*, 19 How. 183, 198. A patentee cannot maintain a bill to have it adjudged that he is not an infringer of the defendant's patent. *Celluloid Manuf. Co. v. Goodyear Co.*, 13 Blatch. 375. A joint owner of a patent may maintain an action against his co-owner, and recover such damages as he has sustained. *Pitts v. Hall*, 3 Blatch. 201. *Contra*, *Aspinwall Manuf. Co. v. Gill*, 32 F. R. 697.

"*Infringement.*" — If an article is made after, and agrees, in substance and principle, with the one described in letters-patent, it is an infringement. It is also an infringement to make a patented article, though the maker does not use it; or to use such an article made by another; or to sell to others a patented article made by another. *Haselden v. Ogden*, 3 Fisher, 378. It is not essential, in order to constitute an infringement, that the article manufactured in imitation of that patented, should operate as successfully as the latter, or that the same result be produced in precisely the same degree. If it is the same in kind, and is produced by substantially the same mode, it is an infringement. *Winans v. Denmead*, 15 How. 330, 344.

"*By action on the case.*" — The fact that the pleading by which the action was begun is called a petition does not affect the form of the action if the allegations are sufficient to make it an action on the case. This section should be construed in connection with § 914. *May v. Mercer Co.*, 30 F. R. 246; *Celluloid Manuf. Co. v. American Zylonite Co.*, 34 Id. 744. No exception has been made in favor of any wrongdoer in this section. The provision giving a right of action for an infringement is general, and includes counties as well as other corporations or individuals. *May v. Ralls Co.*, 31 F. R. 473, *May v. Mercer Co.*, 30 Id. 241; *May v. Logan Co.*, Id. 250; *May v. Fond du Lac Co.*, 27 Id. 691. *Contra*, *May v. Juneau Co.*, 30 Id. 241; *Jacobs v. Board*, 1 Bond, 500. A city is liable in its corporate capacity for the infringement of a patent. *Munson v. New York*, 3 F. R. 339; *Brickill v. New York*, 7 Id. 479. A county is liable for the infringement of a patent, notwithstanding a statute of the State in which it is situated gives the board of supervisors "exclusive power to adjust all claims against" the county. *May v. Saginaw Co.*, 32 F. R. 629. The clause of this section authorizing the party interested to sue, and the provision of § 4921 by which the complainant may recover profits and damages sustained by the infringement, mean that the party in interest must bring the suit, whether at law or in equity, in his own name, and that the right to do so cannot be delegated to another person so that it can be brought in the name of such person when it is not for his benefit. *Goldsmith v. American Paper Collar Co.*, 18 Blatch. 82; 2 F. R. 239. The party must have either the sole interest in the patent, or the whole interest within some particular district or territory. *Suydam v. Day*, 2 Blatch. 20; *Tyler v. Tuel*, 6 Cranch. 324. The patentee is entitled to recover at law although he has agreed to assign, unless he has made a legal assignment and transfer. *Park v. Little*, 3 Wash. 196; *Blanchard v. Eldridge*, 1 Wall. Jr. 337. A licensee cannot maintain an action in his own name, but may bring one in the name of the patentee for his benefit. *Suydam v. Day*, 2 Blatch. 20; *Gayler v. Wilder*, 10 How. 477; *Goodyear v. McBurney*, 3 Blatch. 32; *Goodyear v. Bishop*, 4 Id. 438. The assignees of separate undivided interests in a patent for a certain territory may join in an action for an infringement. *Stein v. Goddard*, 1 McAll. 82. The patentee and an assignee of a moiety may join in an action for an infringement. *Whittemore v. Cutter*.



1 Gall. 429. The assignee of the patent and of a claim for damages may maintain an action at law in his own name for the damages. *Spring v. Domestic Co.*, 13 F. R. 446. If the assignment of a patent includes all claim for prior infringements, the assignee is the only party interested, and an action is well brought in his name alone. *Adams v. Bellaire Stamping Co.*, 25 F. R. 270; distinguishing *Moore v. Marsh*, *infra*; *May v. Logan Co.*, 30 F. R. 250. "Interested" signifies interested in the patent at the time the infringement was committed. Hence, the original owner of the patent, after he has sold his right, may recover for an infringement committed before such sale was made. *Moore v. Marsh*, 7 Wall. 515. The assignee must sue for an infringement made after the assignment was executed and recorded. *Herbert v. Adams*, 4 Mason, 15. The word "assignee" in this section must be construed by reference to § 11 of the act of 1836 (§ 4898). *Blanchard v. Eldridge*, 1 Wall. Jr. 337. One to whom an exclusive right to use a machine for a specified purpose has been granted cannot sue for an infringement of the patent. Neither can one who has an interest in only a part of each patent, as a license to use, in the manufacture of a particular kind of goods, the invention patented. *Suydam v. Day*, 2 Blatch. 20. One who holds less than an exclusive right within a designated part of the country is a mere licensee, and cannot sue in his own name. *Gayler v. Wilder*, 10 How. 477. Under § 14 of the act of 1836, giving a right of action to "grantees of the exclusive right within and throughout a specified part of the United States," it was ruled that the grantee of the exclusive right to construct and use, and to vend to others to be used, two of the patented machines within a designated time, could sue. *Wilson v. Rousseau*, 4 How. 646, 686.

"*As the actual damages.*" — When it appears in an equity case that the defendant's profits from the use of the plaintiff's invention do not amount to so much as the plaintiff's damages arising from the infringement, the amount of such profits may be added to until the sum awarded equals the plaintiff's damages. *Birdsall v. Coolidge*, 93 U. S. 64; *Simpson v. Davis*, 22 F. R. 444; *Child v. Boston & Fair Haven Iron Works*, 19 Id. 258. In an action at law for the infringement of a patent, the plaintiff can recover a verdict for only the actual damages which he has sustained; and the amount of such royalties or license fees as he has been accustomed to receive from third persons for the use of the invention, with interest thereon from the time when they should have been paid by the defendants, is generally, though not always, taken as the measure of his damages. *Tilghman v. Proctor*, 125 U. S. 136, 143, and cases cited. The damages are determined from the actual profits made, and not from what might have been made by reasonable diligence. *Dean v. Mason*, 20 How. 198. The party must show his actual damages by evidence, for the damages cannot be left to the conjecture of the jury. The royalty, if any, will ordinarily measure the damages. Counsel fees cannot be included. *Philip v. Nock*, 17 Wall. 460. The damages are the advantages derived by the infringer from the use of the invention over what he had in using other processes open to the public. *Mowry v. Whitney*, 14 Wall. 620. The profits are damages, and unliquidated until a final decree; and interest cannot be allowed before such final decree. *Id.* An increase should be given only under exceptional circumstances. *Zine v. Peck*, 13 F. R. 475; *Schwarzel v. Holensshade*, 3 Fisher, 196; *Brodie v. Mining Co.*, 4 Id. 137; *Guyon v. Serrell*, 1 Blatch. 244; *Sanders v. Logan*, 2 Fisher, 167; *Livingston v. Woodworth*, 15 How. 546; *Peek v. Frame*, 9 Blatch. 194; *Welling v. La Bau*, 35 F. R. 302; *Lyon v. Donaldson*, 34 Id. 789.

"*With the costs.*" — These words were probably added so as not to limit the amount of the judgment to the precise sum as increased, which would exclude costs when costs cannot be recovered; as, where a disclaimer is not seasonably filed, the court may increase the damages. *Guyon v. Serrell*, 1 Blatch. 244.

SECT. 4920. — Notice is required so that the moving party will not be surprised at the trial by a defence, the nature of which he could not be presumed to know, or be prepared.



to meet. *Teese v. Huntingdon*, 23 How. 2. Evidence of prior use and knowledge of the thing patented cannot be given, though it is pleaded, if proper objection is made, unless the prescribed notice has been given. *Blanchard v. Putnam*, 8 Wall. 420. The notice provided for may be given without leave or order from the court, and a defect in it may be remedied by a second notice given in writing and served as prescribed. *Teese v. Huntingdon*, 23 How. 2. A plea stricken out by the court is not a sufficient legal notice. *Silsby v. Foote*, 1 Blatch. 445; 114 How. 218. Evidence stated in the notice to be for one purpose cannot be used for another. *Pennock v. Dialogue*, 4 Wash. 538; 2 Pet. 1. Testimony is inadmissible as to use by any persons not named in the notice. *Collender v. Griffith*, 11 Blatch. 212. The state of the art can be shown without notice. *Vance v. Campbell*, 1 Black, 427; *Brown v. Piper*, 91 U. S. 37. So also can the similarity of the machine used by the defendant to the model exhibited in court. *Evans v. Hettick*, 7 Wheat. 453. The notice in writing is not a pleading, and instead of being put into the answer should be served on the adverse party. *Cottier v. Stimson*, 20 F. R. 906; 10 Sawyer, 212; *Henry v. United States*, 22 Ct. Cl. 75. A demurrer does not lie to the notice. *Henry v. United States*, *supra*. The defendant may plead specially. *Evans v. Eaton*, 3 Wheat. 454; *Grant v. Raymond*, 6 Pet. 218; *Phillips v. Combstock*, 4 McLean, 525; *Day v. N. E. Car-Spring Co.*, 3 Blatch. 179; *Cottier v. Stimson*, 20 F. R. 906; 10 Sawyer, 212. This section does not enumerate all possible defences, as the party may show that he never did the act, or had a license or authority therefor. *Whittemore v. Cutter*, 1 Gall. 429. As to defences allowed under the general issue without notice, see *Kneass v. Bank*, 4 Wash. 9; *Grant v. Raymond*, 6 Pet. 218. A patent cannot be invalidated in a suit for infringement for any other reasons than are specified in this section, as by showing that the commissioner did not require the observance of the provisions of the statute concerning the signature to the specifications. *Railway Register Manuf. Co. v. North Hudson C. R. Co.*, 23 F. R. 593. The fourth and fifth defences provided for are distinct from each other, and if both are relied on, notice must be given accordingly. *Meyers v. Busby*, 32 F. R. 670. When the first day of the term is the day of trial, the notice must be served on the plaintiff's attorney thirty days before such first day. *Westlake v. Cartter*, 6 Fisher, 518. The party who gives notice is not bound to be so specific as to relieve his adversary from all inquiry or investigation into the facts. If the former gives notice in such manner as puts the latter in the way of obtaining all that is required to enable him to meet the evidence, it is enough. *Wise v. Allis*, 9 Wall. 737.

This section does not prevent the government from bringing a suit to vacate a patent for fraud. *United States v. Bell Telephone Co.*, 128 U. S. 315, 370.

"*First.*" — The patentee is not bound to prove affirmatively that a specification was made too broad, so as to deceive or defraud the public. *Hotchkiss v. Oliver*, 5 Denio, 314. The matters not disclosed must appear to have been concealed for the purpose of deceiving the public. *Park v. Little*, 3 Wash. 196; *Gray v. James*, Pet. C. C. 394. See *Grant v. Raymond*, 6 Pet. 218; *Loom Co. v. Higgins*, 105 U. S. 580. The intent may be presumed from circumstances. *Gray v. James*, Pet. C. C. 394; *Dyson v. Danforth*, 4 Fisher, 133. Materially defective specifications and drawings afford a presumption of a designed concealment. *Whittemore v. Cutter*, 1 Gall. 429. See also *Reutgen v. Kanows*, 1 Wash. 168.

"*Second.*" — The diligence here referred to has no application to the case of interfering applicants. It relates to the case of a prior inventor who defends against a patent surreptitiously granted to a subsequent inventor, and only in such a case; or where it appears that analogous principles are involved, in which case it applies by equitable construction. *Stephens v. Salisbury*, 1 MacArthur, 379. There must be an allegation that the alleged first inventor was at the time using reasonable diligence in adapting and perfecting the invention. *Agawam Co. v. Jordan*, 7 Wall. 583; *Reed v. Cutter*, 1 Story,



590; *Singer v. Walmsley*, 1 Fisher, 558. See also *Phelps v. Brown*, 1 Fisher, 429; 4 Blatch. 362. The *bona fide* inventor who is using reasonable diligence in adapting and perfecting his invention, is saved, as against another who has independently made the same invention and first communicated it to the public, by the spirit, if not by the letter of this clause. *Heath v. Hildreth*, 1 MacArth. Pat. Cas. 12. Under § 15 of the act of 1836, it was not necessary that the first inventor should use reasonable diligence in adapting and perfecting his invention. The clause in that section which provided that the defendant might show, in order to vacate a patent already granted, that it was surreptitiously obtained for an invention which was being diligently prosecuted by another, had no application to the case of contending applicants. *Perry v. Cornell*, 1 MacArth. Pat. Cas. 68.

"*Third.*" — The work must have been published before the date of the patentee's invention. The imprint on the titlepage may be evidence to show when it was printed, but other evidence must be given as to when it was published. *Reeves v. Bridge Co.*, 5 Fisher, 456. The description must be before the discovery, not before the application. *Adams v. Edwards*, 1 Fisher, 1. No evidence is admissible to show that an invention described was made prior to such publication. *Kelleher v. Darling*, 4 Cliff. 424; 3 Ban. & Ard. 438. The word "patented" relates only to patents laid open to the public and protected to the inventors; but the production of a copy of a foreign patent is sufficient evidence that the patent was not a secret one. *Schoerken v. Swift Co.*, 19 Blatch. 209; 7 F. R. 469; *Brooks v. Norcross*, 2 Fisher, 661. It is not required that it shall be alleged or proved that the description was published two years before the invention was made. If it was done prior to the making of the invention it defeats the patent. *Parks v. Booth*, 102 U. S. 96, 103. Depositing a written description of an invention in the Patent Office is not publishing it within the meaning of this section. *Lyman Ventilating Co. v. Lalor*, 12 Blatch. 303. A rejected application for a patent is not a publication. *Herring v. Nelson*, 14 Blatch. 293; *Barker v. Stowe*, 15 Id. 49; *Howes v. McNeal*, Id. 103. Patented inventions cannot be superseded by the mere introduction of a foreign publication of prior date, unless the description and drawings contain and exhibit a substantial representation of the patented improvement in such full, clear, and exact terms as to enable any person skilled in the art or science to which it appertains to make, construct, and practise the invention to the same practical extent as he would be enabled to do if the information was derived from a prior patent. *Seymour v. Osborne*, 11 Wall. 516, 555; *Cohn v. United States Corset Co.*, 93 U. S. 366, 370; *Eames v. Andrews*, 122 Id. 40, 66. An English patent is not issued until the completed specification is filed. *Smith v. Goodyear Co.*, 93 U. S. 486, 498; *Coburn v. Schroeder*, 11 F. R. 425.

"*Fourth.*" — This section and § 4886 are to be construed together, and under them prior knowledge of an invention which was not accessible to the public, will not defeat a patent. *Gayler v. Wilder*, 10 How. 477; *Searls v. Bouton*, 12 F. R. 140. Under §§ 4886, 4920, 4923, the use or knowledge of the use of an invention in a foreign country by persons residing here will not defeat a patent which has here been granted to a *bona fide* patentee who at the time was ignorant of the existence of the invention or its use abroad. *Doyle v. Spaulding*, 19 F. R. 744. The prior invention or discovery must have been complete and capable of producing the result sought to be accomplished, and the burden rests on the defendant to show it. *Coffin v. Ogden*, 18 Wall. 124.

"*Fifth.*" — The use of an invention by the inventor, or by another under his direction, by way of experiment, and for the purpose of perfecting it, is not a public use. *Shaw v. Cooper*, 7 Pet. 292. The use of a street pavement by laying it upon the toll-road of a private corporation for the purpose of testing its qualities, remedying its defects, and perfecting it, is not a public use, though the public travel on such road and obtain a knowledge of the pavement by the use of it. *Elizabeth v. Pavement Co.*, 97 U. S. 126. The



sale of a single machine on trial and warranty is to be regarded as a use of it for such practical tests as the law authorizes an inventor to make, especially where the only test that could be made was by practical use. *Graham v. McCormick*, 10 Biss. 39; *Railway Reg. Manuf. Co. v. Broadway R. Co.*, 22 F. R. 655. An inventor may use for profit a machine which is not perfected for the purpose of determining what are its defects and remedying them. *Sprague v. Smith & G. Manuf. Co.*, 12 F. R. 721. There may be a public use of an invention though only one of the patented articles should be publicly used. The use of a large number may strengthen the proof, but one well-defined case of such use is as effectual to annul the patent as many. *McClurg v. Kingsland*, 1 How. 202; *Consolidated Fruit Jar Co. v. Wright*, 94 U. S. 92; *Pitts v. Hall*, 2 Blatch. 229; *Egbert v. Lippmann*, 104 U. S. 333. Whether the use is public or private does not necessarily depend upon the number of persons to whom it is known. If the inventor gives or sells his production to another for use, without limitation or restriction, or injunction of secrecy, and it is used in public, though only to the knowledge of one person, such use is a public use. *Egbert v. Lippmann*, *supra*. If an inventor sells a machine of which his invention forms a part, and allows its use without restriction, the use is a public one; but a use necessarily open to public view, made in good faith for the sole purpose of testing the invention, is not. *Id.* Where the patentee has made two or more applications for a patent, and the first embraced the subject-matter of the last, and the specifications and drawings which formed a part of it described the patent as issued, the proceedings are regarded as continuous, and the two years began to run when they were initiated. *Graham v. McCormick*, 10 Biss. 39. Public use is not synonymous with general use, but means a use in public as contra-distinguished from a use in secret. *Hunt v. Howe*, 1 MacArth. Pat. Cas. 366. Such a use by an individual will defeat a patent. *Ellithorp v. Robertson*, *Id.* 585; *Rich v. Lippincott*, 2 Fisher, 1. It seems that use in a workshop where the employees were pledged to secrecy is not a public use. *Kendall v. Winsor*, 21 How. 322. Use by the patentee in his business for more than two years before a patent was applied for, by workmen who were not pledged to secrecy, is a public use, though the general public were not allowed to visit the place where such use was carried on. *Perkins v. Nashua C. & G. Paper Co.*, 2 F. R. 451. The acts of an inventor to ascertain the value, utility, or success of his invention, are to be liberally construed unless they are inconsistent with a clear purpose to hold the exclusive privilege. *Jennings v. Pierce*, 15 Blatch. 42. "Public use of an invention, unless by the patentee himself, for profit, or by his consent or allowance, will not work a forfeiture of his title unless it clearly appears that the use was solely for profit, and not with a view to further improvements, or of ascertaining its defects, or for any other purpose of experiment in reducing the invention to practice." *Jones v. Sewall*, 3 Cliff. 563; *Pitts v. Hall*, 2 Blatch. 229; *Emery v. Cavanagh*, 17 F. R. 242. In the sense of the statute public use is proved by a single use by any other person than the inventor, or by him in an open way, if the use is not experimental. *Jones v. Barker*, 11 F. R. 597. A single conditioned sale more than two years before making application forfeits a patent. "Application," as used in this clause of the statute, includes the paper, or some written paper, and the presentation of it to the commissioner. The demand of the statute is not satisfied by an application kept in the inventor's pocket. *Henry v. Francetown S. S. Co.*, 2 F. R. 78. Where the inventor of drive wells put down a well at his house, and four months later drove another well, in the manner described in his patent, at the fair grounds near the town in which he resided, for the use of soldiers in camp there, and he gave orders and directions for the construction of proper apparatus for driving similar wells, and made arrangements for its transportation with the regiment of soldiers to which he belonged, such use was held not a dedication to the public. *Beedle v. Bennett*, 123 U. S. 71, 76; *Andrews v. Carman*, 13 Blatch. 307, 325. See *Andrews v. Hovey*, 123 U. S. 267; 124 *Id.* 694, declaring



this patent void. The defence that an invention has been abandoned is not restricted to reissued patents, but extends to all patents. *Railway Register Manuf. Co. v. Broadway R. Co.*, 26 F. R. 522. If the sale of machines which embody the patented process is relied on in defence to a suit for infringement, it must be made to appear that they were capable of working the process. There is no real invention of a process until a machine is constructed which will work it. *Eastern Paper Bag Co. v. Standard Paper Bag Co.*, 30 F. R. 63. The expression that it had been in public use or on sale means the thing mentioned in § 4886, viz., the art, machine, manufacture, or composition of matter. An assignment of letters-patent is not a sale of the thing or process patented within the meaning of this section, although the letters cover a patent for a process which could not be otherwise sold. The statutes make no distinctions between the kinds of inventions, nor do they provide that the being on sale of the patent shall avoid it where the thing patented is not capable of being sold. *United States Electric L. Co. v. Consolidated Electric L. Co.*, 33 F. R. 869. In a suit in equity to restrain an infringement, where no specification of prior use or knowledge is given under this section, evidence of the state of the art at the date of the application may be received for the purpose of defining the limits of the grant in the original patent, and the scope of the invention described in its specification. *Eachus v. Broomall*, 115 U. S. 429.

It is not required that the names of witnesses who may be called to testify to an alleged prior invention or use shall be given in the answer. *Planing Machine Co. v. Keith*, 101 U. S. 479; *Roemer v. Simon*, 95 Id. 214, 219. The testimony of a witness who was called to prove prior knowledge of the plaintiff's invention was stricken out on motion at the hearing, because the answer did not give the place of his residence, in *Decker v. Grote*, 10 Blatch. 331. The notice must recite where and by whom the invention was used, otherwise proof of prior knowledge and use cannot be given. *Searls v. Bouton*, 12 F. R. 140. But it is not required that the notice specify the time when a person may have possessed the knowledge or use of an invention. *Phillips v. Page*, 24 How. 164. If notice of the name and residence of the alleged prior inventor, and of the place of use, and of the name of some person who has used the invention, have been given or waived, all other witnesses may be examined without notice. *Woodbury Patent P. M. Co. v. Keith*, 4 Ban. & Ard. 100, 103. Notice of the use of a prior machine at Cincinnati, Covington, Pittsburg, Wayne County, Indiana, is not specific enough as a foundation for proof. *Latta v. Shawk*, 1 Bond, 259. A reference to a county, in such a case, is also too indefinite. *Hays v. Sulsor*, 1 Bond, 279. Naming a city is sufficient as to place. *Wise v. Allis*, 9 Wall. 737. A reference to a large book by name and title, without other specification, is too indefinite to admit the contents of it in evidence; and the place where the book was used not being indicated, evidence that a citizen of London had prior knowledge of the invention is not admissible. *Silsby v. Foote*, 14 How. 218.

Where the answer to a bill which alleged infringement set up the defence of prior knowledge and use, and gave the names and residences of witnesses intended to be called to establish the fact, and further alleged that there were certain other witnesses whose names and residences the defendant did not know, and asked leave to insert them when they should be ascertained, it was held competent for the court to allow, the names and residences being ascertained, the amendment to be made *nunc pro tunc*. *Roemer v. Simon*, 95 U. S. 214. Where the original answer set up a prior invention by Y., which was alleged to be like that of the plaintiff, and the public use of the patented machine in two cities named, and the bill of review alleged new matter as to the use by others of the patented machine in other places, and the bill was filed more than thirty days before the clause was finally submitted, it was held to give new notice of prior knowledge and use, and to meet all the requirements of this section. *Craig v. Smith*, 100 U. S. 226. Where the notice specified places at which the machine was used previous to the time the plain-



tiff claimed to have invented it, and alleged that it had been used at sundry other places, evidence was held properly received to show use at places not named. *Evans v. Eaton*, 3 Wheat. 454.

"*The like defences may be pleaded.*" — This clause first appeared in the act of 1870. Its purpose is to furnish appropriate modes in equity pleading for the trial of all issues, both of fact and law, relating both to the alleged infringement and validity of the patent, without framing special issues out of chancery for trial by jury, or sending the parties to a court of law for a determination of their legal rights. The practice provided for was established long before this clause was enacted, and rested upon principles of equity jurisprudence. *Root v. Railway Co.*, 105 U. S. 189.

SECT. 4921. — Under this section the authority of the circuit court, in a case arising under the patent laws of which it has jurisdiction to grant an injunction, according to the course and principles of courts of equity, to prevent the violation of any right secured by a patent, is independent of the award of any other relief in the same suit. *American Cotton Tie Supply Co. v. McCreedy*, 17 Blatch. 291; *Colgate v. International Tel. Co.*, 17 Id. 308, 311. A suit in equity is not dependent on the power to grant an injunction, and may be maintained even when no injunction could be granted, *e. g.*, where the patent has expired before the final hearing. *Blank v. Manuf. Co.*, 3 Wall Jr. 196. A bill may under proper circumstances be sustained, although the patent has expired. *Stevens v. Railway Co.*, 5 Dillon, 486; *Sayles v. Railroad Co.*, Id. 561. An assignee of part of a patent circumscribed as to the interest by local limits can maintain a suit in equity to enjoin infringers and for an account. *Ogle v. Ege*, 4 Wash. 584. A bill will not lie solely to recover damages for an infringement, but will if it prays for an injunction, or a discovery and an account of profits. *Vaughan v. Railroad Co.*, 1 Flippin, 621. An immediate restraining order may be issued when an order is granted to show cause against a motion for a preliminary injunction, to prevent irreparable injury. *Yuengling v. Johnson*, 1 Hughes, 607. A larger discretion over interlocutory injunctions is given under this section than exists in other cases. *Yuengling v. Johnson*, 1 Hughes, 607. A bill will lie in a circuit court between citizens of the same State to prevent an anticipated infringement. *Sherman v. Nutt*, 35 F. R. 149. A demurrer will be sustained where the bill alleges unauthorized construction, and use by the defendant for thirteen years, and makes no excuse for the complainant's failure to assert his rights during that time. *McLaughlin v. Railway Co.*, 21 F. R. 574. Where the bill praying an injunction and an account is sworn to six days before the patent expires, and the bill is filed two days, and the subpoena served three days after the bill is sworn to, and a rule of court requires eight days' notice of a motion for an injunction, and it does not appear that an action at law is not an adequate remedy, a demurrer will be sustained. *Mershon v. Furnace Co.*, 23 Blatch. 329. Whether a case involving the validity or the infringement of letters-patent shall be first tried at law, is a matter of discretion and not of jurisdiction. *Cochrane v. Deener*, 94 U. S. 780. If there has been no trial of the right at law, the plaintiff must show an exclusive possession and exercise of the right before an injunction will be granted. *Hockholtzer v. Eager*, 2 Sawyer, 361. Presumptions of novelty may arise from some or all of the following grounds: (1) The oath of the patentee that he was the original and first inventor; (2) the action of the commissioner in granting a patent; (3) undisturbed exclusive enjoyment; (4) direct adjudications at law or in equity establishing the validity of the patent; (5) injunctions granted to restrain infringements. *Hussey v. Whitely*, 1 Bond, 407. Profit is the gain made upon any business or investment, both the receipts and disbursements being taken into account. *Rubber Co. v. Goodyear*, 9 Wall. 788. It is the net gain of the infringer from the use of the patented article. *La Baw v. Hawkins*, 2 Ban. & Ard. 561. The losses sustained by the owner of the patent in consequence of the infringement constitute the



damages. *La Baw v. Hawkins*, 2 Ban. & Ard. 561. The words “profits” and “damages” are hardly convertible. The former refers to what the defendant has gained by the unlawful use of the patented invention; the latter, to what the plaintiff has lost. This provision makes it unnecessary for a patentee to make his election of remedies, and to proceed at law to recover damages, or in equity for the gains and profits the defendant has made. *Goodyear Dental Co. v. Van Antwerp*, 2 Ban. & Ard. 252. The damages mentioned in this section are of no greater scope or extent than those provided for in § 4919. Hence, counsel fees cannot be recovered as damages. *Bancroft v. Acton*, 7 Blatch. 505. Gains and profits are the proper measure of damage in equity suits, except in cases where the injury sustained by the infringement is plainly greater than the aggregate of what was made by the defendant, in which event the complainant may recover, in addition to the profits the defendant must account for, the damages he has sustained. *Birdsall v. Coolidge*, 93 U. S. 69; *Willimantic Thread Co. v. Clark Thread Co.*, 27 F. R. 865. The infringer is liable for actual, not for possible gains. The profits which he must account for are those which he made by the use of the plaintiff's invention, or the fruits of the advantage which he derived from its use, over what he would have had in using other means then open to the public, and adequate to enable him to obtain an equally beneficial result. This is true, even though from other causes the business in which the invention was employed did not bring profits to the defendant. If the unauthorized use of a patented process produced a definite saving in the cost of manufacture, the user must account to the patentee. *Tilghman v. Proctor*, 125 U. S. 136, and cases cited. By a uniform current of decisions the profits allowed in equity for the injury that a patentee has sustained by the infringement of his patent, have been considered as a measure of unliquidated damages which do not bear interest until after their amount has been ascertained. No mention of interest being made in the patent-law now in force, the rule must be understood as having met with legislative approval. *Id.* The damages intended, are “the actual damages sustained.” The recovery of damages and profits is not intended to be double, but when necessary the damages are to supplement that loss to the complainant, which the profits found to have been received are insufficient to compensate. *Root v. Railway Co.*, 105 U. S. 212; *Dobson v. Carpet Co.*, 114 Id. 443. The fact that a patent is void should be considered on a motion to increase the damages, although through the laches of the defendant he was not allowed to set up the invalidity in defence. *Welling v. La Bau*, 35 F. R. 302. In hearings before a master an account of profits is taken down to the time of the hearing, if the infringement continues to that period. *Tatham v. Lowber*, 4 Blatch. 86. Profits are rightly estimated by finding the difference between cost and sales. Cost is determined by cost of materials, interest, expense of manufacture and sale, and bad debts. *Rubber Co. v. Goodyear*, 9 Wall. 788. Interest on capital stock and manufacturers' profits are to be excluded. *Id.*

**SECT. 4922.** — The object of this section and § 4917 was to obviate the inconvenience and hardship of the common law, which made a patent wholly void if any part of the invention was wrongfully claimed by the patentee, and which made such a defect in a patent an effectual bar to a suit brought upon it. *Hailes v. Stove Co.*, 123 U. S. 588; *Schillinger v. Gunther*, 17 Blatch. 66. See § 4917, citing *Gage v. Herring*, 107 U. S. 640.

*Reissued patent.* — A reissued patent is within the spirit and letter of this section. *Gage v. Herring*, 107 U. S. 640. There may be a disclaimer of something which was introduced into a reissued specification, and which was not incorporated into the original specification. *Schillinger v. Gunther*, 17 Blatch. 66. This section does not apply to a patent for a combination, but only to a patent where the part invented can be clearly distinguished from that claimed but not invented. *Vance v. Campbell*, 1 Black, 427.

“*Material or substantial part.*” — If the thing wrongfully claimed, or claimed without right, is a part of a machine, but not an essential part, and was incorporated into the



patent without the wilful default of the patentee, and without intent to defraud or mislead the public, the failure to file a disclaimer does not affect the validity of the patent. *Hall v. Wiles*, 2 Blatch. 194; *Worden v. Searls*, 21 F. R. 406.

"No costs shall be recovered," &c. — Unless there has been unreasonable neglect or delay in filing a disclaimer, the patentee could under §§ 7, 9 of the act of 1837 (5 St. 193), recover in a suit on his patent, though the disclaimer was filed after suit was brought. *Tuck v. Bramhill*, 6 Blatch. 95. This provision only applies where the patentee has claimed too much, and filed his disclaimer. It has no application where his rights have been affected by neglect. *Mundy v. Lidgerwood Manuf. Co.*, 20 F. R. 191. If the plaintiff obtains a verdict under this section for the infringement of valid claims, while other claims are rejected for want of novelty, he cannot recover costs. He is not deprived of his right to costs because he disclaimed one or more of the claims under his patent after verdict. *Peek v. Frame*, 5 Fisher, 211. Where the disclaimer does not affect the plaintiff's right to recover, he may recover costs as though it had not been filed. *Sharp v. Tift*, 18 Blatch. 132. But where the disclaimer is not filed until after suit is brought, no costs can be allowed. *Burdett v. Estey*, 19 Blatch. 1; *Coburn v. Schroeder*, Id. 377. *O'Reilly v. Morse*, 15 How. 62.

"If he has unreasonably neglected," &c. The defence of unreasonable neglect or delay in filing the disclaimer must be set up in the answer before it can be considered by the court. *Burden v. Corning*, 2 Fisher, 498; *Worden v. Searls*, 21 F. R. 406. Each case must be ruled according to its facts and the merits. A disclaimer, where it is not sought to recover costs, need not be filed until the court has decided as to the contested claims alleged to contain that of which the patentee was not the inventor. *Stutz v. Armstrong*, 20 F. R. 843. If the construction of the original claim is doubtful, the patentee is not called upon to correct it by filing a disclaimer until the Supreme Court has passed upon it. *Mathews v. Flower*, 25 F. R. 830, 834. The question of unreasonable delay is for the court. The time commences to run when the inventor has knowledge that he was not the prior inventor, or when it is adjudged by a competent tribunal that he was not. *Singer v. Walmsley*, 1 Fisher, 558, 575; *Seymour v. McCormick*, 19 How. 96. The neglect to disclaim what the Supreme Court holds invalid, but which the Patent Office and a circuit court had held valid, is not unreasonable. *O'Reilly v. Morse*, 15 How. 62. It is too late to file a disclaimer after the term of the patent has expired. *Vacuum Oil Co. v. Buffalo Lubricating Oil Co.*, 23 F. R. 891.

SECT. 4923. — See notes, §§ 4886, 4920. The word "patented," as here used, means covered and made known to the world by a public patent, so as to bring home to the public, generally and probably, a knowledge of the existence of the invention, and deprive any one of the credit and protection of being original if he afterward makes a like article. Hence private foreign patents are not included. *Brooks v. Norcross*, 2 Fisher, 661; *Parsons v. Colgate*, 15 F. R. 600. A provisional specification under the English patent law is not a patent within the intent of this section. *Parsons v. Colgate*, *supra*. An English patent is not granted within the meaning of this section until the specification is enrolled, and that takes effect only from the date of its enrolment, not from the time of the filing of the provisional specification. *Howe v. Morton*, 1 Fisher, 586. Putting in evidence merely a copy of the specifications and drawings without a copy of the patent itself does not prove that the invention was patented. *Brooks v. Norcross*, 2 Fisher, 661. The publication has no effect unless it was prior to the invention. *Bartholomew v. Sawyer*, 4 Blatch. 347. It is doubtful if knowledge by a person in this country of the use of an invention in a foreign country is sufficient to render a patent void. *Illingworth v. Spaulding*, 9 F. R. 611. A foreign patent or other foreign printed publication describing an invention is no defence to a suit upon the patent, unless the publication was anterior to the invention or discovery in the United States, provided the American patentee at the time of making his application



for the patent believed himself to be the original and first inventor or discoverer. *Elizabeth v. Pavement Co.*, 97 U. S. 126; *Gayler v. Wilder*, 10 How. 477; *Sewall v. Jones*, 91 U. S. 171. The presumption is that the patentee did believe himself the original and first inventor. *Union Sugar Refinery v. Matthieson*, 2 Fisher, 600; 3 Cliff. 639. The improvement must have been so clearly and intelligibly described in a prior publication that the invention could be made or constructed by a competent mechanic. There must be proof of prior knowledge anterior not merely to the date of the patent, but to the time when the invention was actually made. *Judson v. Cope*, 1 Bond, 327.

SECT. 4924. — The word "patentee" is equivalent to inventor. *Woodworth v. Sherman*, 3 Story, 171. The patentee's right to an extension is not defeated although he assigned the original patent and a reissue was granted to his assignee and not assigned to the patentee, the latter not having signed the specifications for the reissue. *Potter v. Braunsdorf*, 7 Blatch. 97. Under § 18 of the act of 1836, a patent was properly extended on the application of the executor or administrator of the deceased patentee. It was competent for such extension to be made notwithstanding the patentee had disposed of his entire interest in the patent he held. This did not affect his rights to an extension. *Wilson v. Rousseau*, 4 How. 646; *Woodworth v. Sherman*, 3 Story, 171; *Washburn v. Gould*, Id. 122; *Brooks v. Bicknell*, 3 McLean, 250. The day on which the application is filed is included. *Johnson v. Onion*, 3 Hughes, 290; *Johnson v. McCulloch*, 4 Fisher, 170.

SECT. 4925. — See note, § 4893. The notice of an application for an extension of the original patent is sufficient, although it has been surrendered and a re-issue granted. The judgment of the commissioner is conclusive on all questions of notice. *Compton v. Belknap Mills*, 3 Fisher, 536; *Brooks v. Bicknell*, 3 McLean, 2560; *Gear v. Grosvenor*, 6 Fisher, 314; 1 Holmes, 215.

SECT. 4927. — A domestic patent covering an invention which has been patented abroad may be extended notwithstanding the expiration of the foreign patent. *Tilghman v. Mitchell*, 9 Blatch. 18. A patent on an invention first patented abroad may be extended; and so may a patent on an invention the term of which has been fixed by a special act. *New American File Co. v. Nicholson File Co.*, 8 F. R. 816. An extension vests an absolute title in the patentee, though he may have had less before the reissue was granted. *Potter v. Empire S. M. Co.*, 3 Fisher, 474. The extended term and the original term are separate and distinct. *Sayles v. Louisville City R. Co.*, 9 F. R. 512. If an extension has been granted in apparent conformity with the statute, the act of the commissioner is not subject to review in any collateral proceeding on the ground of fraud. *Rubber Co. v. Goodyear*, 9 Wall. 788. The decision of the board to whom the act of 1836 referred the question of renewal was not conclusive as to their jurisdiction to act. *Wilson v. Rousseau*, 4 How. 646. The decision of such board was conclusive as to the expense incurred by the patentee, and the notice required to be given was conclusive. But the question as to who had a right to a renewal was not one upon which it could render a final and binding decision. *Brooks v. Bicknell*, 3 McLean, 250, 258. See also *Brooks v. Jenkins*, 3 McLean, 432; *Dorsey Co. v. Marsh*, 6 Fisher, 387; 9 Phila. 395; *Agawam Co. v. Jordan*, 7 Wall. 583; *Bourne v. Goodyear*, 9 Id. 811; *Mowry v. Whitney*, 14 Id. 434.

SECT. 4928. — No one, except a purchaser of the patented article, or a person who is protected by a contract of sale to which the owner of the patent is a party, is protected by this section. *Wooster v. Sidenberg*, 13 Blatch. 88. The object of the clause concerning assignees and grantees is to preserve the contract between them and the patentee as they understood it when it was made. It was competent for Congress, when it conferred a new privilege upon the patentee, to annex to it such conditions as it chose, and he cannot complain that his assignees and grantees are entitled to share with him in the benefit of the renewal according to the interests which they respectively acquired. *Wilson v. Turner*, Taney, 278; *Wilson v. Rousseau*, 4 How. 646. This section continued to those who



were assignees or grantees of the right to use a patented invention during the term of the original patent, whether such right grew out of the purchase of a machine or from a direct assignment or grant of a limited or unlimited right to use. But such right is limited to a right to use, although the original right may have been an exclusive one to use, make, and vend, and it is limited to the respective interests of the assignees and grantees. All the limitations in the original contract, as to territory and number of machines, continue under the extension. If the right to use extended only to the use of a single machine, when the machine has become unfit for use, the right has expired. *Day v. Union India Rubber Co.*, 3 Blatch. 488; 20 How. 216; *Bloomer v. Millinger*, 1 Wall. 340. The rights of assignees and grantees to use a patented process are continued by an extension equally with the rights of such parties to use a patented machine. *Id.* The assignee or grantee under the original patent does not acquire any right under an extension of it beyond what his contract with the patentee gave him. *Woodworth v. Sherman*, 3 Story, 171; *Brooks v. Bicknell*, 4 McLean, 464; *Potter v. Empire Sewing Machine Co.*, 3 Fisher, 474; *Wilson v. Rousseau*, 4 How. 646. The absolute owner of a patented machine has the right to use it during the extended term of the letters-patent or to transfer his ownership. The right of a licensee to use a machine within designated territory expires with the original letters. *Paper-bag Cases*, 105 U. S. 766; *s. p. Bloomer v. Stolley*, 5 McLean, 158. If the licensee's right to make, use, and license others to use is limited by the terms of the license to the term of the original patent, he acquires no right under an extension. *Mitchell v. Hawley*, 16 Wall. 544. Those who manufacture or cause to be manufactured, under the authority of the patentee or his assigns, the patented invention, have the same rights as grantees or assignees. *Bloomer v. Millinger*, 1 Wall. 340. The protection of this section extends to the assignees and grantees of the right to use a patented process during an extension of the patent. *Day v. Union India Rubber Co.*, 3 Blatch. 488; 20 How. 216. A lawful purchaser of a patented machine has a right to use it so long as it lasts, whatever the extensions. *Wilson v. Rousseau*, 4 How. 646; *Bloomer v. McQuewan*, 14 Id. 549; *Chaffee v. Belting Co.*, 22 Id. 223; *Bloomer v. Millinger*, 1 Wall. 351. But it is otherwise, if the patentee so stipulates. *Mitchell v. Hawley*, 16 Wall. 544. The interest of purchasers of a right to make and vend ceases at the time limited by law for its continuance. *Bloomer v. Millinger*, 1 Wall. 351; *Mitchell v. Hawley*, 16 Id. 546. As to waiver of the right given by this section by a license from the patentee, see *Wooster v. Taylor*, 12 Blatch. 384. An assignee has no interest in an extension procured by a special act, unless his rights are expressly mentioned and reserved. *Gibson v. Gifford*, 1 Blatch. 529. See also *Wilson v. Simpson*, 9 How. 109; *Aiken v. Print Works*, 2 Cliff. 435; *Woodworth v. Curtis*, 2 Wood. & M. 524; *Chaffee v. Belting Co.*, 22 How. 217.

SECT. 4929. — See note, § 4910. Patents for designs were first authorized in 1842 (5 St. 543). The original act has not been materially altered. Its design is to encourage the arts of decoration more than the invention of useful products. All regulations and provisions of the statutes applicable to obtaining or protecting patents on inventions are applicable to design patents. Hence, if a design has been in public use or on sale more than two years before application was made for a patent, it cannot be granted. *Theberath v. Rubber & C. H. T. Co.*, 15 F. R. 246. And if granted, it is void. *Burton v. Greenville*, 3 Id. 642. This section allows patents for designs only, not for the means of producing them. *Clark v. Bousfield*, 10 Wall. 133. The phrase "new and original design" may have been intended to protect only such designs as are original and distinctive of themselves, and not those which would be mere improvements upon others. If so, the word "improved" in a patent signifies that the design is new and distinctive, and is therefore within this section. *Wood v. Dolbey*, 19 Blatch. 214. One may be an inventor within this section though he has not the manual skill and dexterity to make the required drafts. A person who furnishes the ideas for producing the result aimed at, may avail himself of the



mechanical skill of others to carry out his contrivance. *Sparkman v. Higgins*, 1 Blatch. 205, 209. But there must be originality and the exercise of the inventive faculty. *Northrup v. Adams*, 2 Ban. & Ard. 567; *Ex parte Neidringhaus*, 2 McArth. 149; *Collender v. Griffith*, 11 Blatch. 212. The design is not required to be useful, but it must be new and original. A patent cannot be obtained by converting an old and unpatentable article into an old and well-known mathematical figure, this not being the result of industry, genius, efforts, and expense. *Wooster v. Crane*, 5 Blatch. 282; *Miller v. Smith*, 5 F. R. 359. If the arrangement of ornament and shape is new, useful, and original, a patent is valid. *Simpson v. Davis*, 12 F. R. 144. Merely making a change in the mode of keeping and presenting an article for sale, no change being made in its form or appearance, is not a design for a manufacture within the purpose of this section. There should be something affecting the article itself. *Pratt v. Rosenfeld*, 3 F. R. 335. The designs contemplated by this section are those which give a peculiar and distinctive appearance to the manufactures or articles to which they are applied, rather than those which are useful. The law contemplates that giving certain new and original appearances to an article may enhance its salable value, enlarge the demand for it, and may be a meritorious service to the public. *Gorham Co. v. White*, 14 Wall. 511. The provisions of the statute applicable to patents generally apply to patents for designs. *Miller v. Smith*, 5 F. R. 359; *Theberath v. Rubber & C. H. T. Co.*, 15 Id. 246. If the design is substantially adopted, there is an infringement. *Root v. Ball*, 4 McLean, 180. See also as to infringements, *Gorham Manuf. Co. v. White*, 14 Wall. 511; *Werner v. Reinhardt*, 10 F. R. 676; *Lehnbeuter v. Holthaus*, 105 U. S. 94.

SECT. 4933. — St. Feb. 4, 1887, ch. 105 (24 St. 387), provides —

"That, hereafter, during the term of letters patent for a design, it shall be unlawful for any person other than the owner of said letters patent, without the license of such owner, to apply the design secured by such letters patent, or any colorable imitation thereof, to any article of manufacture for the purpose of sale, or to sell or expose for sale any article of manufacture to which such design or colorable imitation shall, without the license of the owner, have been applied, knowing that the same has been so applied. Any person violating the provisions, or either of them, of this section, shall be liable in the amount of \$250; and in case the total profit made by him from the manufacture or sale, as aforesaid, of the article or articles to which the design, or colorable imitation thereof, has been applied, exceeds the sum of \$250, he shall be further liable for the excess of such profit over and above the sum of \$250; and the full amount of such liability may be recovered by the owner of the letters patent, to his own use, in any circuit court of the United States having jurisdiction of the parties, either by action at law or upon a bill in equity for an injunction to restrain such infringement.

"SEC. 2. That nothing in this act contained shall prevent, lessen, impeach, or avoid any remedy at law or in equity which any owner of letters patent for a design, aggrieved by the infringement of the same, might have had if this act had not been passed; but such owner shall not twice recover the profit made from the infringement."

## CHAPTER II.

### TRADE-MARKS.

SECT. 4937. — The later act of March 3, 1881 (21 St. 502), ch. 138, authorized and protected the registration of trade-marks, under the restrictions therein stated, when used in commerce with foreign nations, or with the Indian tribes, the owners being domiciled here or in a foreign country, which affords similar facilities to United States citizens. This legislation is recognized without question as to its validity, in *Luyties v. Hollendeer*, 30 F. R. 632; 21 Id. 281; *Glen Cove Manuf. Co. v. Ludeman*, 23 Blatch. 46; *Pratt Manuf. Co. v. Astral Refining Co.*, 27 F. R. 492. Under § 11 of this act a Federal court cannot entertain a suit between citizens of the same State respecting a trade-mark not



intended to be transported to a foreign country or used in lawful commercial intercourse with an Indian tribe. *Luyties v. Hollendeer, supra*. This and § 4938 did not make a contract binding the government to protect a party in the exclusive use of his trade-mark, nor obligate it to return the fee paid for registration thereof on its being held invalid. *Woodman v. United States*, 15 Ct. Cl. 541. Property in trade-marks does not grow out of legislation. *Trade-Mark Cases*, 100 U. S. 82. The acts of Congress fortify the common-law right by conferring a statutory title. The right of property in a trade-mark is not affected by alienage. *La Croix v. May*, 15 F. R. 731. See *Convention*, 25 St. 34, 37. In order to secure the registration of a trade-mark under the act of 1881 the applicant must show that he has the sole right to use it; that it is not identical with the registered or known trade-mark of any other person, and that he is using the trade-mark which he owns in commerce with foreign nations or Indian tribes. *Ex parte Lyon*, 28 O. G. 191; *Price & Steuart's Trade-Mark Cases*, 907.

The entire legislation of Congress in regard to trade-marks originated as recently as July 8, 1870 (16 St. 198). But property in trade-marks, having long been recognized by the common law statutes, did not derive its existence from the act of Congress providing for their registration; and the constitutional power of Congress being limited, as to commerce, to commerce with foreign nations and among the States and with the Indian tribes, this legislation and the act of Aug. 14, 1876 (19 St. 141), punishing by fine and imprisonment the fraudulent use, sale, and counterfeiting of trade-marks registered in pursuance of the United States statutes, are invalid. *Trade-Mark Cases*, 100 U. S. 82; *Baldwin v. Franks*, 120 Id. 687. Since the decision in 100 U. S., the registering of trade-marks at the Patent-Office, it has been advised, should be discontinued. 16 A. G. Op. 586. 22 St. 298, ch. 393, provides that nothing contained in the act of 1881

"shall prevent the registry of any lawful trade-mark rightfully used by the applicant in foreign commerce or commerce with Indian tribes at the time of the passage of said act."

There being no definition of this phrase in the legislation of Congress, it must be construed according to the signification given it in the law. The thing to be protected must be an existing lawful trade-mark, or something that may then for the first time be adopted as such, independently of the statute. By proceeding according to the statute the trade-mark so adopted may be protected by the statute. *Moorman v. Hoge*, 2 Sawyer, 78, 85. A trade-mark is a mark by which the wares of the owner are known in trade. *Shaw Stocking Co. v. Mack*, 12 F. R. 707. A registration must stand or fall as a whole. A suit is not maintainable on it where it is not wholly valid. *Smith v. Reynolds*, 10 Blatch. 100. Registration is nothing more than *prima facie* evidence of ownership, and the validity of the title is always open to investigation in the courts. *Glen Cove Manuf. Co. v. Ludeman*, 22 F. R. 823. An assignee or purchaser of a trade-mark from the original proprietor must, in the use thereof, indicate that he is assignee or purchaser, or he will not be entitled to protection in the use of the mark so assigned. *Stachelberg v. Ponce*, 23 F. R. 430. A circuit court has no jurisdiction over suits for the violation of a trade-mark if the plaintiff and defendant are citizens of the same State, and the bill does not allege that the trade-mark in controversy was used on goods intended to be transported to a foreign country (*Ryder v. Holt*, 128 U. S. 525); or used in lawful commercial intercourse with an Indian tribe. *Schumacher v. Schwenke*, 26 F. R. 818. In a suit to restrain the infringement of a trade-mark, the amount in dispute, in determining the jurisdiction, does not depend upon the profits sought to be recovered. *Symonds v. Greene*, 28 F. R. 834.

The names of the individual members of a firm need not be recorded, nor the place of residence of each. The residence and place of business of the firm were sufficiently recorded by giving the street and number, city, county, and State. *Smith v. Reynolds*,



10 Blatch. 100. Where a trade-mark is claimed for paints generally, it is not required that the kind of paints should be specified. *Id.* The protection of the statute is only to the exclusive use of the trade-mark so far as regards the particular description of goods described in the statement filed. The inhibition of the statute is only against the use of substantially the same trade-mark or substantially the same description of goods; and the wrongful use which may be enjoined is only the affixing by another of substantially the same trade-mark to goods of substantially the same descriptive properties and qualities as those indicated in the statement required to be filed. *Osgood v. Rockwood*, 11 Blatch. 310. The purpose of this provision is to require the applicant to point out the exact scope of his trade-mark, discriminating the essential from the non-essential portions, that the commissioner may determine that the subject proposed for registration is in fact a trade-mark, and does not clash with prior registrations, and if it does, to enable him to pass upon the question of priority of right. *Ex parte Strasburger*, 20 O. G. 155; *Price & Steuart's Cases*, 488.

Any proper word or phrase, whether the name of a person, firm, or corporation, or a geographical term, may be registered, unless it is descriptive of the quality of goods, or is the name of the applicant or manufacturer, or place of manufacture, or is deceptive. *Ex parte Pace*, 16 O. G. 909; *Price & Steuart's Cases*, 216. If words are directly descriptive they are not registrable as trade-marks; but if they are merely suggestive, they are. *Ex parte Heyman*, 18 O. G. 922; *Price & Steuart's Cases*, 361. A trade-mark may consist of a token, letter, sign, or seal. Names, ciphers, monograms, pictures, and figures may be used, and numerals united. *Shaw Stocking Co. v. Mack*, 12 F. R. 707. See note to this case, which collects a large number of cases determining what is or is not a trade-mark. Letters or figures affixed to merchandise by the manufacturer thereof for the purpose of denoting its quality, cannot be appropriated as a trade-mark. *Manuf. Co. v. Trainer*, 101 U. S. 51; *Price & Steuart's Cases*, 224. A geographical name is not a proper subject for trade-mark registration, though it is also the name of an historical personage. *Ex parte Oliver*, 18 O. G. 923; *Price & Steuart's Cases*, 364. A word which indicates a patented machine of peculiar mechanism cannot be protected as a trade-mark after the patent has expired. *Singer Manuf. Co. v. Stanage*, 6 F. R. 279. Under the act of 1881 nothing can be registered as a trade-mark which would not be regarded as such by the courts. The words "time-keeper," applied to watches, indicate the nature of the goods, and are not proper for a trade-mark. There are objections to marks which have been partly registered by others. *Ex parte Strasburger*, 20 O. G. 155; *Price & Steuart's Cases*, 488. An author cannot acquire a right to have his writings protected by using an assumed name. *Clemens v. Belford*, 14 F. R. 731. Neither the color alone nor the form alone of a package, nor the color of an article of commerce, can be used as a trade-mark. *Ex parte Landreth*, 31 O. G. 1441; *Price & Steuart's Cases*, 887.

"*Second.*" — This and the next following section do not constitute a contract binding the government to protect one to whom a trade-mark had been issued in the exclusive use of it. Hence, one who had paid the prescribed fee for the registration of a trade-mark cannot recover it from the government, although the statute authorizing its issue was held unconstitutional. *Woodman v. United States*, 15 Ct. Cl. 541; *Price & Steuart's Cases*, 282. See § 6. Under §§ 4937, 4938, and the rules of the Patent Office, the Commissioner of Patents may institute an interference between opposing claimants for registration of the same trade-mark, for the purpose of deciding who is its owner. If his decision is not appealed from, it is conclusive. If there is no question concerning the infringement, the party in whose favor the decision was made is entitled to an injunction. *Hanford v. Westcott*, 16 O. G. 1181; *Price & Steuart's Cases*, 273.

SECT. 4939. — Examination will be made of the presumptive lawfulness of the trade-



mark offered for registration. *Ex parte Strasburger*, 20 O. G. 155; *Price & Steuart's Cases*, 488. It is the duty of the commissioner to refuse to register alleged trade-marks which are not such. *Ex parte Kipling*, 24 O. G. 899; *Price & Steuart's Cases*, 537. Under § 3 of St. 1881, the applicant for the registration of a trade-mark will be required to name some foreign nation or Indian tribe with which he has commercial relations. *Ex parte Strasburger*, 20 O. G. 155; *Price & Steuart's Cases*, 488. The words "The applicant" appear to mean the name of the person, firm, or corporation applying for the trade-mark, and does not prevent the use of the names of other than such persons, &c. *Canal Co. v. Clark*, 13 Wall. 311; *Ex parte Pace*, 16 O. G. 909; *Price & Steuart's Cases*, 216. A person's name cannot be an essential element in his trade-mark. The name of the person, firm, or corporation does not acquire an arbitrary significance by association with an otherwise valid trade-mark, and cannot be made an essential feature of it. *Ex parte Adriance*, 20 O. G. 1820; *Price & Steuart's Cases*, 577. The quoted words in the act of 1881 mean the name of the applicant separate and alone. The fact that his name has long been used on goods manufactured by him, does not make the name that of the goods, business, or trade. The fact that the name may be of great value does not entitle it to registration as a trade-mark. The statute was designed to prevent any person from using his name in any trade as a trade-mark to the exclusion of other persons of the same name in the same or any other avenue of trade. *Ex parte Fairchild*, 21 O. G. 789; *Price & Steuart's Cases*, 537. The third section of the act of 1881 and the spirit of the whole act authorize the Patent Office to take notice of the facts recited in records filed therein by applicants for trade-marks under the act of 1870. *Ex parte Lyon*, 28 O. G. 191; *Price & Steuart's Cases*, 907.

SECT. 4940. — A registration under the law of 1874 is evidence of the fact that the persons named claimed the right and were permitted to register the trade-mark. When offered in evidence in a contested case to support an applicant's right under the new law, it should be accompanied with evidence identifying the applicant as the person named in it, and showing that the right has been maintained by continued use of the trade-mark, and is in the person who claims it. *Jacoby v. Lopez*, 23 O. G. 342; *Price & Steuart's Cases*, 726. A certified copy is only evidence that what is shown by it to have been filed was filed; not that anything required to be filed, and not shown thereby to have been filed, was filed. *Smith v. Reynolds*, 10 Blatch. 85. Courts take judicial notice of treaties between this government and foreign governments. Hence, a citizen of a foreign government, in suing here for an infringement of a duly registered trade-mark, need not allege that a treaty is in force between his government and this. *Lacroix Fils v. Sarrazin*, 15 F. R. 489.

SECT. 4941. — To constitute an infringement it is not necessary that there should be exact similarity. Two trade-marks are substantially the same if the resemblance is such as to deceive an ordinary purchaser, who gives such attention as a purchaser usually gives, and to cause him to purchase the one supposing it to be the other. *Gorham Co. v. White*, 14 Wall. 511. Where the similarity is sufficient to convey a false impression to the public mind, and is of a character to mislead and deceive the ordinary purchaser in the exercise of ordinary care and caution, it is sufficient to give the injured party a right of redress. *McLean v. Fleming*, 96 U. S. 255. The resemblance need not be so great as to deceive persons who might see the two trade-marks side by side, or such as would deceive experts. *Manuf. Co. v. Trainer*, 101 U. S. 64; *Liggett Tobacco Co. v. Hynes*, 20 F. R. 898.

SECT. 4944. — In the fifth line "sustained" is here inserted, and the words "before any court of competent jurisdiction within the United States," occurring at the end of the section in the cited act, are here omitted. 2 Com. D. 2374.

SECT. 4946. — In the first line "chapter" is here substituted for "section" in the cited act, and the words "firm, corporation, or company," occurring in that act after "person."



in the third line, are here omitted. 2 Com. D. 2374. The act of Congress does not give a property right in trade-marks, and § 10 of the act of 1881 does not abridge or qualify the common-law right, but preserves it. *La Croix v. May*, 15 F. R. 236.

## CHAPTER III.

### COPYRIGHTS.

SECT. 4948. — Sects. 109, 110 of the cited act, having been performed and exhausted, are omitted from the Revision, though not repealed. 2 Com. D. 2375.

SECT. 4949. — Substituted for the cited provision.

SECT. 4950. — This bond is additional to the bond required by Rev. Stats. § 89. 2 Com. D. 2376.

SECT. 4952. — See note, § 4962. No State can in any form interfere with the rights of private persons under the copyright laws of the United States. *Little v. Gould*, 2 Blatch. 362. The only writings that can be protected are those requiring originality; while the word "writings" may be liberally construed to include original designs for engravings, prints, &c., it is only such as are original and are founded in the creative powers of the mind; the writings which are to be protected are the fruits of intellectual labor, embodied in the form of books, prints, engravings, and the like. *United States v. Steffens*, 100 U. S. 82. The copyright act is for the encouragement of learning, not for the encouragement of mere industry independent of learning and science. *Clayton v. Stone*, 2 Paine, 382. A person, to be an author within the meaning of this statute, must, by his own intellectual labor, applied to the materials of his composition, produce an arrangement or compilation new in itself. *Atwill v. Ferrett*, 2 Blatch. 39, 46. A person is not entitled to a copyright on materials furnished him by another when they are in the state in which they were furnished, although he employed such person. *Binns v. Woodruff*, 4 Wash. 48. But literary merit is not a necessary element of a legal copyright. *Drury v. Ewing*, 1 Bond, 540. A copyright cannot be sustained as a right existing at common law, but it depends wholly on the legislation of Congress. *Wheaton v. Peters*, 8 Pet. 591, 662, 663; *Banks v. Manchester*, 128 U. S. 252; 23 F. R. 143. An author has an exclusive right to his letters or compositions, and will not be deemed to have abandoned his privilege to copyright them except by some unequivocal act. *Folsom v. Marsh*, 2 Story, 100. The power to grant copyrights is conferred on Congress for the promotion of the progress of science and the useful arts. It seems that it does not extend to writings of a grossly immoral or indecent character. *Martinetti v. Maguire*, Deady, 216. A copyright will be protected where there is nothing immoral or improper in the article, although it may be used to violate the laws against gambling. *Richardson v. Miller*, 15 Alb. L. J. 340. As to the difference between a copyright and letters-patent, see *Baker v. Selden*, 101 U. S. 99. A copyright cannot be seized or sold on execution at law, but can be reached only in equity. *Stephens v. Cady*, 14 How. 529.

"*Any citizen of the United States.*" The purpose of the copyright laws, from the foundation of the government, has been to encourage native talent, and to protect American authors and artists only. *Yuengling v. Schile*, 12 F. R. 97, 103.

"*Or resident therein.*" The term "resident" means a permanent inhabitant. A mere transient visitor whose family, business intentions, and relations are all abroad, cannot be considered a resident, and the filing a declaration of intention to become a citizen cannot make him one. *Carey v. Collier*, 56 Niles Neg. 262. In order to constitute residence, it is necessary that a man shall go to a place with the intention of remaining, making it his



home or place of abode. *Boucicault v. Wood*, 2 Biss. 34. The publisher of the work of a foreign author can secure the exclusive right to such publication only by the voluntary and unconstrained forbearance of the trade. *Sheldon v. Houghton*, 5 Blatch. 285.

A copyright can be taken out in the name of a trustee for the benefit of some third person who is the author, &c. *Hanson v. Jaccard Jewelry Co.*, 32 F. R. 202; *s. p. Little v. Gould*, 2 Blatch. 165.

*"Authors and inventors."* — These are the only persons who are directly entitled to a copyright under the Constitution. The rights of others are only derivative, and must be clearly shown. *Yuengling v. Schile*, 12 F. R. 97.

*"Proprietor."* — The word "proprietor," in connection with the words "author, inventor, designer," as one of the persons to whom a copyright may be granted, was first used in the act of 1870, although ever since the act of 1790 a proprietor might obtain a copyright if he was the lawful representative of the exclusive rights of a native or resident author. There are three objections which prevent a proprietor from obtaining a copyright on a "painting, drawing, chromo, statue, statuary, and models," which are not mentioned in § 4971 as articles in which an exclusive copyright in the work of any foreign author or artist is prohibited. 1. To grant a copyright to a proprietor would be a reversal of the policy of protection to American authors and artists only. 2. The word "proprietor," as here used, signifies the representative of an artist or author who might himself obtain a copyright. 3. Chromos are embraced in the word "print" as used in § 4971. *Yuengling v. Schile*, 12 F. R. 97, 103.

An author producing a work in the general employ of another will not be deemed to have transferred his right to his employer, unless there is a valid agreement to that effect. *Boucicault v. Fox*, 5 Blatch. 87. The title to contributions given to the proprietor of a work vests in the proprietor as the work is done; no assignment is necessary, and he may copyright the whole work. *Lawrence v. Dana*, 4 Cliff. 1. Contributions given to be used in one edition cannot be used in any other edition. *Id.* A person making drawings and sketches in the employ of the government, under a stipulation that all such shall belong to it which Congress orders to be published, is not entitled to a copyright. *Heine v. Appleton*, 4 Blatch. 125.

The word "book," as applied to a literary composition, does not necessarily imply that the matter is printed. *Roberts v. Myers*, 23 Law Rep. 396. A book may be within the meaning of the statute though it is printed on only one sheet, as the words of a song or the music accompanying it. *Clayton v. Stone*, 2 Paine, 382. A price-current or newspaper is not a book. *Id.* It is not required that the subject of a book should be new, or the materials original, in order that it may be copyrighted. There may be a valid copyright for the plan of a book, as connected with the arrangement and combination of the matter, though all the materials used and its subject are common to all writers. *Greene v. Bishop*, 1 Cliff. 186. Blank forms may be copyrighted. *Brightley v. Littleton*, 37 F. R. 103. A chart published on a single sheet, showing diagrams representing a system of taking measures for and cutting garments, with instructions for its use, is a book. *Drury v. Ewing*, 1 Bond, 540. To entitle an author to a copyright in the plan, arrangement, and combination of his materials, it must be, in these respects, new and original. *Bullinger v. Mackey*, 15 Blatch. 550. A compilation of information concerning railroads and allied subjects may be copyrighted. If made from original sources it is a new work. *Bullinger v. Mackey*, 15 Blatch. 550; *Gray v. Russell*, 1 Story, 11. A compilation made from voluminous public documents, and so arranged as to show readily the date and order of historic events, requires labor, care, and some skill, and is copyrightable. *Hanson v. Jaccard Jewelry Co.*, 32 F. R. 202.

Blank account-books are not the subject of copyright. *Baker v. Selden*, 101 U. S. 99. Nor are prints of articles with printed matter on them, showing how the paper may be



separated and attached to make the parts fit, and not designed as mere pictorial representations. *Rosenbach v. Dreyfuss*, 2 F. R. 219. Nor are newspapers. *Clayton v. Stone*, 2 Paine, 382. Although a compilation of statutes may be so original as to entitle the author to a copyright for the manner in which he has done his work, he cannot obtain it for the laws he sets out alone. The legislature which enacted such laws and authorized the compilation cannot give the author or compiler an exclusive privilege in them. *Davidson v. Wheelock*, 27 F. R. 61. A copyright in reports of judicial decisions cannot cover anything which came from the hands of the judges who wrote such decisions. *Banks v. West Pub. Co.*, 27 F. R. 50; *Banks v. Manchester*, 23 Id. 143; 128 U. S. 254. A reporter of a State or Federal court, although a sworn public officer and paid a fixed salary by a State, can, in the absence of a statute prohibiting it, or reserving a copyright to the government as the assignee of his work, obtain a copyright for a volume of law reports which will cover the matter which is the result of his intellectual labor. *Callaghan v. Myers*, 128 U. S. 647. Therefore a reporter can have a copyright of the matter not embraced in the written opinions of the court, *i. e.*, the titlepage, table of cases, head notes, statements of facts, arguments of counsel, index, the order of arrangement of the cases, the division of the reports into volumes, the numbering and paging of the volumes, the table of the cases cited in the opinions, the subdivision of the index into appropriate condensed titles. *Id.* 649. Judges who in their judicial capacity prepare the opinion, statement of the case, syllabus or head-note, are not authors or inventors within this section, so that the State can become their assignee and take out a copyright. *Banks v. Manchester*, 128 U. S. 244.

*"Chart."* — As here used, "chart" refers to a form of map. An advertising card, made for the purpose of showing paints of various colors, of a sheet of paper with square pieces of paper of various colors attached thereto, and some lithographic work surrounding the squares, advertising the colors, is not a chart; neither is it an engraving or book; and under the act of 1831 it was not the subject of copyright. *Ehret v. Pierce*, 10 F. R. 553; 18 Blatch. 302. See § 4965. Sheets of paper exhibiting tabulated or methodically arranged information are not charts. *Taylor v. Gilman*, 24 F. R. 632; 23 Blatch. 325.

*"Dramatic or musical composition."* — There is no copyright of the right to public representation of musical compositions, but only of dramatic compositions. *Carte v. Duff*, 23 Blatch. 352. Under the act of 1856 (11 St. 138), which gave "the proprietor of a dramatic composition, suited for public representation," the sole right to represent the same, it was held that a mere exhibition, spectacle, or arrangement of scenic effects, without literary character, was not a dramatic composition. *Martinetti v. Maguire*, Deady, 216. The right to a copyright on a drama is not lost because it was publicly acted in a theatre before application was made. *Roberts v. Myers*, 23 Law Rep. 396. A written work, consisting wholly of directions, set in order for conveying the ideas of the author on a stage or public place, by means of characters who represent the narrative wholly by action, is as much a dramatic composition, "designed or suited for public representation," as if language or dialogue were used in it to convey some of the ideas. *Daly v. Palmer*, 6 Blatch. 256. As to the protection of mechanical contrivances in dramatic compositions, see *Daly v. Palmer*, 6 Blatch. 264; *Serrana v. Jefferson*, 33 F. R. 347. Where English authors of an opera publish the libretto and vocal score of it in England, but not the orchestration, they dedicate it to the public, except the instrumental parts. By employing a skilled musician to make and copyright an independent orchestration they do not gain the exclusive right to represent the opera as a dramatic composition. *Carte v. Duff*, 23 Blatch. 347. One who translates a play from a foreign language with the assent of its author and adapts it for representation on the stage, is the author of it and may copyright it. *Shook v. Rankin*, 6 Biss. 477. One who writes a play to be acted at the theatre of another in pursuance of a contract with the latter, and agrees to act in the play so long as



it shall run, and receives a share of the profits as his compensation, may copyright it after it has been acted. *Boucicault v. Fox*, 5 Blatch. 87. The manufacture and sale of perforated strips of paper to be used in organettes, and by which a certain tune is produced, is not a violation of the copyrighted sheet music of the same tune. *Kennedy v. McTammany*, 33 F. R. 584. A new arrangement of an old piece can be copyrighted (*Schubert v. Shaw*, 28 Am. L. Reg. 248); but such arrangement must be more than a copy of the piece with additions and variations such as a writer of music with skill and experience might readily make. *Jollie v. Jaques*, 1 Blatch. 618; *Reed v. Carusi*, Taney, 72. As to piano-forte arrangement of an opera score composed by foreigners, made by a citizen and finally transferred to an agent of the composers, held good, see *Carte v. Evans*, 27 F. R. 861. To be the subject of a copyright, a musical composition must be, in substance, a new and original work. If it is merely a piece which has previously been produced, which a writer of music with experience and skill might readily make, it is not entitled to be copyrighted. *Jollie v. Jaques*, 1 Blatch. 618.

*"Engraving."* — An engraving which merely represents a patented design is not the subject of a copyright so as to interfere with the right of the person who owns the patent to use an engraving for advertising the patented article. *Collender v. Griffith*, 11 Blatch. 212.

*"Print."* — As here used, "print" means a picture, something complete in itself, similar in kind to an engraving, cut, or photograph. It does not mean something printed on paper, that is not intended for use as a picture, but is itself to be cut up and embroidered and made into something entirely different. *Rosenbach v. Dreyfuss*, 2 F. R. 217. Lithographs were included in the word "print," as it was used in the act of 1831, and so were chromolithographs. *Yuengling v. Schile*, 12 F. R. 97. A picture on paper, produced by the art of photography from a glass "negative," was not a print, cut, or engraving within the meaning of the act of 1831. *Wood v. Abbott*, 5 Blatch. 325. Prior to the enactment of St. 1874, ch. 301, § 3 (18 St. 79), the provisions of the statutes relating to engravings, cuts, and prints gave the right to a person who owned a label, bearing distinguishing marks, to have it recorded in the Patent Office as a trade-mark, or registered as a mere print in the office of the librarian of Congress. *United States v. Sewing Machine Co.*, 1 Mackey, 284.

*"Photograph or negative thereof."* — This provision was assailed as being unconstitutional on the ground that a photographer is not an author, and a photograph is not a writing within the meaning of art. 1, § 8, of the Constitution. The court was in doubt, and not being sufficiently clear as to the invalidity, refused to hold the provision invalid. *Sarony v. Burrow-Giles L. Co.*, 17 F. R. 591; *Schreiber v. Thornton*, Id. 603. It was competent for Congress to confer upon the author, designer, or proprietor of a photograph, which is a representation of original intellectual conceptions, the rights herein granted. *Burrow-Giles L. Co. v. Sarony*, 111 U. S. 53. A copyright of a photograph artistically designed to illustrate a musical composition is infringed by stamping an imitation in raised figures on leathern chair bottoms and backs. *Falk v. Howell*, 37 F. R. 202.

*"Chromo."* — The word "print" includes chromo, and by adding the latter word in the act of 1870 Congress did not abolish the restriction which existed upon copyrighting them when made by aliens. The restriction imposed upon prints by § 4971 applies to chromos. *Yuengling v. Schile*, 12 F. R. 97, 107.

*"Painting."* — If a painting has been executed by an artist and can itself be used only as paintings are used, the facts that copies of it may be utilized for advertising purposes, or as labels, and that it is small, do not make it less a painting than if it were larger or copies of it were not to be so used. *Schumacher v. Schwenecke*, 25 F. R. 466. See *Schumacher v. Wogram*, 35 Id. 210.

*"Assigns."* — Where State laws transfer the rights of a reporter of decisions to the Secretary of State in trust for the benefit of the State, it is competent for such Secretary



to take a copyright for a volume of the reports. Where, pursuant to such laws, the State made a contract with a publisher to publish the volumes which the reporter should prepare, and such contract expressed that it was intended to operate as an assignment of the copyright, it was held that the publisher became an assignee of the copyright. *Little v. Gould*, 2 Blatch. 362.

*"Sole liberty of . . . vending."*—Where the owner sells to canvassers upon their agreement to sell only by subscription, a copyright gives him no remedies for breach of such agreement, but does if he sells the books directly to the subscribers through agents who have no ownership of the copies sold. *Henry Bill Pub. Co. v. Smythe*, 27 F. R. 914. A grant of an "exclusive right to take orders for and sell" a book within a certain territory, is only a covenant that no other person shall sell in that territory with the consent or connivance of the grantor. *Webster v. Ellsworth*, 36 F. R. 327. Under such circumstances the licensee could not restrain the sale of the books by others in that territory; nor could the licensor when the books were lawfully purchased elsewhere without notice of the defendant's rights. *Id.*

Under the acts concerning the registration of prints intended to be used for labels, a label may be registered though it contains matter which entitles it to registration as a trade-mark. The person who asks for the registration of such prints may have them registered, notwithstanding the commissioner of patents rules that they are not entitled thereto. *Mandamus* lies to compel their registry. *United States v. Sewing Machine Co.*, 1 Mackey, 284. The act of 1874, concerning the registration of labels, is an amendment to the copyright laws. It is essential, in order to acquire a copyright in any print or label, that the title thereof be first deposited as is required by the section concerning copyrights. *Marsh v. Warren*, 9 Chi. Leg. News, 395; 24 Pitts. L. J. 207. A printed article with directions showing how it may be cut and joined to make the parts properly unite, is not a pictorial illustration or work connected with the fine arts. *Rosenbach v. Dreyfuss*, 2 F. R. 217. See also *Lorillard v. Tobacco Co.*, 14 F. R. 111. For a case where a picture was copyrighted which was held to be an attempted evasion of St. June 18, 1874, see *Schumacher v. Wogram*, 35 F. R. 210.

SECT. 4954. — For an assignment held to pass the author's contingent right to a second term, see *Cowen v. Banks*, 24 How. Pr. 72. Where one employed to compile a book conveyed the copyright to his employer, and it was published by the latter, the name of the compiler appearing as author, it was held that the contract carried only the fourteen-years right, and the author, being alive at the end of that time, had the sole interest in the extended term allowed by law. *Pierpont v. Fowle*, 2 Wood. & M. 23, 41. Everything required to be performed by the acts of Congress must be done or the title to the copyright will not be good. *Wheaton v. Peters*, 8 Pet. 591.

SECT. 4955. — A written transfer of the manuscript of a volume from a reporter to the person taking out the copyright as proprietor is unnecessary. *Callaghan v. Myers*, 128 U. S. 658. An author may convey a distinct portion of his right. And the exclusive right to act and represent a drama is distinct from that of printing and publishing, and may be assigned for certain territory and a limited time. *Roberts v. Myers*, 23 Law Rep. 396. A mere assignment of a copyright will not pass a right to a renewal subsequently granted. *Pierpont v. Fowle*, 2 Wood. & M. 23. A contract to publish a work and give the author a certain price for each copy published does not give the publisher the sole and exclusive right to publish the work. *Willis v. Tibbals*, 33 N. Y. Sup. 220. The copyright is retained by the author in the absence of any agreement with the publisher. *Pulte v. Derby*, 5 McLean, 328. A publisher taking a copyright in his own name under a contract to pay a royalty to the author cannot assign the copyright or publish the work except upon the terms of the contract. *Id.* See also *Mackaye v. Mallory*, 12 F. R. 328; *Little v. Hall*, 18 How. 165; *Page v. Banks*, 13 Wall. 608; 7 Blatch. 152; *Stephens v. Cady*, 14 How. 528; *Stephens v.*



Gladding, 17 Id. 447. An assignee's right to maintain an action for the violation of a copyright is not defeated because the assignment was not recorded. *Webb v. Powers*, 2 Wood. & M. 497.

SECT. 4956. — The words "deliver at the office of the Librarian of Congress or," in the second and eighth lines, and in the second line of § 4959, are new in the Revision. 2 Com. D. 2378.

SECT. 4957. — It is queried whether the certificate of the librarian, under his official seal, is evidence of the deposit of the copies required. A statement added to such certificate, setting forth other facts, to the effect that two copies were deposited, such statement being unsigned and unsealed, is admissible in evidence only against him. *Merrell v. Tice*, 104 U. S. 557. But a memorandum signed by the librarian of the fact and date of the deposit of the work, written by him on the same paper as the certificate to the copy of the record, is admissible evidence of such facts. *Callaghan v. Myers*, 128 U. S. 656.

SECT. 4958. — See note, § 4962.

SECT. 4959. — The purpose of the copyright acts is to secure the rights of authors, and, so far as they require acts of them, the statutes should be liberally construed in order to give effect to the inherent right of the author to his work. *Myers v. Callaghan*, 10 Biss. 139, 146; 5 F. R. 726; 128 U. S. 617.

"*Before publication.*" — This expression supposes that a printing or publishing will soon take place. Its meaning is made clear by the language that the author shall not be entitled to a copyright unless within ten days from the publication he shall deliver two copies. These provisions and the analogous clauses in the patent and trade-mark statutes make it clear that, to secure the copyright of a book or dramatic composition, the work must be published within a reasonable time after the titlepage has been filed. *Boucicault v. Hart*, 13 Blatch. 47, 55. The filing of the title does not entitle the author to protection for an unpublished book. *Centennial Catalogue Co. v. Porter*, 2 Weekly Notes of Cas. 601. Under the law of 1831 (4 St. 436) the three conditions prescribed by statute, namely, the deposit before publication of a printed copy of the title of the book, the giving of information of the copyright by the insertion of the notice on the titlepage or next page, and the depositing of a copy of the book within three months after the publication, were conditions precedent to the perfection of the copyright (*Wheaton v. Peters*, 8 Pet. 591; *Merrell v. Tice*, 104 U. S. 557; *Callaghan v. Myers*, 128 Id. 652); and although they were all done on the same day, the law presumes *prima facie* that they were done in lawful order. *Callaghan v. Myers*, *supra*, 657. As to the presumption of the deposit of the title before publication, and the presumption that where the work purports to have been deposited within a certain time after the date of the deposit of the title, it was deposited within that time after publication, see *Callaghan v. Myers*, 128 U. S. 655. Where the work was deposited more than five months after the deposit of the title, it cannot be presumed that such deposit was within three months after publication. The delivery of copies of a book to the State is a publication. *Callaghan v. Myers*, 128 U. S. 655. Allowing an unprinted dramatic composition to be represented publicly on the stage for the benefit of the author is not a publication of it. *Boucicault v. Hart*, 13 Blatch. 47. A sale of the printed work constitutes a publication of it within the meaning of the statute. The fact that the date of publication was advertised to be later than the sales made is immaterial. *Gottsberger v. Aldine Book Pub. Co.*, 33 F. R. 381.

"*A printed copy of the title.*" — The title of a copyrighted publication separate from the publication which it is used to designate, is not protected by the copyright. *Osgood v. Allen*, 1 Holmes, 185. All the conditions required to be performed are important, and must be complied with. *Wheaton v. Peters*, 8 Pet. 591; *Ewer v. Cox*, 4 Wash. 487; *Baker v. Taylor*, 2 Blatch. 82. The number of volumes in which it is stated a work will



be published is not a part of the title. *Dwight v. Appleton*, 1 N. Y. Leg. Obs. 195, 198. The printed copy of the title must be deposited before the publication of the book. *Baker v. Taylor*, 2 Blatch. 82; *Chase v. Sanborn*, 4 Cliff. 306; *Parkinson v. Laselle*, 3 Sawyer, 331. The title required to be deposited is not a printed copy of the titlepage. The act is complied with if all the words contained in the title, as deposited, are not in the titlepage of the book, if those omitted are not material. *Donnelly v. Ivers*, 20 Blatch. 381. Slight variations between the titlepage and the title deposited are immaterial. *Carte v. Evans*, 27 F. R. 861. If a sale of a book was made before the title was deposited, it is presumed that the book was published. *Baker v. Taylor*, 2 Blatch. 82. A copy of the title, which has the form and appearance of a printed one, whether made by an impression upon type or with a pen, with or without the aid of tracing paper, is a printed copy within the meaning of this section. *Chapman v. Ferry*, 18 F. R. 539.

"*Deliver . . . two copies.*" — The delivery of other copies to the government in pursuance of an act of Congress on another subject, and for a different purpose, does not excuse compliance with this requirement. *Wheaton v. Peters*, 8 Pet. 591. This provision must be complied with. *Merrell v. Tice*, 104 U. S. 557. Where a work consists of a series of volumes, the delivery of the first volume within the required time, and the others before any piracy has been committed or action begun, is a sufficient compliance with the law to enable the author to recover for an infringement of the copyright. *Dwight v. Appleton*, 1 N. Y. Leg. Obs. 195, 199. If the delivery of the copies is made ten days before the formal publication of the work, it is enough, though it may not have been done within that number of days after it was printed. *Chapman v. Ferry*, 18 F. R. 539. A bill which asks for an injunction restraining the infringement of an alleged copyright is insufficient if it alleges that the orator delivered at the office of the librarian of Congress, or deposited in the mail addressed to that officer, a copy of the title, &c., the same form of allegation being used concerning the delivery of copies. *Falk v. Howell*, 34 F. R. 739. Where the claimant of a copyright testified that he put two copies of the article in the mail, without testifying as to the address on them, and put in evidence an acknowledgment of the receipt of them over the official signature of the librarian of Congress, this was held sufficient evidence of a proper delivery. *Blume v. Spear*, 30 F. R. 629; 24 Blatch. 328.

SECT. 4960. — "Recovered" in the sixth line is here substituted for "collected" in the cited act, and the words "in the nature of an action" in the seventh line are here added. 2 Com. D. 2379.

SECT 4961. — The original act contained the words "without cost to the proprietor" after "destination"; the provision of § 95 of that act by which copyright matter, if designated to be such on the outside of the package, might pass free by mail, was also omitted from the Revision. 2 Com. D. 2379.

SECT. 4962. — St. June 18, 1874, ch. 301 (18 St. 78), which took effect August 1, 1874, and repealed prior inconsistent provisions, changes this provision by § 1, by striking out all after "upon" in the seventh line, and substituting the following, the remainder of the act being also printed here for convenience:—

"Some visible portion thereof, or of the substance on which the same shall be mounted, the following words, viz.: 'Entered according to act of Congress, in the year—, by A. B., in the office of the Librarian of Congress, at Washington;' or, at his option, the words 'copyright,' together with the year the copyright was entered, and the name of the party by whom it was taken out, thus 'copyright 18—, by A. B.'"

"SECT. 2. That for recording and certifying any instrument of writing for the assignment of a copyright, the Librarian of Congress shall receive from the persons to whom the service is rendered, \$1; and for every copy of an assignment, \$1; said fee to cover, in either case, a certificate of the record, under seal of the Librarian of Congress; and all fees so received shall be paid into the U. S. treasury."

"SECT. 3. That in the construction of this act the words 'engraving,' 'cut,' and 'print' shall



be applied only to pictorial illustrations or works connected with the fine arts. And no prints or labels designed to be used for any other article of manufacture shall be entered under the copyright law, but may be registered in the Patent Office. And the Commissioner of Patents is hereby charged with the supervision and control of the entry or registry of such prints or labels, in conformity with the regulations provided by law as to copyright of prints, except that there shall be paid for recording the title of any print or label not a trade-mark, \$6, which shall cover the expense of furnishing a copy of the record under the seal of the Commissioner of Patents, to the party entering the same."

St. August 1, 1882, ch. 366 (22 St. 181), provides —

"That manufacturers of designs for molded decorative articles, tiles, plaques, or articles of pottery or metal subject to copyright may put the copyright mark prescribed by Rev. Stats. § 4962, and acts additional thereto, upon the back or bottom of such articles, or in such other place upon them as it has heretofore been usual for manufacturers of such articles to employ for the placing of manufacturers, merchants, and trade marks thereon."

"*Give notice.*" — The requirement concerning giving notice on the titlepage does not relieve a person from complying with the precedent conditions, but imposes an additional duty, which is a prerequisite to the right to maintain an action for an infringement. *Parkinson v. Laselle*, 3 Sawyer, 330; *Lawrence v. Dana*, 4 Cliff. 1. The object of the requirement concerning notice is to prevent a person from becoming liable through ignorance. *Id.*; *Sarony v. Burrow-Giles L. Co.*, 17 F. R. 591. The law is satisfied with the initial of the Christian name, the full surname being given. *Sarony v. Burrow-Giles L. Co.*, *supra*; *Burrow-Giles L. Co. v. Sarony*, 111 U. S. 53. Under a former statute which required that notice that an engraving was copyrighted should "be impressed on the face thereof," it was held, that it was a sufficient compliance if the notice was plainly engraved on the plate from which the print was taken, within the line of a reasonable margin, and where it would not be covered when properly framed. *Rossiter v. Hall*, 5 Blatch. 362. If a second edition has the required notice, using a different year in the title will not avoid the copyright. *Farmer v. Calvert Co.*, 1 Flip. 228. The statute requires that a new notice in the prescribed form shall be given in every improved edition published during the term. Compliance with it, when the original edition is published, is a full protection for that edition throughout the term; but it does not protect a second edition with notes, nor any succeeding edition with improvements. The copyright of the original edition is not affected because of neglect to comply with the law on the publication of a second, nor will compliance on the publication of the second edition cure material defects in the copyright of the first. *Lawrence v. Dana*, 4 Cliff. 1, 61. If a work comprises several volumes, the publication of a second edition in a different number of volumes does not require a new notice. And in such case an entry in the proper place in the first volume is all that is required. *Dwight v. Appleton*, 1 N. Y. Leg. Obs. 195. Before the amendment made by the act of 1874 (18 St. 78), the notice was to be inscribed on some portion of the face or front of the article, or on the face of the substance on which it should be mounted. The act referred to requires it to be inscribed "upon some visible portion thereof, or of the substance on which the same shall be mounted." Held, that notice printed on the first page of the composition, in plain sight, was good. If such page was not a portion of the composition, it was the substance on which the composition was mounted. *Blume v. Spear*, 30 F. R. 629. A label which has been copyrighted and registered in the Patent Office does not contain the required notice, under the act of 1874, unless it gives the name of the person who took the copyright. It seems that there can be no variation from the prescribed form. Publication without the proper notice is an abandonment of the copyright. *Higgins v. Keuffel*, 30 F. R. 627. The omission of the words "in the office of the librarian of Congress, at Washington," rendered the notice insufficient under this section before the amendment of 1874. *Jackson v. Walkie*, 29



F. R. 15. Where the date of the notice in the book is prior to the actual date of the entry, the copyright expires in twenty-eight years from the date stated in the book, and such variance is immaterial. *Callaghan v. Myers*, 128 U. S. 657. That the printed title was deposited by "E. B. Myers & Chandler," and the printed notice of the entry of the copyright purports to show that the copyright was entered by E. B. Myers alone, is immaterial. *Id.*

"*Name of the party.*" — Under this section, as amended by St. 1874, ch. 301, the provision concerning the name of the party is complied with by giving the initial of the Christian name, the surname being given in full. *Sarony v. Burrow-Giles L. Co.*, 17 F. R. 591; s. c. 111 U. S. 53.

SECT. 4963. — The last thirty-one words of this section are here substituted for the following in the cited section: "forfeit and pay \$100; one moiety thereof to the person who shall sue for the same, and the other to the use of the United States, to be recovered by action in any court of competent jurisdiction." 2 Com. D. 2381. The penalty cannot be recovered if suit is brought by more than one person. *Ferrett v. Atwill*, 1 Blatch. 151. Though separate transactions under this law may constitute separate offences, yet the printing of many copies as a single continuous act is but one offence, and each imprint is a separate cause of action. *Taft v. Stephens Lith. Co.*, 38 F. R. 28. The penalty imposed by this statute is for stamping or marking, as copyrighted, articles which may be copyrighted. The words "or other article," following the enumeration of book, map, &c., do not mean any article whatsoever, but such articles as are declared by the preceding sections to be the subject of copyright, only a part of which are specified by enumeration herein. *Rosenbach v. Dreyfuss*, 2 F. R. 217. If the article mentioned in the complaint may or may not be one which is copyrightable under the statute, it should be alleged to be so. *Id.* A summons in an action to recover the penalty provided for by this section must be indorsed with a reference to the statute under which the action is brought. But if the declaration served with the summons refers to the statute, the defect in the latter will be remedied. The error is not amendable under § 954 of these statutes, nor under the New York code of procedure. *Brown v. Pond*, 5 F. R. 31, 41. An indorsement as follows was ruled to be sufficient: "For \$2,500 debt for a penalty imposed by title 60, ch. 3, of an act of Congress entitled 'An act to revise the statutes,' &c., approved June 20, 1874," the complaint served showing the nature of the action fully. Though there was an error in the date, the references, being to the only act of Congress which contained such a chapter and title, cured that mistake. *Brown v. Church*, 5 F. R. 41.

SECT. 4964. — The penalty is only incurred for printing and publishing so much of a book as infringes the copyright on it. *Rogers v. Jewett*, 22 Law Rep. 339. The copyright on an illustrated newspaper is not infringed by making a plate from which a copy of a portion of the book could be produced, such plate being sold to another. *Harper v. Shoppell*, 26 F. R. 519. But if such copy is of a picture which formed an important, substantial, and material part of the newspaper, and was sold to the proprietors of a rival paper, knowing that it would be published therein, the person who made the copy is equally guilty with the publishers of an infringement of the copyright. *Harper v. Shoppell*, 28 F. R. 613. An action on the case is the proper mode of procedure. *Atwill v. Ferrett*, 2 Blatch. 39. Unless a publisher has notice that agents of the person who owns the copyright of a book are employed to make sales by subscription at a stated price, he may buy copies of it and sell them at such price as he sees fit. *Clemens v. Estes*, 22 F. R. 899. But if sales are made by the owner of the copyright directly to subscribers through agents, the latter having no property in the copies they sell, a dealer who obtains copies from such agents, as the result of the agents' wrongful act, and without the consent or knowledge of their principal, will be enjoined from selling them, and compelled to account for profits on copies sold. *Henry Bill Pub. Co. v. Smythe*, 27



F. R. 914. A bill of complaint is defective unless it alleges the performance of the acts required by §§ 4956, 4962, which are essential, and conditions precedent to the title of the proprietor of a copyright. *Wheaton v. Peters*, 8 Pet. 591; *Jollie v. Jaques*, 1 Blatch. 618; *Parkinson v. Laselle*, 3 Sawyer, 333; *Music Co. v. Paper Co.*, 19 F. R. 758; *Trow City Directory Co. v. Curtin*, 36 Id. 829. The forfeiture cannot be enforced in a suit in equity. *Stevens v. Gladding*, 17 How. 447; *Callaghan v. Myers*, 128 U. S. 663. As to damages, see *Callaghan v. Myers*, 128 U. S. 663, *et seq.* As to abridgments, see *Folsom v. Marsh*, 2 Story, 100; *Gray v. Russell*, 1 Id. 19. An abridgment of a copyrighted work is lawful, but a compilation is not. *Story v. Helcombe*, 4 McLean, 366. To constitute an infringement, there must be a substantial copy of the whole or a material part of the thing copyrighted. *Perris v. Hexamer*, 99 U. S. 674. A copyright of a label registered in the Patent Office is abandoned so as to bar an action for infringement, when the only notice of the copyright given on the label is by printing thereon the words and figures "Registered 3693, 1883." *Higgins v. Keuffel*, 24 Blatch. 351, 360 F. R. 627.

SECT. 4965. — The original act had "moiety" for "half" in next to the last line and the following additional words at the end of the section, "to be recovered by action in any court of competent jurisdiction." 2 Com. D. 2381. An action under this section is abated by the death of the defendant, whatever may be the State law as to survival of actions. *Schreiber v. Sharpless*, 110 U. S. 76. In an action under this section the defendant cannot be compelled to produce in evidence his books of account, &c. *Johnson v. Donaldson*, 3 F. R. 22.

"Every sheet . . . found in his possession." — This section is penal, and must be strictly construed. The penalty for each sheet is limited to sheets found in the defendant's possession. *Backus v. Gould*, 8 How. 798; *Sarony v. Ehrich*, 28 F. R. 79; 23 Blatch. 556. The words "found in his possession" do not refer to the finding of the jury as to the defendant's possession of the articles, but the fact of their being so found prior to the time the cause of action accrued. *Thornton v. Schreiber*, 124 U. S. 612. One who holds photographs in his possession as the employee of another, in whose premises they are stored, they being subject to the order of the latter, is not liable although he may be the superintendent of the department in which they are stored. *Id.* With the consent of the non-resident author, a citizen made a copy of the former's production and transferred it to another citizen, who copyrighted it and made an assignment thereof to a non-resident foreigner, who was the agent of the foreign author. On such facts it was held that the assignee was entitled to be protected in his rights under the assignment. *Carte v. Evans*, 27 F. R. 861. The penalty provided for will not be decreed in an action brought to obtain an account of profits. *Stevens v. Cady*, 2 Curtis, 200. The penalties and forfeitures herein provided for cannot be enforced in a suit in equity. *Chapman v. Ferry*, 12 F. R. 693.

"Copy." — As here used, the word "copy" is a general term, added to the more specific terms which precede it, and used for the purpose of covering methods of reproduction not included in such terms. Hence a photograph of a copyrighted engraving is an infringement of the latter. *Rossiter v. Hall*, 5 Blatch. 362.

The corresponding section of the act of 1790 provided for maps, charts and books (1 St. 124). A chart at that time was a marine map, according to all the dictionaries. The act of 1802 (2 St. 171) added historical or other prints, and that of 1831 (4 St. 436) added musical compositions, cuts, and engravings; the act of 1863 (13 St. 540) added photographs; and that of 1870 (16 St. 198) added paintings, drawings, chromos, statues, statuary, and models or designs intended to be perfected as works of fine arts. A distinction has been made as to the measure of recovery for the infringement of a book and other works ever since the act of 1831. Sheets of paper exhibiting tabulated or methodi-



cally arranged information came to be known as charts in 1864. When books and charts were first protected by the copyright laws, such sheets of paper would not have been protected as a chart. No change has been made in the use of that term by Congress which indicates an intention to give it a broader meaning than it originally had. It has been kept separate from the word "book" and kept with the word "map," showing an intention to continue its use in the same sense of a chart of the class with maps and other works of art. Because this section is penal it must be construed strictly; hence such a chart as is stated is not within it. *Taylor v. Gilman*, 24 F. R. 632; 23 Blatch. 325.

"*Proprietor*." — See § 4952. One who buys a painting, employs an artist to color it and who designed it, is the proprietor, notwithstanding it was suggested by a woodcut. *Schumacher v. Shwencke*, 25 F. R. 466.

"*One half to the use of the United States*." — It is doubtful whether this clause applies to a case which does not relate to a painting, statue, or statuary. *Thornton v. Schreiber*, 124 U. S. 612, 614.

SECT. 4966. — This section is designed to secure to the author of a copyrighted play the sole right to its performance in any public place after it has been printed. Until then, the common law protects it. *Boucicault v. Fox*, 5 Blatch. 87, 97. The author or proprietor of a dramatic work may maintain an action for an infringement of his copyright committed after filing the title thereof, but before its publication. *Boucicault v. Wood*, 2 Biss. 34. The exclusive right given by this section applies only where the composition has been copyrighted. *Boucicault v. Hart*, 13 Blatch. 47. If all that is substantial and material in a scene of a copyrighted play, a great part of it being represented by actions and not by spoken language, is used in the same order, with the same sequence of events, and conveyed the same sensations and impressions to the spectators, there is an infringement. *Daly v. Palmer*, 6 Blatch. 256.

SECT. 4967. — The original act had the following additional words at the end of the section: "To be recovered by action on the case in any court of competent jurisdiction." 2 Com. D. 2381. This section must be construed in accordance with the rule that words in common use are to be taken in their natural, plain, and obvious meaning, unless the context clearly shows that they are to have a different signification. Under this rule manuscript does not include a picture, and the purchaser of a painting may acquire title to it by an oral contract with the owner. *Parton v. Prang*, 3 Cliff. 537. Equity will interfere if a substantial part only of the manuscript has been printed. It will also restrain the publication of private letters, which are within the statute. *Bartlett v. Crittenden*, 5 McLean, 32. "Publish" here means publish in print. No redress for an unauthorized theatrical representation can be obtained under this section. *Keene v. Wheatley*, 9 Am. L. Reg. 33, 45. It is probable that the public representation of a manuscript play is not within this statute. *Boucicault v. Fox*, 5 Blatch. 87. Where it was alleged in a bill asking an injunction restraining the defendant from performing or representing a play, or from printing or publishing, that he had, without consent, printed and published parts of it, and announced his intention to sell them, an injunction was granted restraining the publication. *Boucicault v. Hart*, 13 Blatch. 47.

SECT. 4968. — Every printing for sale is a new infraction of the rights of the person who holds the copyright, notwithstanding the plates from which the printing was done were made more than two years before the action was begun. *Reed v. Carusi*, Taney, 72. Where a suit was docketed by consent in November, as of the April term preceding, it was held that it will be taken, so far as the limitation is concerned, as having been brought on the first day of the April term. *Id.*

SECT. 4970. — *Conn. v. Gould*, 34 F. R. 319. The legal assignee of the author is such a party. *Little v. Gould*, 2 Blatch. 362, 369. The assignee of the exclusive right of acting and representing a drama for a limited time in all but a limited portion of the



United States, is such a party. *Roberts v. Myers*, 23 Law Rep. 396. An injunction will not be granted at the suit of one who has not an exclusive right in himself. *Martinetti v. Maguire*, Deady, 216. The holder of the legal title may maintain an action for infringement, though another may be the beneficial owner. *Hanson v. Jaccard Jewelry Co.*, 32 F. R. 202. An injunction to prevent infringement of a copyright may be granted, although an action under § 4965 is pending. *Schumacher v. Schwencke*, 25 F. R. 466. The court is bound to consider not only the quantity and quality of the matter appropriated, but the intention with which such appropriation is made, the extent to which the plaintiff is injured by it, and the damage to the defendant by an injunction. *Farmer v. Elstner*, 33 F. R. 494. Where the pirated part can be separated from the rest, that part alone will be enjoined; otherwise the whole. *Id.*

SECT. 4971. — "*Print.*" — This word includes chromos and chromo-lithographs. *Yuengling v. Schile*, 12 F. R. 97.



## TITLE LXI.

## BANKRUPTCY.

THE bankruptcy act of March 2, 1867, here incorporated, and the amendments thereof, were repealed by St. June 7, 1878 (20 St. 99), ch. 160, which contained this proviso:—

“That such repeal shall in no manner invalidate or affect any case in bankruptcy instituted and pending in any court prior to the day when this act shall take effect; but as to all such pending cases and all future proceedings therein, and in respect of all pains, penalties, and forfeitures which shall have been incurred under any of said acts prior to the day when this act takes effect, or which may be thereafter incurred, under any of those provisions of any of said acts which, for the purposes named in this act, are kept in force, and all penal actions and criminal proceedings for a violation of any of said acts, whether then pending or thereafter instituted, and in respect of all rights of debtors and creditors (except the right of commencing original proceedings in bankruptcy), and all rights of, and suits by, or against assignees, under any, or all of said acts, in any matter or case which shall have arisen prior to the day when this act takes effect (which shall be on September 1, 1878), or in any matter or case which shall arise after this act takes effect, in respect of any matter of bankruptcy authorized by this act to be proceeded with after said last-named day, the acts hereby repealed shall continue in full force and effect until the same shall be fully disposed of, in the same manner as if said acts had not been repealed.”

The United States law of 1867, although taking effect, for some purposes, from the day of its passage, did not suspend the prior State insolvent laws until June 1, 1867, which was the earliest day on which proceedings under it could be instituted. *Day v. Bardwell*, 97 Mass. 246. Its effect was to suspend the State laws, so long as it continued in force, with respect to debtors within its own purview only, and as to proceedings begun after it took effect; and upon its repeal, those laws became again immediately operative. *Sturges v. Crowninshield*, 4 Wheat. 195; *Thornhill v. Bank*, 1 Woods, 8; *Sullivan v. Hieskill*, Crabbe, 527; *Ex parte Eames*, 2 Story, 322; *Griswold v. Pratt*, 9 Met. 16; *Judd v. Ives*, 4 Id. 401; *Rowe v. Page*, 54 N. H. 190; *Van Nostrand v. Carr*, 30 Md. 128; *Reed v. Taylor*, 32 Iowa, 209; *Martin v. Berry*, 37 Cal. 208; *Gottschalk v. Meyer*, 28 La. Ann. 885; *Shears v. Solhinger*, 10 Abb. Pr. N. S. 287.



## TITLE LXII.

## NATIONAL BANKS.

## CHAPTER I.

## ORGANIZATION AND POWERS.

SECT. 5133. — *Rich v. State Bank of Lincoln*, 7 Neb. 201; *Bullard v. Bank*, 18 Wall. 589; *Continental Bank v. Folsom*, 3 S. E. Repr. 269. See notes, §§ 5154, 5191, 5220. St. June 20, 1874, ch. 343, § 1 (18 St. 123), provides that the cited act of 1864 shall thereafter be known as "the national-bank act." St. July 12, 1882, ch. 290 (22 St. 162), provides that any national banking association organized under 12 St. 665; 13 St. 99, 21 St. 66; or under Rev. Stats. §§ 5133, 5134, 5135, 5136, 5154, —

"may, at any time within the two years next previous to the date of the expiration of its corporate existence under present law, and with the approval of the Comptroller of the Currency, to be granted, as hereinafter provided, extend its period of succession by amending its articles of association for a term of not more than 20 years from the expiration of the period of succession named in said articles of association, and shall have succession for such extended period, unless sooner dissolved by the act of shareholders owning two-thirds of its stock, or unless its franchise becomes forfeited by some violation of law, or unless hereafter modified or repealed.

"SEC. 2. That such amendment of said articles of association shall be authorized by the consent in writing of shareholders owning not less than two-thirds of the capital stock of the association; and the board of directors shall cause such consent to be certified under the seal of the association, by its president or cashier, to the Comptroller of the Currency, accompanied by an application made by the president or cashier for the approval of the amended articles of association by the Comptroller; and such amended articles of association shall not be valid until the Comptroller shall give to such association a certificate under his hand and seal that the association has complied with all the provisions required to be complied with, and is authorized to have succession for the extended period named in the amended articles of association.

"SEC. 3. That upon the receipt of the application and certificate of the association provided for in the preceding section, the Comptroller of the Currency shall cause a special examination to be made, at the expense of the association, to determine its condition; and if after such examination or otherwise it appears to him that said association is in a satisfactory condition, he shall grant his certificate of approval provided for in the preceding section, or if it appears that the condition of said association is not satisfactory, he shall withhold such certificate of approval.

"SEC. 4. That any association so extending the period of its succession shall continue to enjoy all the rights and privileges and immunities granted and shall continue to be subject to all the duties, liabilities, and restrictions imposed by the Revised Statutes of the United States and other acts having reference to national-banking associations, and it shall continue to be in all respects the identical association it was before the extension of its period of succession: *Provided, however*, That the jurisdiction for suits hereafter brought by or against any association established under any law providing for national-banking associations, except suits between them and the United States, or its officers and agents, shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking business where such national-banking associations may be doing business when such suits may be begun: And all laws and parts of laws of the United States inconsistent with this proviso be, and the same are hereby, repealed. (See note, § 5234, post.)

"SEC. 5. That when any national-banking association has amended its articles of association as provided in this act, and the Comptroller has granted his certificate of approval, any shareholder not



assenting to such amendment may give notice in writing to the directors, within thirty days from the date of the certificate of approval, of his desire to withdraw from said association, in which case he shall be entitled to receive from said banking association the value of the shares so held by him, to be ascertained by an appraisal made by a committee of three persons, one to be selected by such shareholder, one by the directors, and the third by the first two; and in case the value so fixed shall not be satisfactory to any such shareholder, he may appeal to the Comptroller of the Currency, who shall cause a reappraisal to be made, which shall be final and binding; and if said reappraisal shall exceed the value fixed by said committee, the bank shall pay the expenses of said reappraisal, and otherwise the appellant shall pay said expenses; and the value so ascertained and determined shall be deemed to be a debt due, and be forthwith paid, to said shareholder from said bank; and the shares so surrendered and appraised shall, after due notice, be sold at public sale, within 30 days after the final appraisal provided in this section: *Provided*, That in the organization of any banking association intended to replace any existing banking association, and retaining the name thereof, the holders of stock in the expiring association shall be entitled to preference in the allotment of the shares of the new association in proportion to the number of shares held by them respectively in the expiring association.

"SEC. 6. That the circulating notes of any association so extending the period of its succession which shall have been issued to it prior to such extension shall be redeemed at the Treasury of the United States, as provided in § 3 of the act of 1874, and such notes when redeemed shall be forwarded to the Comptroller of the Currency, and destroyed as now provided by law; and at the end of three years from the date of the extension of the corporate existence of each bank the association so extended shall deposit lawful money with the Treasurer of the United States sufficient to redeem the remainder of the circulation which was outstanding at the date of its extension, as provided in Rev. Stats. §§ 5222, 5224, 5225; and any gain that may arise from the failure to present such circulating notes for redemption shall inure to the benefit of the United States; and from time to time, as such notes are redeemed or lawful money deposited therefor as provided herein, new circulating notes shall be issued as provided by this act, bearing such devices, to be approved by the Secretary of the Treasury, as shall make them readily distinguishable from the circulating notes heretofore issued: *Provided, however*, That each banking association which shall obtain the benefit of this act shall reimburse to the Treasury the cost of preparing the plate or plates for such new circulating notes as shall be issued to it.

"SEC. 7. That national-banking associations whose corporate existence has expired or shall hereafter expire, and which do not avail themselves of the provisions of this act, shall be required to comply with the provisions of Rev. Stats. §§ 5221, 5222, in the same manner as if the shareholders had voted to go into liquidation, as provided in Rev. Stats. § 5220; and the provisions of Rev. Stats. §§ 5224, 5225, shall also be applicable to such associations, except as modified by this act; and the franchise of such association is hereby extended for the sole purpose of liquidating their affairs until such affairs are finally closed.

"SEC. 8. That national banks now organized or hereafter organized, having a capital of \$150,000, or less, shall not be required to keep on deposit or deposit with the Treasurer of the United States United States bonds in excess of one-fourth of their capital stock as security for their circulating notes; but such banks shall keep on deposit or deposit with the Treasurer of the United States the amount of bonds as herein required. And such of those banks having on deposit bonds in excess of that amount are authorized to reduce their circulation by the deposit of lawful money as provided by law; *provided*, That the amount of such circulating notes shall not in any case exceed ninety per centum of the par value of the bonds deposited as herein provided: *Provided further*, That the national banks which shall hereafter make deposits of lawful money for the retirement in full of their circulation shall at the time of their deposit be assessed for the cost of transporting and redeeming their notes then outstanding, a sum equal to the average cost of the redemption of national-bank notes during the preceding year, and shall thereupon pay such assessment. And all national banks which have heretofore made or shall hereafter make deposits of lawful money for the reduction of their circulation shall be assessed and shall pay an assessment in the manner specified in § 3 of the act approved June 20, 1874, for the cost of transporting and redeeming their notes redeemed from such deposits subsequently to June 30, 1881.

"SEC. 9. That any national banking association now organized or hereafter organized, desiring to withdraw its circulating notes, upon a deposit of lawful money with the Treasurer of the United States, as provided in § 4 of the act of June 20, 1874, or as provided in this act, is authorized to deposit lawful money and withdraw a proportionate amount of the bonds held as security for its circulating notes in the order of such deposits; and no national bank which makes any deposit of lawful money in order to withdraw its circulating notes shall be entitled to receive any increase of its circulation for the period of six months from the time it made such deposit of lawful money for the purpose aforesaid: *Provided*, That not more than three millions of dollars of lawful money shall be deposited during any calendar month for this purpose: *And provided further*, That the provisions of this section shall not apply to bonds called



for redemption by the Secretary of the Treasury, nor to the withdrawal of circulating notes in consequence thereof.

"SEC. 10. That upon a deposit of bonds as described by §§ 5159, 5160, except as modified by § 4 of the act of June 20, 1874, and as modified by § 8 of this act, the association making the same shall be entitled to receive from the Comptroller of the Currency circulating notes of different denominations, in blank, registered and countersigned as provided by law, equal in amount to ninety per centum of the current market value, not exceeding par, of the United States bonds so transferred and delivered, and at no time shall the total amount of such notes issued to any such association exceed 90 per centum of the amount at such time actually paid in of its capital stock; and the provisions of Rev. Stats. §§ 5171, 5176, are hereby repealed.

"SEC. 11. That the Secretary of the Treasury is hereby authorized to receive at the Treasury any bonds of the United States bearing three and a half per centum interest, and to issue in exchange therefor an equal amount of registered bonds of the United States of the denominations of \$50, \$100, \$500, \$1000, and \$10,000, of such form as he may prescribe, bearing interest at the rate of three per centum per annum, payable quarterly at the Treasury of the United States. Such bonds shall be exempt from all taxation by or under State authority, and be payable at the pleasure of the United States; *Provided*, That the bonds herein authorized shall not be called in and paid so long as any bonds of the United States heretofore issued bearing a higher rate of interest than three per centum, and which shall be redeemable at the pleasure of the United States, shall be outstanding and uncalled. The last of the said bonds originally issued under this act, and their substitutes, shall be first called in, and this order of payment shall be followed until all shall have been paid.

"SEC. 12. That the Secretary of the Treasury is authorized and directed to receive deposits of gold coin with the Treasurer or assistant treasurers of the United States, in sums not less than \$25, and to issue certificates therefor in denominations of not less than \$20 each, corresponding with the denominations of United States notes. The coin deposited for or representing the certificates of deposits shall be retained in the Treasury for the payment of the same on demand. Said certificates shall be receivable for customs, taxes, and all public dues, and when so received may be reissued; and such certificates, as also silver certificates, when held by any national-banking association, shall be counted as part of its lawful reserve; and no national-banking association shall be a member of any clearing-house in which such certificates shall not be receivable in the settlement of clearing-house balances: *Provided*, That the Secretary of the Treasury shall suspend the issue of such gold certificates whenever the amount of gold coin and gold bullion in the Treasury reserved for the redemption of United States notes falls below one hundred millions of dollars; and the provisions of Rev. Stats. § 5207, shall be applicable to the certificates herein authorized and directed to be issued.

"SEC. 13. That any officer, clerk, or agent of any national banking association who shall wilfully violate the provisions of an act entitled 'An act in reference to certifying checks by national banks,' approved March 3, 1869, being Rev. Stats. § 5208, or who shall resort to any device, or receive any fictitious obligation, direct or collateral, in order to evade the provisions thereof, or who shall certify checks before the amount thereof shall have been regularly entered to the credit of the dealer upon the books of the banking association, shall be deemed guilty of a misdemeanor, and shall on conviction thereof in any circuit or district court of the United States, be fined not more than \$3000, or shall be imprisoned not more than 5 years, or both, in the discretion of the court.

"SEC. 14. That Congress may at any time amend, alter, or repeal this act and the acts of which this is amendatory."

The constitutionality of the bank act of 1864 rests on the same principle as the act creating the Second Bank of the United States. The reasoning of the court in *McCulloch v. Maryland*, 4 Wheat. 316, and in *Osborne v. Bank of the United States*, 9 Id. 708, applies. *Farmers' Bank v. Dearing*, 91 U. S. 29. National banks are designed to aid the government in the administration of an important branch of the public service. Hence, the States can exercise no control over them, nor in any wise affect their operation, except in so far as Congress may see proper to permit. *Id.* Under the national currency act of 1864, and the amendatory act of 1865, banking associations might have been organized without the right to obtain, issue, and circulate notes. These acts placed no restriction upon the aggregate amount of capital of the banks which might be organized under them. 11 A. G. Op. 334. The prosecution of an action against the receiver of a national bank in a Canadian court for the recovery of bonds, was restrained by the circuit court, in *Hendee v. Conn. & P. R. R. Co.*, 26 F. R. 677.



22 St. ch. 162, § 4, placed national banks upon the same footing as other banks, and they cannot therefore, merely in view of their corporate right, sue in a Federal court. *Union Bank of Cincinnati v. Miller*, 15 F. R. 703. Said section does not oust Federal courts of the jurisdiction of suits brought by an officer of the United States, under the authority of their laws, to recover of the stockholders of an insolvent national bank money which, when recovered, is to be paid over to the Treasurer of the United States for the benefit of the creditors of the bank. *Price v. Abbott*, 17 F. R. 506. Under it, a national bank cannot remove a suit against it from the State court upon the ground that it is a corporation organized under the laws of the United States, thereby making the suit one arising under the laws of the United States (*Cooper v. Leather Manufacturers' Bank*, 29 F. R. 161), unless a similar suit, by or against a State bank in like situation, could be so removed. *Leather Manufacturers' Bank v. Cooper*, 120 U. S. 778. It repeals Rev. Stats. § 629, subd. 10, and disables national banks from bringing suit in the Federal courts against residents of their own State and judicial district. *Bank of Jefferson v. Fore*, 25 F. R. 209. The appraisers mentioned in § 5 of said act may correct a clerical error in computing the figures on which their valuation was made, and in the result of the valuation, before the time for an appeal from their appraisal has expired. *Bank of Clarion v. Brenneman*, 114 Penn. St. 315.

SECT. 5134. — *Davis v. Stevens*, 17 Blatch. 259, 20 Alb. L. J. 490; *Chatham Bank v. Merchants' Bank*, 4 Thomp. & Cook (N. Y.) 196; *Van Allen v. Assessors*, 3 Wall. 573.

"*The place where its operations of discount and deposit are to be carried on.*"—This phrase must be construed reasonably. It does not prevent the purchase of coin by one bank at the place of business of another. *Merchants' Bank v. State Bank*, 10 Wall. 604, 651.

SECT. 5136. — *Bullard v. Bank*, 18 Wall. 589; *Cadle v. Tracy*, 11 Blatch. 101; *Evansville Bank v. Metropolitan Bank*, 2 Biss. 527; *Manufacturers' Bank v. Baack*, 2 Abb. U. S. 232; 8 Blatch. 137; *St. Louis Bank v. Brinkman*, 1 F. R. 45, 47; *Town of Lyons v. Lyons Bank*, 8 Id. 369, 376; *Scott v. Pequonnock Bank*, 15 Id. 494, 499; *Eastern Townships' Bank v. Bank of St. Albans*, 22 Id. 186; *Movius v. Lee*, 24 Blatch. 291; 30 F. R. 298; *Crocker v. Marine Bank*, 101 Mass. 240; *Bank of Lyons v. Ocean Bank*, 60 N. Y. 278; *Yerkes v. Bank of Port Jervis*, 69 Id. 382; *Talmage v. Third Nat. Bank*, 91 Id. 531; *National Bank of Gloversville v. Wells*, 15 Hun, 51; *Bank of Montpelier v. Hubbard*, 49 Vt. 1; *Stephens v. Monongahela Bank*, 88 Penn. St. 157; *Higley v. Bank of Beverly*, 26 Ohio St. 75; *Fridley v. Bowen*, 87 Ill. 151; *Bank of Memphis v. Kidd*, 20 Minn. 234; *Holmes v. National Bank*, 18 S. C. 31. Service of process on the cashier of a national bank, who is found in a district other than the one where the bank is located, does not confer jurisdiction upon the court of the district in which such service is made, for a national bank does not change its location to correspond with the temporary residence of one of its officers. *Main v. Second Nat. Bank*, 6 Biss. 26. A national bank may maintain a suit on behalf of its stockholders, to enjoin the collection of a tax unlawfully assessed on their shares of stock by State officers. *Hills v. Exchange Bank*, 105 U. S. 319. This provision seems to place national banks on an equal footing with natural persons, and to confer upon them the right to sue and be sued in the Federal courts, only to the same extent as such persons, and under like circumstances and conditions. *St. Louis Nat. Bank v. Allen*, 2 McCrary, 92; *Manufacturers' Bank v. Baack*, 2 Abb. U. S. 232; 8 Blatch. 137; *Cadle v. Tracy*, 11 Blatch. 101.

"*Discounting and negotiating promissory notes.*"—This expression contemplates loans and discounts as understood in commercial law, and according to the known usage and practice of banks. *Merchants' Nat. Bank v. Sevier*, 14 F. R. 662. To discount a note is to deduct the interest *in presenti*, and pay over in money the face value of the note. To negotiate a promissory note or bill of exchange is either to buy or sell it. *Seligman v. Charlottesville Nat. Bank*, 3 Hughes, 647.



A national bank is not authorized to discount a note which stipulates for the payment of an attorney's fee of ten per cent on the amount due if suit is brought to enforce payment for the use of the attorney bringing the suit. *Merchants' Nat. Bank v. Sevier, supra*. A national bank is authorized to guarantee by indorsement the obligation of a borrower, and such indorsement made by one of its directors and the vice-president is presumed to have been authorized (*People's Bank v. National Bank*, 161 U. S. 181), but not to guarantee the obligation of one who has made a deposit of collateral security with the bank. It may loan money on such security, but not its credit. *Seligman v. Charlottesville Nat. Bank, supra*; *Johnson v. Same*, 3 Hughes, 657. A bank may make a loan taking the stock of another bank as collateral security (*National Bank v. Case*, 99 U. S. 628, 633), or of another corporation. *Shoemaker v. National Mechanics' Bank*, 2 Able U. S. 416; *Pittsburg Locomotive Works v. State Nat. Bank*, 21 Int. Rev. Rec. 349; *Carrfield v. State Bank*, *Thompson's Nat. Bank Cases*, 312. It may take, hold, and sue upon coupons issued with and annexed to town bonds payable to bearer, and separated from the bonds (*Bank of North Bennington v. Bennington*, *Browne's N. B. Cas.* 497), and upon coupons attached to sealed bonds issued by a town in aid of a railroad. *First Nat. Bank v. Bennington*, 16 Blatch. 53.

A national bank has no authority under this and the following sections to take a mortgage on real estate as security for future advances. *Kansas Valley Bank v. Rowell*, 2 Dillon, 371; *Crocker v. Whitney*, 71 N. Y. 161. But unless restrained by its charter, it may perhaps take such a mortgage to secure anticipated liabilities. *Crocker v. Whitney, supra*. Where a bank loaned money and took as security an assignment and a deed of trust of real estate, it was held that the deed of trust was not void, and the bank could not be enjoined from selling thereunder. If a national bank makes a loan on real security, the security is not void, but may be enforced. *Union Bank v. Matthews*, 98 U. S. 658, reversing *Matthews v. Skinker*, 62 Mo. 329. See *Woods v. People's Bank*, 83 Penn. St. 57; *Bank of Waterloo v. Elmore*, 52 Iowa, 541; *Roebling v. First Nat. Bank*, 30 F. R. 744.

While by implication a bank is prohibited from dealing in stock, it may take stock in payment or compromise of a doubtful debt, in order to avoid loss, and with a view to convert the stock into money. *First Nat. Bank v. Exchange Bank*, 92 U. S. 122. The implication is that a national bank is prohibited from loaning money on real estate. What is so implied is as effectual as if it were so expressed. But a bank is not precluded from enforcing the collection of a note executed by A. to B., and secured by a deed of trust of lands, the deed being in effect a mortgage with a power of sale annexed, the money for which the note was given being loaned to B., who assigned the note and deed to the bank. *National Bank v. Matthews*, 98 U. S. 624; *National Bank v. Whitney*, 103 Id. 99.

The words "by discounting and negotiating promissory notes, drafts, bills of exchange," &c., do not limit the mode of exercising the incidental powers granted, but limit the kind of banking which is authorized by the bank. *Shinkle v. First Bank of Ripley*, 22 Ohio, St. 516. A bank may dispose of its right in coin which it holds in pledge (*Merchants' Bank v. State Bank*, 10 Wall. 604), while dealing in checks is a part of its usual business. *Bank of Rochester v. Harris*, 108 Mass. 514. None of the five distinct grants of power enumerated in the seventh subdivision of this section is a limitation upon any other. *Shoemaker v. National Mechanics' Bank, supra*.

On a suit against a stockholder to enforce his liability, or a party upon his contracts with the bank, the certificate of the comptroller is conclusive as to the completeness of the organization under the laws of the United States. *Casey v. Galli*, 94 U. S. 673. As the only powers conferred upon directors are those which reside in them as a board, and when acting collectively as such, the individual consent of the majority of the members



acting separately, is not enough to ratify an unauthorized appropriation of the funds of the bank by the cashier. *First Nat. Bank v. Drake*, 35 Kansas, 564. This section was neither repealed nor modified by the amendment to Rev. Stats. § 5198. *Continental Bank v. Folsom*, 78 Ga. 449. See this case also for a consideration of the act of July 12, 1882.

SECT. 5137. — *First Bank of Charlotte v. Exchange Bank of Baltimore*, 92 U. S. 122; *Robinson v. Bank of New Berne*, 58 How. Pr. 306; *Stephens v. Monongahela Bank*, 88 Penn. St. 157; *Richards v. Kountze*, 4 Neb. 200; *Scofield v. State Bank of Lincoln*, 9 Id. 316; *Wroten's Assignee v. Armat*, 31 Gratt. 228. Only the government can dispute the bank's right to acquire and hold real property. *Reynolds v. Crawfordsville Bank*, 112 U. S. 405; *Fortier v. New Orleans Bank*, Id. 439; *Wherry v. Hale*, 77 Mo. 20. A mortgage executed to a national bank as collateral security for an existing indebtedness, and for such as the mortgagor might thereafter incur, is enforceable. *National Bank v. Whitney*, 103 U. S. 99. Only the government can object to the provision concerning future advances. Id. *Contra*, *Kansas Valley Bank v. Rowell*, 2 Dillon, 371. A bank may sell real estate owned by it, and take back a mortgage to secure the purchase-money. *New Orleans Bank v. Raymond*, 29 La. Ann. 355. It may take a mortgage of real estate by way of security for an indebtedness previously contracted and evidenced by new notes of the mortgagor. *Farmers', &c. Bank v. Wallace*, 10 Westn. Repr. 466; 12 N. E. Repr. 439, 445; *Matthews v. Abbott*, 2 Haskell, 289; *Worcester Bank v. Cheeney*, 87 Ill. 602; *Merchants' Bank v. Mears*, 10 Chi. Leg. News, 180. It may purchase at sheriff's sale land mortgaged to it in good faith as security for a debt previously contracted. *Heath v. Bank of Lafayette*, 70 Ind. 106. And where a bank purchased real estate mortgaged to it, and, in order to secure the same debt, it purchased other real estate not mortgaged to it, the title to that which it was authorized to purchase was not affected. And though it were otherwise, the debtor could not take advantage of it. *Reynolds v. Crawfordsville Nat. Bank*, *supra*. A mortgage to a national bank to secure a present loan by the discount of commercial paper in the usual course of business is not void, but only voidable at the election of the government. *Graham v. Bank of New York*, 32 N. J. Eq. 804. But a real estate mortgage executed to a bank officer to secure a loan made concurrently therewith to the mortgagor by the bank is void. *Fridley v. Bowen*, 87 Ill. 151. An indorsement by a married woman charging her estate with the payment of the note, is such a security as a national bank may take. *Third Bank v. Blake*, 73 N. Y. 260. As to other property likewise only the government can dispute the bank's right thereto, as where the bank sues for the amount of coupons payable to bearer, it not appearing how they were acquired. *Lyons v. Lyons Bank*, 19 Blatch. 279.

SECT. 5139. — *Van Allen v. Assessors*, 3 Wall. 573; *Dickinson v. Central Bank*, 129 Mass. 279; *Magruder v. Colston*, 44 Md. 349; *Hale v. Walker*, 31 Iowa, 344. This section and Rev. Stats. § 5151, for the purposes of construction should be considered together. *Davis v. Stevens*, 17 Blatch. 259; 20 Alb. L. J. 490. The power to prescribe the manner of transferring shares of stock can go only to the extent of prescribing conditions essential to the protection of the association against fraudulent transfers, or such as may be designed to evade the just responsibility of the stockholder. Under the pretence of exercising this power, the association cannot clog the transfer with useless restrictions, or make it dependent upon the consent of the directors or other stockholders. *Johnston v. Laffin*, 103 U. S. 800; 5 Dillon, 65; 17 Alb. L. J. 146. If a stockholder deliver his certificate to one to whom he has made a sale of his stock, and authorized him, or any one else, to transfer them on the books of the bank, the transaction as between the parties is complete. *Johnston v. Laffin*, *supra*. If no mode of transferring shares of stock has been provided by the bank, it is bound to recognize a transfer thereof made by a foreign executor, such transfer being valid under the laws of the State in which the bank is situated. *Hobbs v. Western Nat. Bank*, 8 W. N. C. 131.



A by-law provided that shares of stock should be transferable on the books of the bank, in person or by attorney, only on the surrender of the certificates. The bank allowed a transfer to be made without requiring such surrender; and it was held bound to transfer to the transferee, who produced the certificates with a properly executed power of attorney, although it had no notice of the last transfer. *Bank v. Lanier*, 11 Wall. 362. And where the by-laws provided that shares of stock should be transferred only on the books of the association, it was held that one to whom a transfer had been made on the back of the certificate, was entitled to damages for the refusal of the bank to transfer the shares, although there had been an attachment thereof between the time of transfer and the notice thereof given the bank. *Hazard v. National Exchange Bank*, 26 F. R. 94; *Continental Nat. Bank v. Eliot Nat. Bank*, 7 Id. 369. See *Scott v. Pequonock Nat. Bank*, 15 Id. 494. Certificates of shares in national banks are so far negotiable, or *quasi* negotiable, that a by-law of the bank which undertakes to make them subject to the debt of the transferrer to the bank, is void. *Bullard v. The Bank*, 18 Wall. 582. A bank may waive, by the acts of its cashier, the provision of a State statute to the effect that bank stock shall be transferable only as the by-laws provide, and that no stockholder shall transfer his stock until his debt to the bank is discharged or secured to the satisfaction of the directors. *National Bank v. Watertown Bank*, 105 U. S. 217.

As between the vendor and the vendee of national bank stock, the title passes by a delivery and the execution of a power of attorney to transfer it. If a bank has no by-law regulating the transfer of stock, a record thereof made on the stock book by its cashier vests in the vendee a title to the stock. *Id.*

A stockholder, who is also a creditor of a bank, cannot cancel or reduce his assessment by offsetting his claim against the bank. *Hobart v. Gould*, 8 F. R. 57.

Those persons only have the rights and liabilities of stockholders who appear to be such as are registered on the books of the association, the stock being transferable only in that way. No person becomes a shareholder, subject to such liabilities and succeeding to such rights, except by such transfer; until such transfer the prior holder is the stockholder for all the purposes of the law. *Richmond v. Irons*, 121 U. S. 27, 58. If a person allows a transfer to be made to him, upon the books of a bank, of shares of stock therein, even though such transfer is made solely as security for a debt due, the transferee becomes individually liable for all contracts of the bank to the extent prescribed by the act. *Moore v. Jones*, 3 Woods, 53. A purchaser of stock in a national bank, who for the purpose of concealing his ownership, and escaping individual responsibility, causes it to be transferred to another person pecuniarily irresponsible, is, so long as he remains the actual owner, a shareholder, within the meaning of this section and Rev. Stats. § 5151. *Davis v. Stevens*, 17 Blatch. 259. If an executor, under a decree of court, transfers shares of bank stock belonging to the estate to the residuary legatee, the transfer is valid, and the estate is not liable to an assessment on the stock, notwithstanding the remaining assets in the executor's hands were not sufficient to pay the legacies. *Witters v. Sowles*, 32 F. R. 130.

SECTS. 5140, 5141. — *Van Allen v. Assessors*, 3 Wall. 573; *Eaton v. Pacific Bank*, 144 Mass. 260; 10 N. E. Rep. 844; 4 New Eng. Rep. 63; *Wright v. Merchants' Bank*, 3 Cent. L. J. 351; *Stanton v. Wilkeson*, 8 Ben. 357. See note, § 5220, *post*.

SECT. 5142. — *Delano v. Butler*, 118 U. S. 634; *Eaton v. Pacific Bank*, 144 Mass. 260; *Winters v. Armstrong*, 37 F. R. 508. St. May 1, 1886, ch. 73 (24 St. 18), provides —

“That any national banking association may, with the approval of the Comptroller of the Currency, by the vote of shareholders owning two-thirds of the stock of such association, increase its capital stock, in accordance with existing laws, to any sum approved by the said Comptroller, notwithstanding the limit fixed in its original articles of association and determined by said Comptroller; and no increase of



the capital stock of any national banking association either within or beyond the limit fixed in its original articles of association shall be made except in the manner herein provided.

"SEC. 2. That any national banking association may change its name or the place where its operations of discount and deposit are to be carried on, to any other place within the same State, not more than thirty miles distant with the approval of the Comptroller of the Currency, by the vote of shareholders owning two-thirds of the stock of such association. A duly authenticated notice of the vote and of the new name or location selected shall be sent to the office of the Comptroller of the Currency; but no change of name or location shall be valid until the Comptroller shall have issued his certificate of approval of the same.

"SEC. 3. That all debts, liabilities, rights, provisions, and powers of the association under its old name shall devolve upon and inure to the association under its new name.

"SEC. 4. That nothing in this act contained shall be so construed as in any manner to release any national banking association under its old name or at its old location from any liability, or affect any action or proceeding in law in which said association may be or become a party or interested."

SECT. 5143. — *Morrison v. Price*, 23 F. R. 217, 219; *Eaton v. Pacific Bank*, 144 Mass. 260. Where a national bank reduces its capital stock, it cannot retain as a surplus fund or for any other purpose any portion of the money which it receives from the stock which is retired. Seeley *v. New York Exchange Bank*, 1 Thomp. N. B. Cas. 804.

SECT. 5144. — *Van Allen v. Assessors*, 3 Wall. 573. The liability which prevents a shareholder from voting is only the non-payment of his subscription as such shareholder. *United States v. Barry*, 36 F. R. 246.

SECT. 5145. — *Bank of Lyons v. Ocean Bank*, 60 N. Y. 278. This section and the five following are framed to embody the provisions of §§ 9, 10 of St. 1864, the order and expression being modified without intention to change the substance. 2 Com. D. 2461. This section does not prohibit the resignation of a director during the year. The apparent purpose of it is to make the term of office conform to the time of the new election, and not to absolutely require every director to serve the full term. An oral resignation made to the president of the board is good. *Movius v. Lee*, 24 Blatch. 291; 30 F. R. 298.

SECT. 5146. — *Rich v. State Bank of Lincoln*, 7 Neb. 201. The purpose of this section obviously is to require the office of director to be kept in the hands of those who are personally and pecuniarily interested in the affairs of the bank. When a director bargains for a sale of his stock and resigns his position, so far as he can do so, to the president of the bank, in his place as such president, he ceases to be a director. *Movius v. Lee*, 24 Blatch. 291; 30 F. R. 298.

SECT. 5147. — *Rich v. State Bank of Lincoln*, 7 Neb. 201; *Movius v. Lee*, *supra*; *Lockwood v. National Bank*, 9 R. I. 308.

"*Shall take an oath.*" — A notary public has authority to administer the oath provided for by this section. An oath hereunder is not invalidated because the notary in certifying the fact that it had been taken erroneously used the word "county" when he should have used "city," and used the seal of the bank instead of his own official seal. *United States v. Neale*, 14 F. R. 767.

"*Owner in good faith, and in his own right.*" — An irrevocable power of attorney given by a director, whereby he constituted the person named therein his attorney for the purposes therein set forth, covering an indebtedness from the director to the person who held such power and binding the shares of stock in a national bank held by him, prevents such director from being an owner in good faith, &c. *United States v. Neale*, *supra*.

An action by a stockholder will not lie against the president and directors for their neglect and mismanagement of the affairs of the bank whereby insolvency ensued and the stock became worthless. *Conway v. Halsey*, 44 N. J. Law, 462.

SECT. 5151. — *Morrison v. Price*, 23 F. R. 217; *Price v. Abbott*, 17 Id. 506; *Witters v. Sowles*, 25 Id. 168; *Brown v. Finn*, 34 Id. 124; *Wright v. Merchants' Bank*, 3 Cent. L. J. 351; *Delano v. Butler*, 118 U. S. 634; *Johnson v. Lafin*, 5 Dillon, 65; *Eaton v. Pacific Bank*, 144 Mass. 260; *Bank of Lyons v. Ocean Bank*, 60 N. Y. 278. See notes, §§ 5201,



5205, and 5220. This liability of the shareholders is an asset of the bank in the nature of a guaranty fund to be resorted to in the event of its insolvency. *Irons v. Manufacturers' Bank*, 21 F. R. 197. The liability is that of principals and not of sureties, and is not a promise to answer for the debt of another under the Statute of Frauds. *Hobart v. Johnson*, 8 F. R. 493. It is several and is not affected by the failure of the other shareholders to pay, and the comptroller's assessment of a sufficient percentage concludes the amount. *United States v. Knox*, 102 U. S. 422; *Casey v. Galli*, 94 Id. 673. This liability is fixed by the shareholder's knowledge of the bank's existing or imminent insolvency, and cannot be escaped by his transfer of his shares. *Bowden v. Johnson*, 107 U. S. 251; *Whitney v. Butler*, 118 Id. 655 (reversing *Price v. Whitney*, 28 F. R. 297); *Irons v. Manufacturers' Bank*, 17 Id. 308; 27 Id. 591; *Davis v. Stevens*, 17 Blatch. 259; *Bowden v. Santos*, 1 Hughes, 158. The delivery of the certificates to the president of the bank in any other capacity than as president does not release the shareholder. *Richmond v. Irons*, 121 U. S. 27, 58. It includes married women whose separate estate can be charged at law with an assessment. *Witters v. Sowles*, 32 F. R. 767; *Keyser v. Hitz*, 2 Mackey (D. C.) 473. Those who hold themselves out as owners of stock are also liable whether they own stock or not. *Case v. Small*, 4 Woods, 78; 10 F. R. 722. And so are the transferees of shares to whom the bank has issued a certificate not recorded in accordance with Rev. Stats. § 5139. *Laing v. Burley*, 101 Ill. 591; *Johnston v. Laffin*, 103 U. S. 800; *Weyer v. Franklin Nat. Bank*, 57 Ind. 198. But a trustee whose trust appears on the books of the bank is not liable. *Wells v. Larrabee*, 36 F. R. 866; *Davis v. Essex Baptist Society*, 44 Conn. 582. One who holds stock in pledge or as collateral security, and who appears on the books of the corporation as the owner, is liable (*National Bank v. Case*, 99 U. S. 628; *Moore v. Jones*, 3 Woods, 53; *Hale v. Walker*, 31 Iowa, 344); although the loan has since been paid, and the certificate surrendered with an executed power of attorney for transfer. *Bowdell v. Farmers', &c. Bank*, 14 Bankers' Mag. 387. But not if he never held himself out as the owner. *Anderson v. Philadelphia Warehouse Co.*, 111 U. S. 479; 4 F. R. 130.

The shareholder cannot controvert the bank's legal existence when called on to respond to this liability. *Keyser v. Hitz*, 2 Mackey (D. C.) 473; *Casey v. Galli*, 94 U. S. 673. Nor can he, when also a creditor of the bank, diminish his assessment by offsetting his individual claim. *Hobart v. Gould*, 8 F. R. 57. His statutory liability survives to his personal representatives, and includes interest on the bank's debts not exceeding such liability. *Richmond v. Irons*, 121 U. S. 27; *Bowden v. Johnson*, *supra*.

When the comptroller orders an assessment for the par value of the stock, an action for the recovery thereof must be at law. *Casey v. Galli*, 94 U. S. 673; *Kennedy v. Gibson*, 8 Wall. 498, 505; *Stanton v. Wilkeson*, 8 Ben. 357; *Bailey v. Sawyer*, 4 Dillon, 463; *Witters v. Sowles*, 32 F. R. 767. The receiver cannot maintain such action if a bill has already been filed by a creditor under the act of 1876. *Harvey v. Lord*, 11 Bias. 144; 10 F. R. 236. In such action there must be proof that the bank was insolvent. The comptroller's letter is insufficient. *Bowden v. Morris*, 1 Hughes, 378.

A receiver is an officer of the United States, and as such may sue in the Federal courts in the district in which such bank is located. *Frelinghuysen v. Baldwin*, 12 F. R. 395. He is the proper person to bring suit, and he may do so either in his own name or in the name of the bank for his use. *Stanton v. Wilkeson*, 8 Ben. 357. A letter from the comptroller directing him to bring suit is sufficient evidence that such suit was authorized. *Bowden v. Johnson*, 107 U. S. 251.

The stockholder's liability attaches when the contracts are made, debts are created, or engagements are entered into by the bank, but not for such as are made after his decease. *Witters v. Sowles*, 32 F. R. 130.

The determination of the comptroller as to the necessity for instituting proceedings to enforce the personal liability of shareholders, and to what extent, is conclusive upon them.



Such determination is indispensable to the institution of a suit by the receiver, and the fact must be distinctly proved and averred if denied. *Kennedy v. Gibson*, 8 Wall. 498; *Bailey v. Sawyer*, 4 Dillon, 463; *National Bank v. Case*, 99 U. S. 628. The ordinary costs of the cause are taxable against the stockholders; but they cannot be compelled to contribute, as a debt due to the bank from themselves, to a fund for the payment of the expenses of the receivership. *Richmond v. Irons*, 121 U. S. 27, 64.

The expression "all contracts, debts, and engagements" must be restricted to such as have been duly contracted in the ordinary course of the business of the bank. Such business ceases when the bank goes into liquidation; after that there is no authority on the part of the officers of the bank to transact any business in its name so as to bind the shareholders, except that which is implied in the duty of liquidation, unless the stockholders expressly confer authority to that effect. *Richmond v. Irons*, 121 U. S. 27, 60.

An assessment imposed upon the shareholders by their own action under Rev. Stats. § 5205 is not the assessment contemplated by this section. The obligations resulting from the two sections are entirely diverse, and payments made under the former cannot be applied to the satisfaction of the individual responsibility secured by the latter. *Delano v. Butler*, 118 U. S. 634. A subscription by a stockholder to a proposed increase of the capital stock to the sum of \$500,000, and his payment thereof, is a binding agreement to accept the number of shares he paid for, although such stock is not increased to the full amount proposed. *Id.* Such a stockholder is not entitled to equitable relief on the ground that the money paid under Rev. Stats. § 5205 was in fact applied to the satisfaction of the debts of the bank, and that he paid it in the belief that it would exonerate him from further liability as a stockholder, such belief being induced by representations made to him by others interested in the affairs of the bank. *Id.*

A State statute of limitations may be pleaded as effectively in a Federal as in a State court, and the former will follow the decisions of the latter in construing it. *Price v. Yates*, 2 Nat. Bank Cases, 204; 19 Alb. L. J. 295.

The act of 1876, ch. 156 (19 St. 63), did not create any new liability, nor did it provide for enforcing such liability against stockholders where it could not have been enforced before that act was passed. That statute is not retroactive and does not create rights which did not exist prior to its passage. If any construction is to be given to it, it is that of limiting the tribunal in which proceedings are to be instituted for enforcing the stockholders' liability to a United States court, instead of allowing creditors to resort to any competent tribunal with equity power. *Irons v. Manufacturers' Nat. Bank*, 17 F. R. 308. See *Richmond v. Irons*, 121 U. S. 27, 48. A bill filed under § 2 of the act of 1876 is good although it does not purport on its face to be filed by the complainant on his own behalf and on behalf of all other creditors. A prayer therein that the complainant be given priority over other creditors will be disregarded. *Id.* A bill filed before the enactment of the law of 1876, and amended thereafter so as to make the individual shareholders defendants, will not be held multifarious for that reason. *Id.*; *Harvey v. Lord*, 11 Biss. 144; 10 F. R. 236. Stockholders named in a bill to enforce their liability and averred by it to be without the jurisdiction of the court, need not be made co-defendants. Creditors of the bank are not proper parties to such a bill. *Kennedy v. Gibson*, 8 Wall. 498.

SECT. 5152. — *Davis v. Stevens*, 17 Blatch. 259; 20 Alb. L. J. 490; *Price v. Whitney*, 28 F. R. 297. Upon a suit in equity against a husband and wife jointly to reach assets in the hands of the husband as executor of a deceased shareholder, and also on failure thereof to reach the interest of the wife as residuary legatee of such deceased shareholder, the wife is the real party in interest and the husband is therefore not a competent witness. *Witters v. Sowles*, 28 F. R. 121. The meaning of this section seems to be that such estates and funds as an executor or administrator has in his hands, at the time when



the liability attaches, are liable in like manner as the testator would be if living at that time, and having in his hands the stock and other property, as the executor had it in his hands; and not that they are holden as the testator would have been if the liability had attached in his lifetime (*Witters v. Sowles*, 32 F. R. 130); and to protect persons who hold stock in a representative capacity from any personal liability. *Irons v. Manufacturers' Bank*, 21 F. R. 197; *Whitney v. Butler*, 118 U. S. 655. A stockholder in a national bank died and his estate was settled and distributed. Between the time of his death and the distribution the bank failed, and after the distribution an assessment was made on those who were stockholders at the time of the failure, for the payment of the bank debts. In an action brought by the receiver against the administrator it was held that the latter was not a shareholder at the time of the failure, but that the estate was liable. *Davis v. Weed*, 44 Conn. 569.

SECT. 5153. — Such designation of a national bank as a national depository does not change the character of its organization, or make its managers public officers, or the government liable for its acts. *Branch v. United States*, 12 Ct. Cl. 281.

The Secretary of the Treasury has authority under this section to receive from national banks, designated as depositories of public money, Treasury notes of the United States as security for the safe keeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as financial agents of the government. 16 A. G. Op. 96.

SECT. 5154. — See note, § 5133. St. Feb. 14, 1880, ch. 25 (21 St. 66), provides —

"That any national gold bank organized under the provisions of the laws of the United States, may, in the manner and subject to the provisions prescribed by Rev. Stats. § 5154, for the conversion of banks incorporated under the laws of any State, cease to be a gold bank, and become such an association as is authorized by § 5133, for carrying on the business of banking, and shall have the same powers and privileges, and shall be subject to the same duties, responsibilities, and rules, in all respects, as are by law prescribed for such associations: *Provided*, That all certificates of organization which shall be issued under this act shall bear the date of the original organization of each bank respectively as a gold bank."

No authority other than that conferred by Congress is required to enable a State bank to become a national bank; and the comptroller's certificate is conclusive as to the completeness of the organization, in a suit to enforce a stockholder's liability or contracts with the bank. *Casey v. Galli*, 94 U. S. 673; *Lockwood v. National Bank*, 9 R. L. 308; *Maynard v. Mechanics' Bank*, 1 Brewst. (Penn.) 483; *City Nat. Bank v. Phelps*, 97 N. Y. 44; *Thatcher v. West River Bank*, 19 Mich. 196. The liabilities of the corporation remain the same notwithstanding the change from a State to a national bank. *Coffey v. Bank of Missouri*, 46 Mo. 140. A savings-bank in the District of Columbia, under this section and the act of June 30, 1876 (19 St. 94), may be converted into a national bank. *Keyser v. Hitz*, 2 Mackey, 473. If the owners of more than two-thirds of the stock of a bank consent to the conversion of the bank into a national bank, it can be effected without the concurrence of the other stockholders. *Id.* While making the change from a State to a national bank, and before the requirements of the State statute are fully complied with, it is subject to State taxation. *Commonwealth v. Manufacturers', &c. Bank*, 2 Pearson's Dec. (Penn.) 386; 2 Br. N. B. C. 459.

In *Atlantic Bank v. Harris*, 118 Mass. 147, an action by a national bank, as such, was sustained on a cause of action accruing to the association as a State bank, although by a State statute the State bank was continued a body corporate for three years for the purpose of prosecuting and defending suits, &c. See further, as to the authority of a national bank to sue in its old name as a State corporation, *Thomas v. Farmers' Bank*, 46 Md. 43.

SECT. 5156. — *Bullard v. Bank*, 18 Wall. 589; *Conklin v. Second Nat. Bank*, 45 N. Y. 655.



## CHAPTER II.

## OBTAINING AND ISSUING CIRCULATING NOTES.

SECT. 5159. — See note, § 5133, *ante* (§ 10 of act there cited), and § 4 of St. 1874, printed in note to § 5191. *Van Antwerp v. Hulburt*, 8 Blatch. 282.

The Treasurer of the United States cannot retain as security for a claim due to the United States the bonds deposited with him by a national bank under this section to secure its circulation. 12 A. G. Op. 549.

SECT. 5167. — *Van Antwerp v. Hulburt*, 8 Blatch. 282.

SECT. 5169. — *Casey v. Galli*, 94 U. S. 673. Where the existence of the corporation is denied, the certificate of the Comptroller of the Currency under this section is competent evidence in proof of the disputed fact. *Mix v. Bank of Bloomington*, 91 Ill. 20.

SECT. 5171. — See § 10 of St. 1882, cited § 5133, note. St. March 3, 1875, ch. 130, § 1 (18 St. 372), provides —

“That the national-bank notes shall be printed under the direction of the Secretary of the Treasury, and upon the distinctive or special paper which has been, or may hereafter be, adopted by him for printing United States notes. . . . *Provided*, That the above-named notes, currency, and other securities of the United States be executed with not less than three plate-printings: *And provided further*, That the Secretary of the Treasury shall have executed one or two of such printings by such responsible and capable and experienced bank-note companies or bank-note engravers as may contract for the same at the lowest cost to the Government, and at prices not greater than those heretofore paid for the same class of work; no company or establishment executing more than one printing upon the same note or obligation, and the final printing and finishing to be executed in the Treasury Department.”

SECT. 5172. — See preceding note, and § 5 of St. 1874, cited, § 5191, note. 24 St. 227, appropriating for engraving and printing, provides as follows: —

“For labor and expenses of engraving and printing. . . . *Provided*, That no portion of this sum shall be expended for printing United States notes of large denomination in lieu of notes of small denomination cancelled or retired.

“For wages of not more than 180 plate-printers, . . . to be expended under the direction of the Secretary of the Treasury: *Provided*, That any part of this sum may be used for purchasing and operating new and improved plate-printing presses. For engravers’, printers’, and other materials, except distinctive paper, and for miscellaneous expenses, — dollars to be expended under the direction of the Secretary of the Treasury. *Provided*, That hereafter receipts for miscellaneous work authorized by law to be performed by the Bureau of Engraving and Printing for the several Departments of the Government, and the amounts properly chargeable to national banks for engraving their plates shall be deposited, and covered into the Treasury as miscellaneous receipts.”

*Ex parte* Houghton, 8 F. R. 897; *Re* Aldrich, 16 Id. 369, 371. The imprint of the seal of the Treasury forms no part of the contract. *United States v. Bennett*, 17 Blatch. 357.

SECT. 5174. — 19 St. 252, ch. 69, changes in the second line “but pieces” to “bed-pieces.”

SECT. 5177. — See § 10 of St. 1882, cited, § 5133, note. Repealed by 18 St. 296, ch. 15 (see notes §§ 3513, 3588, *ante*), § 3, which provides that —

“each existing banking-association may increase its circulating-notes in accordance with existing law without respect to said aggregate limit; and new banking associations may be organized in accordance with existing law without respect to said aggregate limit; and the provisions of law for the withdrawal and redistribution of national-bank currency among the several States and Territories are hereby repealed.”



The last clause just quoted repeals §§ 7, 8, 9 of 18 St. 123, ch. 343. The original acts cited on § 5177 contemplated an apportionment altogether future, and the first part of § 7 of 13 St. 484, ch. 78, was omitted in the Revision as no longer operative. 2 Com. D. 2473.

SECTS. 5178–5180. — See preceding note. In § 5180, "forthwith" is here added in the fourth line, and the words "necessary to be withdrawn from," in that line, are substituted for "to be retired by" in the original act. 2 Com. D. 2475.

SECT. 5183. — Amended by 18 St. 320, ch. 80, by inserting the words "post notes or" after "issue." This provision does not apply to the certifying, as "good," of checks given in the course of business for convenience (*Merchants' Bank v. State Bank*, 10 Wall. 604; *Espy v. Cincinnati Bank*, 18 Id. 604); or to certificates of deposit, not payable until a future day certain. *Hunt*, Appellant, 141 Mass. 515; *Riddle v. Butler Bank*, 27 F. R. 503.

SECT. 5184. — See note, § 3581.

SECT. 5185. — See note, § 5154. This provision is substituted for §§ 3, 4, 5 of the cited act. 2 Com. D. 2478. 18 St. 302, ch. 19, repeals so much of this section as limits the circulation of banking associations organized for the purpose of issuing notes payable in gold, severally to \$1,000,000, and provides that —

"each of such existing banking associations may increase its circulating notes, and new banking associations may be organized, in accordance with existing law, with respect to such limitation."

SECT. 5186. — This and the preceding section are framed to embody the substance of §§ 3, 4, 5 of the cited act. 2 Com. D. 2479.

SECT. 5188. — See note, § 3708. The only penalty here provided is a penalty recoverable in a *qui tam* action by an informer, and it cannot therefore be recovered by an indictment on the part of the Government. *United States v. Laescki*, 29 F. R. 699.

SECT. 5190. — This section does not prevent the purchase of coin by one bank at the banking house of another. *Merchants' Bank v. State Bank*, 10 Wall. 604.

## CHAPTER III.

### REGULATION OF THE BANKING BUSINESS.

SECT. 5191. — *Van Antwerp v. Hulburt*, 8 Blatch. 282; *Stanton v. Wilkeson*, 8 Ben. 357; *Wright v. Merchants' Bank*, 3 Cent. L. J. 351; *First Bank of Lyons v. Ocean Bank*, 60 N. Y. 278. The provisions of this section relate to the banks specified in § 6 of St. 1876, ch. 156. 15 A. G. Op. 605; see note, § 5220. St. March 3, 1887, ch. 378 (24 St. 559), provides —

"That whenever three-fourths in number of the national banks located in any city of the United States having a population of 50,000 people shall make application to the Comptroller of the Currency, in writing, asking that the name of the city in which such banks are located shall be added to the cities named in Revised Statutes, §§ 5191, 5192, the Comptroller shall have authority to grant such request, and every bank located in such city shall at all times thereafter have on hand, in lawful money of the United States, an amount equal to at least 25 per centum of its deposits, as provided in Revised Statutes, §§ 5191, 5195.

"SEC. 2. That whenever three-fourths in number of the national banks located in any city of the United States having a population of 200,000 people shall make application to the Comptroller of the Currency, in writing, asking that such city may be a central reserve city, like the city of New York, in which one-half of the lawful-money reserve of the national banks located in other reserve cities may be deposited, as provided in Revised Statutes, § 5195, the Comptroller shall have authority, with the approval of the Secretary of the Treasury, to grant such request, and every bank located in such city shall at all times thereafter have on hand, in lawful money of the United States, 25 per centum of its deposits, as provided in Revised Statutes, § 5191."



St. June 20, 1874, ch. 343 (18 St. 123), provides, —

"SEC. 2. That § 31 of the 'national-bank act' (i. e. of 1864) be so amended that the several associations therein provided for shall not hereafter be required to keep on hand any amount of money whatever, by reason of the amount of their respective circulations; but the moneys required by said section to be kept at all times on hand shall be determined by the amount of deposits in all respects, as provided for in the said section.

"SEC. 3. That every association organized, or to be organized, under the provisions of the said act, and of the several acts amendatory thereof, shall at all times keep and have on deposit in the Treasury of the United States, in lawful money of the United States, a sum equal to five per centum of its circulation, to be held and used for the redemption of such circulation; which sum shall be counted as a part of its lawful reserve, as provided in § 2 of this act; and when the circulating notes of any such associations, assorted or unassorted, shall be presented for redemption, in sums of \$1000, or any multiple thereof, to the Treasurer of the United States, the same shall be redeemed in United States notes. All notes so redeemed shall be charged by the Treasurer of the United States to the respective associations issuing the same, and he shall notify them severally, on the first day of each month, or oftener, at his discretion, of the amount of such redemptions; and whenever such redemptions for any association shall amount to the sum of \$500, such association so notified shall forthwith deposit with the Treasurer of the United States a sum in United States notes equal to the amount of its circulating-notes so redeemed. And all notes of national banks worn, defaced, mutilated, or otherwise unfit for circulation shall, when received by any assistant treasurer or at any designated depository of the United States, be forwarded to the Treasurer of the United States for redemption as provided herein. And when such redemptions have been so re-imbursed, the circulating notes so redeemed shall be forwarded to the respective associations by which they were issued; but if any of such notes are worn, mutilated, defaced, or rendered otherwise unfit for use, they shall be forwarded to the Comptroller of the Currency and destroyed and replaced as now provided by law: *Provided*, That each of said associations shall re-imburse to the Treasury the charges for transportation, and the costs for assorting such notes; and the associations hereafter organized shall also severally re-imburse to the Treasury the cost of engraving such plates as shall be ordered by each association respectively; and the amount assessed upon each association shall be in proportion to the circulation redeemed, and be charged to the fund on deposit with the Treasurer: *And provided further*, That so much of § 32 of said national-bank act requiring or permitting the redemption of its circulating notes elsewhere than at its own counter, except as provided for in this section, is hereby repealed.

"[St. March 3, 1875, ch. 130, § 3 (in part), provides that, at the end of each month, the Secretary of the Treasury shall re-imburse the Treasury to the full amount paid out under the provisions of this section by transfer of said amount from the deposit of the national banking-associations with the Treasury of the United States; and at the end of each fiscal year he shall transfer from said deposit to the Treasury of the United States such sum as may have been actually expended under his direction for stationery, rent, fuel, light, and other necessary incidental expenses which have been incurred in carrying into effect the provisions of this section. 18 St. 399.]

"SEC. 4. That any association organized under this act, or any of the acts of which this is an amendment, desiring to withdraw its circulating notes, in whole or in part, may, upon the deposit of lawful money with the Treasurer of the United States in sums of not less than \$9,000, take up the bonds which said association has on deposit with the Treasurer for the security of such circulating notes; which bonds shall be assigned to the bank in the manner specified in § 19 of the national-bank act; and the outstanding notes of said association, to an amount equal to the legal-tender notes deposited, shall be redeemed at the Treasury of the United States, and destroyed as now provided by law: *Provided*, That the amount of the bonds on deposit for circulation shall not be reduced below \$50,000.

"SEC. 5. That the Comptroller of the Currency shall, under such rules and regulations as the Secretary of the Treasury may prescribe, cause the charter-numbers of the association to be printed upon all national-bank notes which may be hereafter issued by him.

"SEC. 6. That the amount of United States notes outstanding and to be used as a part of the circulating-medium, shall not exceed the sum of \$382,000,000, which said sum shall appear in each monthly statement of the public debt, and no part thereof shall be held or used as a reserve."

SECT. 5192. — See preceding note, and note, § 5240.

SECT. 5193. — 14 St. 558, ch. 194, providing that certain temporary loan certificates may be counted, was omitted from the Revision as temporary. 2 Com. D. 2483.

SECT. 5194. — See note, § 5220.



SECT. 5195. See § 3 of St. 1874, cited in note to § 5191. *Wright v. Merchant's Bank*, 3 Cent. L. J. 351; *Stanton v. Wilkeson*, 8 Ben. 357.

SECT. 5197. — *National Bank of Gloversville v. Wells*, 15 Hun, 51. "Or district" here added in the fourth line. 2 Com. D. 2483. The phrase "banks of issue," employed in this section, does not embrace savings and deposit banks. *Clarion Nat. Bank v. Gruber*, 87 Penn. St. 468. A note made and signed in Washington, D. C., but dated at Leavenworth, Kansas, and sent to a national bank there, which discounted it, is governed, as to the rate of interest, by the laws of Kansas. It is not usurious for a bank, on discounting a note, to take out interest in advance. A contract for a loan of money at a rate of interest legal under the laws of the State where it was made, and where the money is to be advanced, though payment of the note is to be made in a State where the rate of interest is less, is not usurious, if it is not a mere device to evade the laws of the State where payment is to be made. *Second Nat. Bank v. Smoot*, 2 McArthur, 371. National banks are placed on an equality with natural persons only as to the rate of interest, and not as to the character of the contracts they are authorized to make; and that rate thus ascertained is made applicable both to loans and discounts, if there is any difference between them. It is not intimated or implied that if, in any State, a natural person may discount paper, without regard to any rate of interest fixed by law, the same privilege is given to national banks. The privilege only extends to charging some rate of interest, allowed to natural persons, which is fixed by the State law. *National Bank v. Johnson*, 104 U. S. 271; *Re Wild*, 11 Blatch. 243. That clause of this section which limits national banks to seven per cent is violated by discounting paper in a State, the laws of which permit natural persons to reserve and pay such rate of interest as they may agree upon, if such a bank is a party to an agreement which reserves to it more than seven per cent. *National Bank v. Johnson*, *supra*. Under a statute of New York forbidding a corporation to plead the defence of usury, which the highest court of the State construed to mean that the rate of interest which a corporation may pay is not fixed or limited, a national bank which charged a New York corporation more than seven per cent interest was held to have forfeited the interest on the loan. *Re Wild*, 11 Blatch. 243. A national bank may charge and take the same rate of interest as any State bank of issue (*First Nat. Bank v. Tinstman*, 36 Leg. Int. 228; *Tiffany v. Nat. Bank of Missouri*, 18 Wall. 409), except such banks of issue as have been permitted a higher than the legal rate by special act of the legislature. *Duncan v. First Nat. Bank*, 11 Bank. Mag. 787; 6 W. N. C. 159.

SECT. 5198. — *Knapp v. Williamsport Nat. Bank*, 15 F. R. 333; *Pacific Nat. Bank v. Mixer*, 124 U. S. 721, 726; *Johnson v. Gloversville Nat. Bank*, 74 N. Y. 329; *First Nat. Bank of Whitehall v. Lamb*, 50 Id. 95; *Morehouse v. Bank of Oswego*, 98 Id. 503, reversing 30 Hun, 628; *Talmage v. Third Nat. Bank*, 91 N. Y. 531; *Adams v. Dannis*, 29 La. Ann. 315; *Continental Nat. Bank v. Folsom*, 3 So. E. 269; *Brown v. Second Nat. Bank of Erie*, 72 Penn. St. 209; *Stephens v. Monongahela Bank*, 88 Id. 157; *Central Nat. Bank v. Richland Nat. Bank*, 52 How. Pr. 136; *Rhoner v. First Nat. Bank of Allentown*, 14 Hun, 126; *Allen v. Bank of Xenia*, 23 Ohio St. 97; *Kinser v. Farmers' Nat. Bank*, 13 N. W. Rep. 59. As to *Leather Manfr's Bank v. Cooper*, 120 U. S. 778, see notes, § 5133; as to *Holmes v. Nat. Bank*, 18 S. C. 31, see notes, § 5242. Amended by St. Feb. 18, 1875, ch. 80 (18 St. 320), by adding the following:—

"That suits, actions, and proceedings against any association under this title may be had in any circuit, district, or territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located, having jurisdiction in similar cases."

This amendment relates to transitory actions only, and not to such actions as are by law local in their character. Hence a national bank may be sued in a State court in a



local action in any other county or city than that where the bank is located. *Casey v. Adams*, 102 U. S. 66. The amendment of 1872 relates only to actions to recover usurious interest, and does not affect the jurisdiction of State courts in other matters. *New Orleans Nat. Bank v. Adams*, 3 Woods, 21. Section 30 of St. June 3, 1864, is remedial as well as penal, and is to be liberally construed to effect the legislative object. *Farmers' Nat. Bank v. Dearing*, 91 U. S. 29.

Under § 5198 the penalty recoverable by suit against the bank is twice the whole amount of the interest actually paid, and not twice the amount of the excess over the legal rate (*Hill v. Barre Nat. Bank*, 15 F. R. 432), whether the amount is paid in one or several payments. *Hintermister v. First Nat. Bank*, 64 N. Y. 212; *Nat. Bank of Madison v. Davis*, 8 Biss. 100; 6 Cent. L. J. 106; *Crocker v. Nat. Bank*, 4 Dillon, 358; *Farmers' Nat. Bank v. Dearing*, *supra*. But in *Hintermister v. First Nat. Bank*, *supra*, the plaintiff was allowed to recover only twice the amount of illegal interest paid. And the plaintiff may recover such as accrues after maturity of the note, as well as what accrues before. *Bank of Uniontown v. Stauffer*, 1 F. R. 187; *Shunk v. First Nat. Bank of Galion*, 22 Ohio St. 508. The principal of the debt is not forfeited because of the usury. *Cheek v. Merchants' Nat. Bank*, 10 Heisk. 618, note; *Shinkle v. First Nat. Bank of Ripley*, 22 Ohio St. 516; *First Nat. Bank of Peterborough v. Childs*, 133 Mass. 248; *Citizens' Nat. Bank v. Leming*, 8 Int. Rev. Rec. 132; *Farmers' Nat. Bank v. Dearing*, *supra*.

"*Knowingly done.*" The defendant in a suit upon a bill of exchange, if he alleges usury, must make it appear that the bank knowingly received or reserved an amount in excess of the statutory rate of interest, and the current exchange of sight drafts. If there is no proof of the rate of exchange, the bank will be entitled to recover. *Wheeler v. National Bank*, 96 U. S. 268.

Only the sum lent, without interest, can be recovered when illegal interest has been knowingly stipulated for, but not paid; while, if such illegal interest has been paid, twice the amount so paid can be recovered in an action of debt or suit in the nature thereof against the offending bank. *Barnet v. Cincinnati Nat. Bank*, 98 U. S. 555; *Driesback v. National Bank*, 104 Id. 52; *Uniontown Nat. Bank v. Stauffer*, 1 F. R. 187. If the bank sues upon the last of a series of notes, on which the interest is at the legal rate, but which incorporates usurious interest charged on some of the earlier notes, it cannot recover the illegal interest so incorporated, nor any interest upon the renewal notes from the date of the reduction to the legal rate; but the illegal excess cannot be applied in that suit by way of set-off, or payment, or counter-claim, the defendant's remedy being in the penal action brought under this section. *Barnet v. Cincinnati Nat. Bank*, *supra*; *F. & M. Bank of Mercer v. Hoagland*, 7 F. R. 159; *Cake v. Lebanon Nat. Bank*, 86 Penn. St. 303; *Cadiz Bank v. Slemmons*, 34 Ohio St. 142; *Higley v. Beverley Nat. Bank*, 26 Id. 75; *Merchants' Nat. Bank v. Myers*, 74 N. C. 514; *Clarion Nat. Bank v. Gruber*, 91 Penn. St. 377; *Fayette County Bank v. Dushane*, 96 Id. 340; *Auburn Nat. Bank v. Lewis*, 81 N. Y. 15; *Peterborough Nat. Bank v. Childs*, 133 Mass. 248; *Stephens v. Monongahela Bank*, 111 U. S. 197; *Hade v. McVay*, 31 Ohio St. 231; *Wiley v. Starbuck*, 44 Ind. 298. *Contra*, *Overholt v. Mt. Pleasant Nat. Bank*, 82 Penn. St. 490; *Lucas v. Government Nat. Bank*, 78 Id. 228; *Brown v. Erie Nat. Bank*, 72 Id. 209; *Stephens v. Monongahela Bank*, 88 Id. 157; *Auburn Nat. Bank v. Lewis*, 75 N. Y. 516; *Peterborough Nat. Bank v. Childs*, 130 Mass. 519. See *National State Bank of Newark v. Boylan*, 2 Abb. N. C. 216. At any time up to the time of final payment of the principal, or up to the time of entering judgment, the bank may consider the excessive interest paid on account of the loan, and so apply it, and lessen the principal. And the cause of action is not complete until payment of the loan is actually made or judgment entered therefor. *Duncan v. First Nat. Bank*, 11 Bank. Mag. 787; 6 W. N. C. 159. The two years do not



begin to run until one or the other of these things have occurred. *Id.* Only the person paying the interest, or his legal representatives, and not his creditors, can recover the forfeiture here provided for. *Barrett v. Shelbyville Bank*, 85 Tenn. 426. The assignee of a bankrupt is his legal representative. *Crocker v. National Bank*, 4 Dillon, 353; *Wright v. First Nat. Bank of Greensburg*, 18 Alb. L. J. 115. And so is the receiver of an insolvent corporation its legal representative. *Barbour v. National Exchange Bank*, 12 N. E. Rep. 5; *Lazear v. National Union Bank*, 2 Br. N. B. Cas. 261. An accommodation indorser without consideration is entitled to the same benefit by way of set-off or rebatement of the usurious interest as the maker. *National Bank of Auburn v. Lewis*, 75 N. Y. 516. The usurious interest may be recovered by the person who paid it, though the principal debt may not have been paid. *Stout v. Ennis Nat. Bank*, 8 S. W. Rep. (Tex.) 808; *Lynch v. National Bank*, 22 W. Va. 554.

State courts have jurisdiction of suits instituted for such recovery. *Ordway v. Central Nat. Bank*, 47 Md. 217; *Pickett v. Merchants' Nat. Bank*, 32 Ark. 346; *Hale v. McVay*, 31 Ohio St. 231; *National Bank of Peterborough v. Childs*, 133 Mass. 248; *Lelandon Nat. Bank v. Karmany*, 98 Penn. St. 65; *Lynch v. National Bank*, 22 W. Va. 554; *Dow v. Irasburgh Nat. Bank*, 50 Vt. 112. They also have jurisdiction of actions of contract brought by the resident of the State against a national bank located in another State, except such as have committed or contemplate committing an act of insolvency. *Robinson v. National Bank of New Berne*, 58 How. Pr. 306; 81 N. Y. 385; *National Shoe & Leather Bank v. Mechanics' Nat. Bank*, 89 Id. 467. After a judgment in a Federal court against a national bank, for taking unlawful interest, an action cannot be maintained in the State court against the same bank to recover the excess above the legal interest. *Hill v. Barre Bank*, 56 Vt. 582. If a bank discounts a note at a usurious rate of interest, paying the borrower the proceeds less the interest, and in a suit to recover the loan the borrower pleads the usury, the bank will recover the face of the note less the entire interest taken out, received or reserved, and no more. If the note thus discounted is renewed for the same amount, the borrower paying usurious interest in advance, in a suit on the note, the defendant may recoup double the amount of the entire interest paid on renewal, or in an independent action of debt he may recover from the bank double the amount of the entire interest thus paid. *National Bank v. Davis*, 8 Biss. 100. Where a national bank gave its debtor an extension of time in consideration of his transferring to it, before maturity, a negotiable note as collateral and making advance payment of usurious interest for the extended period, and he indorsed the note so as to make the bank a party and bind it for its due presentation and for notice of non-payment, the statute was held not to make the contract of indorsement void, and such effect cannot be given it by a court. The discounting of a note at an unlawful rate of interest will not discharge the sureties in the absence of fraud. *First Nat. Bank of Columbus v. Garlinghouse*, 22 Ohio St. 492. The taking of illegal interest is not a fraud upon creditors in itself. Appeal of *Second Nat. Bank of Titusville*, 85 Penn. St. 528. Where a State statute authorized parties to agree in writing for a higher rate of interest than the legal rate, it was held that national banks could make a similar agreement. *Wiley v. Starbuck*, 44 Ind. 298. No forfeitures can be imposed upon national banks for stipulating for or receiving illegal interest, except such as are provided for in the United States statutes. *National Bank v. Davis*, *supra*; *Farmers' Nat. Bank v. Dearing*, 91 U. S. 29; *National Exchange Bank v. Moore*, 2 Bond. 170. The amendment to this section expressly confers on the State courts concurrent jurisdiction with the Federal courts in "suits, actions, and proceedings against any association under the banking act." *First Bank of Tecumseh v. Overman*, 34 N. W. Rep. 107.

"Commenced within two years from the time the usurious transaction occurred" — If all actual payments in excess of the legal rate were made more than two years before



the defendant in a suit on the note filed his plea of usury, the amount paid cannot be recovered nor credited upon the principal of the note. *National Bank v. Davis*, 8 Biss. 100.

SECT. 5199. — The surplus fund which a national bank is required to reserve from its net profits is not excluded in the valuation of its shares for taxation. *Strafford Nat. Bank v. Dover*, 58 N. H. 316; *First Nat. Bank v. Peterborough*, 56 Id. 38.

SECT. 5200. — *Stephens v. Monongahela Bank*, 88 Penn. St. 157; *Movius v. Lee*, 24 Blatch. 291; 30 F. R. 298; *Witters v. Foster*, 26 Id. 737; *Fowler v. Scully*, 72 Penn. St. 456; *Second Nat. Bank v. Burt*, 93 N. Y. 233. Public policy does not require nor did Congress intend that an excess of loans beyond one-tenth part of the amount of the capital stock actually paid in should enable the borrower to avoid the payment of the money he actually received. *Gold Mining Co. v. National Bank*, 96 U. S. 640; *Shoemaker v. Mechanics' Bank*, 2 Abb. 416; *O'Hare v. Second Nat. Bank*, 77 Penn. St. 96; *Wroten's Assignee v. Armat*, 31 Gratt. 228; *Corcoran v. Batchelder*, 147 Mass. 541; *Duncomb v. N. Y. H. & N. R. R.*, 84 N. Y. 190. A contract entered into contrary to this section is not void, and if a bank which makes such a contract is punishable for so doing, it must be at the instance of the Government, and not of an individual. *Wyman v. Citizens' Nat. Bank*, 29 F. R. 734; *Stewart v. National Union Bank*, 2 Abb. U. S. 424. Under § 5239 a director of a national bank who makes or assents to the making of a loan contrary to this section, is personally and individually liable for loss occasioned thereby; but this rule does not apply where a director is the borrower. *Witters v. Sowles*, 31 F. R. 1. In Vermont a cause of action against a director of a national bank, for neglect of duty as a director in violating the provisions of §§ 5200, 5202 and 5204, not involving the personal misappropriation of the property of the bank, does not survive. *Witters v. Foster*, 23 Blatch. 457.

SECT. 5201. — *Van Allen v. Assessors*, 3 Wall. 573; *Stanton v. Wilkeson*, 8 Ben. 357; *Wright v. Merchants' Bank*, 3 Cent. L. J. 351; *Johnson v. Laffin*, 5 Dillon, 65; *Bank of Charlotte v. Exchange Bank*, 92 U. S. 122; *Stephens v. Monongahela Bank*, 88 Penn. St. 157; *Fowler v. Scully*, 72 Id. 456; *Rich v. State Bank*, 7 Neb. 201; *Prosser v. First Nat. Bank*, 13 N. E. Repr. (N. Y.) 287, 289. See § 3 of St. 1876, cited in note, § 5220.

The prohibition against the bank loaning on its own stock does not render the bank liable for the proceeds of a sale of its shares left by a shareholder as security for a loan, who authorized the bank to sell them in case of his failure to pay. *Xenia Bank v. Stewart*, 107 U. S. 676. A bank by-law indorsed on a stock certificate, prohibiting a stockholder indebted to the bank from transferring his certificate, is void as being in contravention of this section. *Feckheimer v. Exchange Bank*, 79 Va. 80; *Conklin v. Second Nat. Bank*, 45 N. Y. 655; *Evansville Nat. Bank v. Metropolitan Nat. Bank*, 2 Biss. 527; 10 Am. L. Reg. N. S. 774. The following cases would not now be followed: *Rosenback v. Salt Springs Nat. Bank*, 53 Barb. 495; *Young v. Vough*, 8 C. E. Green (N. J.), 325; 9 Id. 535. A bank has the right to hold a cash dividend as pledged for the indebtedness of a shareholder to the bank. And a bank may attach the shares of a stockholder for his debt to the bank. *Hagar v. Union Nat. Bank*, 63 Maine, 509.

A sale of the bank's stock to it by the president cannot be ratified, if not made to prevent a loss. *Bundy v. Jackson*, 24 F. R. 628. It is a loan within the meaning of this section for one bank to place its funds on permanent deposit with another. *Bank v. Lanier*, 11 Wall. 369. The making of a loan by a national bank to its stockholders does not give the bank a lien on the shares of such stockholders. *Id.* Nor is such a lien created where the articles of association and by-laws of the bank directly provide for it, because such provisions are against the spirit of this statute. *Bullard v. Bank*, 18 Wall, 589. Such a lien is not a regulation of the business of the bank, or a regulation for the conduct of its affairs within the meaning of Rev. Stats. § 5133. *Id.* As to the right of



an assignee of a bankrupt against a bank for a refusal to transfer stock on which it claims a lien, see *Meyers v. Valley Nat. Bank*, 18 N. B. Reg. 34.

The sale which a bank is required to make of its own stock is a real and not a fictitious sale. If the president and cashier make an unauthorized sale of the bank's stock to themselves, and it is ratified, they will not be allowed to set up their own illegal or unauthorized act to avoid their contract; nor to allege that the sale and purchase were merely colorable, or to avoid a forfeiture of the bank's charter, or for any other deceptive or illegal purpose. *Bundy v. Jackson*, *supra*.

SECT. 5202. — *Bullard v. Bank*, 18 Wall. 589; *Eastern Townships' Bank v. Vermont Bank of St. Albans*, 22 F. R. 186; *Witters v. Foster*, 26 Id. 737; *Rich v. State Bank*, 7 Neb. 201.

SECT. 5204. — Directors who procure the declaration of a dividend without net profits to pay it, are not criminally liable for conspiracy to defraud the bank. *United States v. Britton*, 108 U. S. 199. Nor are they personally liable, in the absence of bad faith, for losses to the bank from their error of judgment as to the value of the assets. *Witters v. Sowles*, 31 F. R. 1.

SECT. 5205. — *Stanton v. Wilkeson*, 8 Ben. 357; *Wright v. Merchants' Bank*, 3 Cent. L. J. 351; *Eaton v. Pacific Bank*, 144 Mass. 260. Amended by § 4 of St. 1876, as stated in note to § 5220. A stockholder assessed with his assent under this section is not thereby relieved of his individual liability under § 5151. *Morrison v. Price*, 23 F. R. 217; *Delano v. Butler*, 118 U. S. 634.

SECT. 5207. — See § 12 of St. 1882, stated in note, § 5133.

SECT. 5208. — *Stephens v. Monongahela Bank*, 88 Penn. St. 157; *Wright v. Merchants' Bank*, 3 Cent. L. J. 351. See § 13 of St. 1882, stated in note, § 5133. This section does not invalidate an oral acceptance of, or promise to pay a check, there being at the time sufficient funds of the drawer in possession to meet it. *First Nat. Bank v. Merchants' Nat. Bank*, 7 W. Va. 544.

SECT. 5209. — *United States v. Farrington*, 5 F. R. 343; *Ex parte Hitz*, 111 U. S. 766; *Ex parte Bain*, 121 Id. 1; *United States v. Martin*, 4 Cliff. 156. The president does not violate this provision by procuring the discount of a note insufficiently secured, although he applies the money to his own use; nor is he criminally liable for permitting a depositor who has not paid his indebtedness to the bank, to withdraw his deposit. *United States v. Britton*, 108 U. S. 193. If an officer of a national bank permits a firm of which he is a member to overdraw its account with intent to defraud, he is punishable criminally under this section. *United States v. Fish*, 24 F. R. 585. An indictment following this section, charging that the accused was an officer; that, with intent to deceive, he made at a stated time and place a false entry on the books of the bank, which it describes, is sufficient, though it does not aver that the entry was made in the bank's due course of business and in one of its accounts, nor that interest was due from the person named in the entry, nor that an examining agent had then been appointed. *United States v. Britton*, 107 U. S. 655. This section punishes the embezzlement of the property of national banks, but not of the property of individuals deposited with, and in the custody of such banks. *Commonwealth v. Tenney*, 97 Mass. 50. State courts have no jurisdiction under this section, but they can punish such officers under State laws for purloining the property of customers of the bank. *State v. Tuller*, 34 Conn. 280. See also *Hoke v. People*, 13 N. E. Rep. (Ill.) 823. The crimes named by this section are infamous, and must be prosecuted by indictment. *United States v. De Walt*, 9 Sup. Ct. Rep. 111; *United States v. Hale*, 10 Chi. Leg. News, 22.

"*With intent to injure or defraud.*" — This term means nothing more than that general intent to injure or defraud, which always arises in contemplation of law when one willfully or intentionally does that which is illegal or fraudulent; and which, in its necessary



or natural consequence, must injure another. The intent may be shown, or may be conclusively presumed from the doing of the wrongful, fraudulent, and illegal acts. The intent specified is presumed when the unlawful act which results in loss or injury is proved to have been knowingly committed. *United States v. Harper*, 33 F. R. 471, 481. The intent to defraud is to be inferred from the fact of embezzlement. *Re Van Campen*, 2 Ben. 419. The words "with intent, in either case, to injure or defraud" apply to embezzlement as well as to making false entries. *United States v. Voorhees*, 9 F. R. 143; 12 Repr. 713. On the trial of the cashier of a national bank indicted under this section, the defendant offered evidence to prove that his taking moneys and funds of the bank, and using them in stock speculations carried on in his own name, by depositing them with a stockbroker as margins, were known to the president and some of the directors of the bank, and were sanctioned by them; and that such dealings of his with the funds of the bank were intended for the account and benefit of the bank, and were believed by him to have been sanctioned by the president and some of the directors, though there was no resolution of the board of directors authorizing or sanctioning them, such evidence being offered to disprove the averment in the indictment that the acts were done with "intent to injure and defraud" the bank. Held, that such evidence must be excluded. *United States v. Taintor*, 11 Blatch. 374. The phrase "intent to injure or defraud" is the same as that used in indictments for forgery. There it refers to a general guilty intent, and such indictments are held conclusively proved when the act is proved to have been knowingly committed. The phrase has the same meaning in this statute, and the intent is to be proved in the same way. *United States v. Taintor*, 11 Blatch. 374, 378.

The honest exercise of official discretion, in good faith without fraud, for the advantage or supposed advantage of the association, is not punishable; but if official action be taken, not in the honest exercise of discretion, in bad faith for personal advantage and with fraudulent intent, it is punishable. *United States v. Fish*, 24 F. R. 585, 588. The statute does not use the words "embezzles" and "wilfully misapplies" as synonymous. In order to misapply the funds of the bank, it is not necessary that the officer charged should be in actual possession of them by virtue of a trust committed to him. He may abstract them from the other funds of the bank unlawfully, and afterwards criminally misapply them, or by virtue of his official relation to the bank, he may have such control, direction, and power of management as to direct an application of the funds in such a manner and under such circumstances as to constitute the offence of wilful misapplication. *United States v. Northway*, 120 U. S. 327; *United States v. Harper*, 33 F. R. 471, 477; *United States v. Fish*, 24 Id. 585, 589.

The wilful misapplication made an offence by this section means a misapplication for the use, benefit, or gain of the party charged, or of some company or person other than the association. To constitute the offence, there must be a conversion to his own use, or the use of some one else, of the moneys and funds of the association by the party charged. *United States v. Britton*, 107 U. S. 655; *United States v. Harper*, 33 F. R. 471, 477.

A director violates this clause if, knowing that he has no money to his credit in the bank, and no right to draw money therefrom, he obtains money from it to which he has no right by means of his overdraft made with intent to defraud, and converts the same to his own use in fraud of the bank. *United States v. Warner*, 26 F. R. 616.

"Wilfully" means designedly. It is not necessary that the party who misapplies should derive any benefit from the transaction. This is made clear by the use of the word "injure," in connection with the word "defraud." *United States v. Lee*, 12 F. R. 816; *United States v. Taintor*, 11 Blatch. 374. If the evidence shows that funds have been misapplied, the defendant cannot say that it was not done with guilty intent. *Id.* *Contra*, *United States v. Voorhees*, 9 F. R. 143. So far as the question of guilt or innocence under this section is concerned, there is no distinction between a loan in bad faith



for the purpose of defrauding the bank, and an application of money with like intent in a form other than that of a loan. A loan of the moneys of a bank by its president in bad faith for the purpose of defrauding the bank, is no loan in the sense of the law. *United States v. Fish*, 24 F. R. 585, 589. If the president of a bank gives false credits to a firm of which he is a member, and causes the checks drawn by such firm against such credits to be paid, the entries being made by him with the understanding that they were to be drawn against, he is guilty of a misapplication of the funds of the bank. *Id.*

"*Abstracts.*" — This word as used in this section is not a word of settled technical meaning like "embezzle." It is a word of simple, popular meaning, without ambiguity. It means to take or withdraw from, so that to abstract the funds of the bank, or a portion of them, is to take and withdraw from the possession and control of the bank the moneys and funds alleged to be so abstracted. To constitute the offence within the meaning of this statute it is necessary that the moneys and funds should be abstracted from the bank without its knowledge and consent, with the intent to injure or defraud it or some other company or person, or to deceive some officer of the association, or an agent appointed to examine its affairs. *United States v. Northway*, 120 U. S. 327. The offence of abstraction is committed where one, for his own benefit, takes the property of another. It is not necessary that any position of trust should exist between the parties, or that the property should come lawfully into the possession of the party who abstracts it. *United States v. Lee*, 12 F. R. 816. To constitute the offence of abstracting the funds of a bank it must appear that the defendant had official relations with it; that he took or withdrew, or directed the taking or withdrawal, of its moneys, funds, credits, or assets; that this was done without the knowledge or consent of the bank or of its board of directors; that the money or effects so taken and withdrawn were converted to the defendant's own use, or for the benefit and advantage of some person other than the association, and that this was done with intent to injure and defraud the association. No previous lawful possession is necessary in order to the commission of this offence, and it is not material by what means, contrivances, or devices the abstraction of the funds of the bank is effected and accomplished. *United States v. Harper*, 33 F. R. 471, 479.

"*False entry.*" — If the president directs a clerk employed in the bank to make false entries in its books, he is a principal in the offence, and the entries are, in law, made by him. *Re Van Campen*, 2 Ben. 419; *United States v. Harper*, 33 F. R. 471, 480.

If the false entry is calculated to deceive, the making of it in the books of the association, with intent to deceive, is all that is necessary to bring the act within the meaning of the statute. The fact that its falsity may be exposed by an examination of other books of account does not render it any the less a false entry made with intent to deceive. The statute is not designed to punish only those officers who make false entries with intent to deceive examiners appointed before the false entries were made. *United States v. Britton*, 107 U. S. 655; *United States v. Harper*, 33 F. R. 471, 480. The words "any false entry in any book, report, or statement," are sufficiently comprehensive to forbid a falsification of the books of a national bank in any manner, whether by an original false entry or by changing by erasure a correct entry already made. In either event it is necessary to write in the books, — to make an entry of some sort, — and if the words or figures so written falsify the fact or transaction intended to be authenticated, the act is necessarily within the prohibition of the statute. *United States v. Crecilus*, 34 F. R. 30.

"False" means wilfully and intentionally false, with intent to deceive. One who made a mistake in the amount of an item would not be guilty. *United States v. Allen*, 10 Biss. 90.

An officer who verifies a report made up by a clerk is responsible for the statements contained in it, and cannot be heard to plead ignorance of them. *Id.*

"*Embezzles.*" — This word appears to mean, whenever used to distinguish a crime



which a person has the opportunity to commit by reason of some office or employment, some breach of confidence or trust, or some misuse of an opportunity. *United States v. Conant*, 9 Cent. L. J. 129; *United States v. Harper*, 33 F. R. 471. Embezzlement is a species of larceny, and is applicable to the stealing of property by clerks, agents, servants, and parties acting in fiduciary capacities. In order to constitute this crime it is necessary that the property embezzled should come lawfully into the hands of the party embezzling, and by virtue of the position of trust he occupies. *United States v. Lee*, 12 F. R. 816.

If the president of a bank, charged as a trustee with the administration of the funds of the bank, converts them to his own use, he embezzles and abstracts them, unless he shows authority for so doing. *Re Van Campen*, 2 Ben. 419.

In order to constitute embezzlement there must be an actual and lawful possession or custody of the property of another by virtue of some trust, duty, agency, or employment, committed to the party charged; and while so lawfully in the possession and custody of such property, the person must unlawfully and wrongfully convert the same to his own use. It is not necessary that the accused should have been in the exclusive possession or custody at the time of the conversion to his own use. If it appears that the business and assets of the bank were actually or practically intrusted to the care and management of the defendant, so that by virtue of his position as vice-president, director, or agent, he had not merely access to, or a constructive holding of, but such actual custody of the funds, moneys, and credits of the association as enabled him to have and exercise control over the same, that would place him in the lawful possession thereof. If his position and employment gave the defendant a superior or a joint and concurrent possession with subordinate employees or agents of the bank, his possession would be lawful. *United States v. Harper*, 33 F. R. 471, 475.

*Indictment.* — An indictment for embezzlement under this section is fatally defective, unless it alleges that it was done with intent to injure or defraud. *United States v. Conant*, 9 Cent. L. J. 129; *United States v. Britton*, 107 U. S. 655. An indictment alleged that the president of a bank misapplied \$25,000 of its money "by causing the said sum of \$25,000 to be credited to G. & W. on the books of the bank," &c. A credit of \$105,000 was shown by a single entry, \$25,000 of which the jury found was a misapplication. Held, an immaterial variance. *United States v. Fish*, 24 F. R. 585. Charging the defendant with committing the acts alleged against him in his capacity as "president and agent" does not vitiate the counts in which he is so described. *United States v. Northway*, 120 U. S. 327.

A count charging embezzlement is good if it alleges that the moneys and funds alleged to have been embezzled were at the time in the possession of the defendant as president and agent, and were converted to his own use. This necessarily means that they had come into his possession in his official character, so that he held them in trust for the use and benefit of the association. *Id.*

An indictment against persons as aiders and abettors of the director of a bank in misapplying the funds thereof is not good unless it alleges facts which show a misapplication of the funds of the bank by the director. *United States v. Warner*, 26 F. R. 616. An indictment which alleges the making of a false entry with intent to deceive the Comptroller of the Currency, is bad, he not being an agent appointed to examine the affairs of national banks. *United States v. Bartow*, 10 F. R. 874.

An allegation that the defendant made a false report of the condition of the bank may support a finding that he made a false entry in a report, the indictment containing the words "whereby, by means of a false entry therein by him made." *Id.*

In alleging the wilful misapplication of the funds of a bank by its president and agent it is not necessary to say that the funds charged to have been misapplied had previously come into the defendant's possession as president and agent (*United States v. Northway*,



120 U. S. 327); nor in charging a president with aiding and abetting F., the cashier of the bank, with the misapplication of its funds, to allege that the defendant then and there knew that said F. was such cashier. *Id.*

SECT. 5210. — *Davis v. Stevens*, 17 Blatch. 259; *Moore v. Jones*, 3 Woods, 53; *Meyers v. Valley Nat. Bank*, 18 N. B. Reg. 34; *First Nat. Bank v. Peterborough*, 56 N. H. 38; *Hershire v. First Nat. Bank*, 35 Iowa, 272; *Abbott v. Bangor*, 54 Maine, 540; *Rich v. State Bank*, 7 Neb. 201. The provision requiring each bank to post up a list of its stockholders in its business was merely designed to furnish to the public dealing with the bank a knowledge of the names of its corporators, and to what extent they might be relied on as giving safety to those dealing with it. There is no connection between the purpose of this clause and the subject of taxation. *Waite v. Dowley*, 94 U. S. 527.

SECT. 5211. — *Ex parte Bain*, 121 U. S. 1; *United States v. Bartow*, 10 F. R. 873; *Van Antwerp v. Hulburt*, 8 Blatch. 282; *Graves v. Lebanon Nat. Bank*, 10 Bush, 23. See § 6 of St. 1876, cited in note to § 5220, *post*. Amended by 19 St. 252, ch. 69, by changing "associations" in the seventh line to "association." St. Feb. 26, 1881 (21 St. 352), ch. 82, provides —

"that the oath or affirmation required by Rev. Stats. § 5211, verifying the returns made by national banks to the Comptroller of the Currency, when taken before a notary public properly authorized and commissioned by the State in which such notary resides and the bank is located, or any other officer having an official seal, authorized in such State to administer oaths, shall be a sufficient verification as contemplated by said § 5211. *Provided*, That the officer administering the oath is not an officer of the bank."

Prior to the passage of the act of February, 1881, a notary public was not authorized to administer to a bank officer an oath verifying the report made by him under this section. *United States v. Curtis*, 107 U. S. 671.

SECT. 5213. — See §§ 3, 6, of St. 1876, cited in note to § 5220.

SECT. 5214. — See § 22 of St. 1879, cited in note, § 3407. 16 A. G. Op. 173 and 187, see note, § 3408; *Johnston v. United States*, 17 Ct. Cl. 157. The obligations and penalties imposed upon national banks by this section and §§ 5215, 5216, and 5217, relate to solvent banks, and not to banks which have passed into the hands of the Comptroller of the Currency. *Jackson v. United States*, 20 Ct. Cl. 298.

SECT. 5215. — 16 A. G. Op. 173. The five per cent redemption fund deposited by a national bank with the United States treasurer is a fund for the sole purpose of redeeming circulating notes, and, upon the bank's insolvency, cannot be used by the treasurer to pay the tax due the United States under this section. *Jackson v. United States*, 20 Ct. Cl. 298.

SECT. 5219. — *Union Bank of Cincinnati v. Miller*, 15 F. R. 703; *Exchange Bank Cases*, 21 Id. 99; *Mercantile Bank of New York v. New York*, 28 Id. 776; *Maguire v. Board of Comm'rs*, 71 Ala. 401; *McMahon v. Palmer*, 102 N. Y. 176. Sect. 41 of the cited St. 1864 having given rise to conflicting decisions in the courts, Congress passed the explanatory act of 15 St. 34, ch. 7 (1868), declaring that the words "place where the bank is located, and not elsewhere," in said § 41, shall be construed and held to mean the State within which the bank is located; and this section was framed to embody the substance of both provisions. 2 Com. D. 2490. Cases arising under this section are Federal questions within the removal acts, and they may be removed to the Federal court although the provisions of the United States statute have been re-enacted by the State legislature. *Richards v. Rock Rapids*, 72 Iowa, 77; 33 N. W. Rep. 372. An action to enforce a right conferred by this section is a suit arising under the laws of the United States within the meaning of the act of March 3, 1875. *Stanley v. Board of Supervisors*, 6 F. R. 561; 105 U. S. 305. This section applies as well to Territories as to States, as may be seen by reference to Rev. Stats. §§ 5134, 5157, 5181, 5197, 5239, 5242. *Com'rs of Silver Bow County v. Davis*, 12 Pac. Rep. 688.



In addition to the restrictions now imposed upon State taxation of national-bank shares, the act of 1864 declared "that the tax so imposed, under the laws of any State, upon the shares of any of the associations authorized by this act, shall not exceed the rate imposed upon the shares in any of the banks organized under the authority of the State where such association is located." While this statute was in force, a State law which did not levy any tax upon shares in State banks, the tax being assessed upon the capital of the banks after deducting that portion which was invested in United States securities, but which imposed a tax on the shares of national banks, was held not to be warranted by the act of Congress. *Van Allen v. The Assessors*, 3 Wall. 573, reversing 33 N. Y. 161.

It is competent for the States, under authority from the United States, to tax the shares of national-bank stock held by individuals, although the bank's capital is invested in government bonds which are not subject to taxation. *Van Allen v. The Assessors*, *supra*. The restriction in the act of 1864 (not now in force) had reference to banks of issue, and Congress meant no more than to require of each State, as a condition to the exercise of the power to tax the shares in national banks, that it should, as far as it had the capacity, tax in like manner the shares of the banks of issue of its own creation. But when by contract a State has agreed not to tax its banks of issue, only two in number, not to exceed one per cent, while it taxes its other banks two per cent, it may tax the shares of national banks two per cent, it appearing that the capital of the two banks of issue forms but a very inconsiderable portion of the capital of the State banks. *Lionberger v. Rouse*, 9 Wall. 468.

*Remedy for illegal taxation.* — Independently of a State statute declaring that suits may be brought to enjoin the illegal levy of taxes and assessments or the collection of them, when a rule or system of valuation is adopted by those whose duty it is to make the assessment, which is designed to operate unequally and to violate a fundamental principle of the Constitution, and when this rule is applied to a large class of individuals or corporations, equity may interfere to restrain this unconstitutional exercise of power. *Cummings v. National Bank*, 101 U. S. 153. The proper mode of procedure in such case is to pay the amount of the tax equal to that assessed upon other property, and to enjoin the collection of the balance. *Id.*; *National Bank v. Kimball*, 103 U. S. 732; *Williams v. Supervisors*, 122 Id. 154. Where the inequality of valuation is the result of a State statute designed to discriminate injuriously against the owners of national-bank shares, a court of equity will give appropriate relief. *People v. Weaver*, 100 U. S. 539; *Pelton v. National Bank*, 101 Id. 143; *Cummings v. National Bank*, *supra*. In *National Bank v. Mobile*, 62 Ala. 284, the remedy was held to be at law, and not by injunction. Equity will not restrain the collection of taxes because the assessing officers reached a correct result by an erroneous method. *St. Louis Nat. Bank v. Papin*, 4 Dillon, 29; 3 Cent. L. J. 689. If it appears that a bank will be subjected to a multiplicity of suits on account of the illegal taxation of its shares, equity will give relief. *City Nat. Bank v. Paducah*, 2 Flippin, 61; *Cummings v. National Bank*, 101 U. S. 153, 156. The Federal courts have jurisdiction to restrain by injunction the taxation, by State authority, of the capital stock of a national bank invested in United States securities. *Bank of Omaha v. Douglass County*, 3 Dillon, 298. A national bank is not subject to local municipal taxation of its business, and the enforcement of such tax may be enjoined. *Mayor of Macon v. First Nat. Bank*, 59 Ga. 648.

*Pleading.* — A bill which seeks to enjoin the collection of a tax is insufficient if it fails to show that national-bank shares are discriminated against by statute, or are rated higher in proportion to their value than other property, under a rule established by the assessing officers. An allegation that the assessments are unequal and partial is not sufficient to put a court of equity in motion. *National Bank v. Kimball*, 103 U. S. 732.



In order to render an assessment on such shares void, it must appear that it was the intent of the State statute to tax the shares of the capital stock of national banks at a higher rate than other moneyed capital in the hands of individuals, or that the assessors acted under some agreement which tended to produce the same result. *First Bank of Chicago v. Farwell*, 7 F. R. 518. It is not sufficient to merely show that the State laws provide a different mode or manner of taxing moneyed capital invested in savings-banks or other corporations from that applied to the taxation of money invested in national banks. Before the assessment of the shares in the latter can be held invalid and void, it must be shown that there is, in fact, a higher burden of taxation imposed upon the money thus invested than is imposed upon other moneyed capital. *Richards v. Incorporated Town of Rock Rapids*, 31 F. R. 505.

*Collection of tax.* — Provided the tax upon shares is levied according to the rules prescribed by this section, it may be collected from the bank, as Congress has not provided for the method of its collection. *National Bank v. Commonwealth*, 9 Wall. 353. The tax may be enforced by distraint against the property of the bank. *First Nat. Bank v. Douglas County*, 3 Dillon, 330. But not where the warrant directs the collector to levy the tax upon the goods and chattels of the stockholders. *National Bank v. Fancher*, 48 N. Y. 524.

*Taxation of real property.* — If State banks are allowed to deduct from the value of their stock the value of the real estate they own, national banks are entitled to the same privilege. *City Nat. Bank v. Paducah*, 2 Flippin, 61. See *Covington City Nat. Bank v. Covington*, 21 F. R. 484. The furniture owned by national banks is not taxable by the States, because this section does not authorize it. *Covington City Nat. Bank v. Covington*, *supra*; *National Bank of Oskaloosa v. Young*, 25 Iowa, 311. See *Mayor of Macon v. First Nat. Bank*, *supra*. In Pennsylvania under the act of June 10, 1881, the real estate of national banks is subject to taxation apart from their other capital. *Second Bank of Titusville v. Caldwell*, 13 F. R. 429. Stockholders who reside in a regularly organized fire district in the town in which a bank is located cannot be subjected to a tax on their national-bank shares for fire-district purposes. *Rich v. Packard Nat. Bank*, 138 Mass. 527. As to Michigan, see *Howell v. Cassopolis*, 35 Mich. 471; as to Illinois, see *National Bank of Mendota v. Smith*, 65 Ill. 44.

*"Taxed in the city or town where the bank is located."* — This clause is a law of the property. Every owner takes the shares subject to this power of taxation under State authority, and every non-resident, by becoming an owner, voluntarily submits himself to the jurisdiction of the State in which the bank is established for all the purposes of taxation on account of his ownership. His money invested in the shares is withdrawn from taxation under the authority of the State in which he resides, and submitted to the taxing power of the State where, in contemplation of law, his investment is located. The State, therefore, within which a national bank is located has jurisdiction for the purposes of taxation of all the shareholders of the bank, both resident and non-resident, and of all its shares. *Tappan v. Merchants' Nat. Bank*, 19 Wall. 490. The manifest intention of this clause is to permit the State in which a national bank is located to tax, subject to the limitations of the section, all the shares of its capital stock without regard to their ownership. And national banks owning the shares of the capital stock of another national bank, by reason of that ownership are on the same footing with all other owners. *Bank of Redemption v. Boston*, 125 U. S. 60. Resident stockholders in New Jersey are to be assessed for their shares in the township or ward where they reside (*State v. Newark*, 11 Vroom, 558); in North Carolina, at their residence or at the location of the bank, as the legislature directs (*Buie v. Comm'rs of Fayetteville*, 79 N. C. 267); in Massachusetts, in the same city or town, within the same State, where the owner resides. *Austin v. Boston*, 14 Allen, 359. See *McMahon v. Palmer*, 102 N. Y. 176; 6 No. E. Rep. 400; *Abbott v.*



Bangor, 54 Maine, 840; *Packard v. Lewiston*, 55 Id. 456; *Austin v. The Aldermen*, 7 Wall. 694.

The words, "at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens," refer to the entire process of assessment, which, in the case of national-bank shares, includes both their valuation and the rate of percentage upon such valuation. Consequently, the act of Congress is violated if, in connection with a fixed percentage applicable to the valuation alike of national-bank shares and of other moneyed investments or capital, the State law establishes or permits a mode of assessment by which such shares are valued higher in proportion to their real value than is other moneyed capital. *Boyer v. Boyer*, 113 U. S. 689, 695. The prohibition cannot be evaded by the assessment of equal rates of taxation upon unequal valuations. Where a State statute authorizes individuals to deduct the amount of debts owing by them from the assessed value of their personal property and moneyed capital subject to taxation, the share-owners of national banks are entitled to the same deduction. *People v. Weaver*, 75 N. Y. 30; 100 U. S. 539. For applications of this principle, see *Supervisors v. Stanley*, 105 U. S. 305; *Hills v. Exchange Bank*, 5 F. R. 248; 105 U. S. 319; *Evansville Bank v. Britton*, 10 Biss. 503; 8 F. R. 867; 105 U. S. 322; *Cummings v. National Bank*, 101 Id. 153; *City Nat. Bank v. Paducah*, 2 Flippin, 61; *Richards v. Incorporated Town*, 31 F. R. 505.

If State laws exempt from taxation for local purposes railroad securities, stocks in corporations which are subject to taxation for State purposes, mortgages, judgments, recognizances, and moneys due on contracts for the sale of real estate, and it is admitted that large amounts of exempted property come under these various classes, it is a discrimination against national-bank shares, and is forbidden by this statute. *Boyer v. Boyer*, 113 U. S. 689, reversing *Boyer's Appeal*, 103 Penn. St. 387. Perfect equality of taxation between State and national banks is not required. This statute does not interfere with State modes of taxation. All that is necessary to satisfy it is that the system of State taxation of its own citizens, of its own banks, and of its own corporations, shall not work a discrimination unfavorable to the holders of the shares of national banks. Within these limits, the manner of assessing and collecting all taxes by the States is uncontrolled by the act of Congress. *Davenport Bank v. Davenport*, 64 Iowa, 140; 123 U. S. 83; 8 Sup. Ct. Rep. 73; *People v. Commissioners*, 35 N. Y. 423; 4 Wall. 244. The true construction of the restriction that the taxation "shall not be at a greater rate than is assessed upon other moneyed capital," &c., is that it prohibits an assessment based upon a valuation which discriminates unfairly against bank shares, and is not merely intended to secure equality in the rate of the tax after the assessment has been made. *Albany City Bank v. Maher*, 6 F. R. 417. If neither the necessary, usual, or probable effect of a State system of assessment discriminates in favor of State banks or moneyed capital in the hands of citizens against national banks upon the face of the statute, nor any evidence is given of the intention of the legislature to make such a discrimination, nor any proof that it works an actual and material discrimination, the State statute will not be held invalid. *Davenport Bank v. Davenport*, 123 U. S. 83. See *Richards v. Incorporated Town*, 31 F. R. 505. When State laws impose different rates of taxation for different classes of moneyed capital, the rate imposed upon shares in national banks should approximate as closely as may be to the rate imposed upon other moneyed capital of the same or similar class, viz., shares of State banks. There is an unjust discrimination against national-bank shares where the rate per share on a State bank whose capital was in excess of the capital of all the national banks in the city in which it was located was fifty cents, and the rate imposed upon the latter was \$1.05 per share, which was theoretically laid upon all banks, but from the payment of which State banks were relieved. *City Nat. Bank v. Paducah*, 2 Flippin, 61.



This statute forbids assessing officers from valuing some property at a certain percentage of its true value in money and applying another percentage to other property, and a larger percentage to the shares of national banks, as the adoption of a six-tenths rule as to one taxpayer and a seven-tenths rule as to another. It is not material that national-bank shares are assessed on that basis at less than their true value in money, that being the rule prescribed by State law. It also forbids an equalizing board from equalizing such shares with the moneyed capital invested in incorporated State banks. The equalization must be with the whole moneyed capital subject to taxation. *First Nat. Bank v. Treasurer*, 25 F. R. 749. If assessing officers adopt and follow a rule to assess real estate at one-third its value, ordinary personal property the same, and moneyed capital at three-fifths its value, and the State board of equalization increases the valuation of bank shares to their full value, the tax levied upon the latter is unjust. *Cummings v. National Bank*, 101 U. S. 153.

Under the limitations of this section, shares in national banks are liable to taxation by the State without regard to the fact that the capital of such banks is invested in bonds of the United States, declared by the acts creating them to be exempted from taxation by or under State authority. So construed, the act is constitutional. *People v. The Commissioners*, 4 Wall. 244; affirming *Van Allen v. Assessors*, 3 Wall. 573; *First Bank of Chicago v. Farwell*, 7 F. R. 518.

If a State statute directs that all moneyed capital, including national-bank shares, shall be assessed at its cash value, and assessing officers systematically and intentionally assess all moneyed capital far below such value and bank shares at their full value, this statute is violated. *Pelton v. National Bank*, 101 U. S. 143; 21 Alb. L. J. 232. Error or inequality which arises from a mistake in judgment on the part of the assessing officers, the differences in the valuations made by them as compared with the estimates placed on the property by witnesses not being greater than frequently arises between witnesses in cases for the trial of questions of value, does not vitiate an assessment. *Exchange Nat. Bank v. Miller*, 19 F. R. 372; *National Bank v. Kimball*, 103 U. S. 732.

The proper officer, in accordance with the rules and practice adopted for the valuation of other moneyed capital of individuals, fixed the taxable value of national-bank shares at sixty per centum of their true value in money, and certified and transmitted the same to the annual State board of equalization for incorporated banks. This board had no power to make any equalization except as to bank shares among themselves, its only purpose being to make the capital stock of all incorporated banks in the State equal in valuation for the purposes of taxation so far as relates to their actual cash value. It made an order increasing the valuation to sixty-five per centum, and certified that value to the officer and it became the basis of taxation, and it was held that there was a discrimination within the meaning of this statute. *Whitbeck v. Mercantile Nat. Bank*, 127 U. S. 193. In the taxation of stock of national banks the owners thereof, having no other credits or moneyed capital, are entitled to deduct their *bona fide* debts from the assessed value of such shares of stock. *Wasson v. First Nat. Bank*, 107 Ind. 206; 34 Alb. L. J. 311; *Peavey v. Greenfield*, 4 New Eng. (N. H.) 529; *Bressler v. Wayne County*, 41 N. W. Rep. (Neb.) 356.

The owner of national-bank shares does not lose his right to the same deductions on account of indebtedness as is accorded to the owners of other property, though he failed to demand that it be made before the tax-roll was delivered for the collection of the taxes (*Whitbeck v. Mercantile Nat. Bank*, 127 U. S. 193; 8 Sup. Ct. Rep. 1121); nor because national-bank stock was not included in the list of "solvent credits" enumerated in the State statute. *McAden v. Comm'rs of Mecklenburg Co.*, 2 S. E. Rep. 670. See *People v. Ryan*, 88 N. Y. 142.

Trust companies organized under the laws of New York are not banks in the com-



mercial sense of the word, although they issue shares of stock which are moneyed capital in the hands of individuals. They are taxable for local purposes upon the actual value of their stock, and are subject to a franchise tax, in the nature of an income tax, payable to the State for State purposes. But this does not show that investments in them are subject to less taxation than is imposed upon shares of bank stock. *Mercantile Bank v. New York*, 121 U. S. 138. Savings banks are not within the meaning of this statute so as to require that, if they are exempted from taxation, shares in national banks must also be exempted therefrom. The only limitation to be added to the rule announced in *Hepburn v. School Directors* (23 Wall. 480), where it was said that this section was not intended to curtail the State power on the subject of taxation, and that it simply requires that capital invested in national banks shall not be taxed at a greater rate than like property similarly invested, and that it was not intended to cut off the power to exempt particular kinds of property, is that the exemptions should be founded upon just reason, and not operate as an unfriendly discrimination against investments in national-bank shares. However large, therefore, may be the amount of moneyed capital in the hands of individuals, in the shape of deposits in savings-banks as now organized, which the policy of the State exempts from taxation for its own purposes, that exemption cannot affect the rule for the taxation of shares in national banks, provided they are taxed at a rate not greater than other moneyed capital in the hands of individual citizens otherwise subject to taxation. *Mercantile Bank v. New York*, 121 U. S. 138, 161; *Bank of Redemption v. Boston*, 125 Id. 60. State bonds, or municipal bonds issued by State authority, are not within the reason of the rule established for the taxation of national-bank shares. *Mercantile Bank v. New York*, 121 U. S. 138, 162. The exemption from State taxation of interest-paying bonds issued by a municipal corporation, they being in the hands of individuals, does not invalidate an assessment upon the shares of national banks. This statute has not cut off the discretionary power of the States over the subject of exempting particular classes of property from taxation (*Adams v. Nashville*, 95 U. S. 19), and in Indiana, shares in national banks may be taxed, although by a statute passed prior to the Banking Act State banks are exempt from taxation. *Richmond v. Scott*, 48 Ind. 568.

When an exemption or deduction from taxation is allowed by the laws of a State, and is of such general operation as to affect all classes of taxable property, it must be allowed in assessing shares in national banks, because it is the rule of assessment. *National Albany Ex. Bank v. Wells*, 18 Blatch. 478. But moneyed capital cannot be said to be exempt from taxation by State laws because that portion of it which is invested in the shares of various classes of corporations is exempt, if such capital is taxed in the hands of corporations. Shareholders in national banks may be taxed under State laws at a higher rate than is imposed upon stockholders in other than moneyed corporations, without violation of this statute. *First Nat. Bank v. Waters*, 19 Blatch. 242. National-bank shares may be assessed at more than their par value. *Hepburn v. School Directors*, 23 Wall. 480; *People v. Commissioners*, 94 U. S. 415. In assessing national-bank stock in New York the assessors must determine the actual value of the shares, taking into consideration all the capital of the bank, whether surplus or in real estate or otherwise, and then deduct from such value such sum as represents the proportion which the assessed value of the real estate bears to the assessed value of the entire capital. *Tradesmen Nat. Bank v. Comm'rs*, 69 N. Y. 91; *Gallatin Bank v. Comm'rs*, 67 Id. 516.

*"Other moneyed capital."* Money at interest is not the only moneyed capital included in this term. Stock in banks is such capital, and it seems that other investments in stocks and securities might be included in it. *Hepburn v. School Directors*, 23 Wall. 480, 484. It seems that the words "moneyed capital in the hands of individual citizens" more aptly describes ready money or capital invested in private banking than it does capital invested in manufacturing corporations, insurance companies, and the like. As origi-



nally used in the act of 1864, the phrase signified something different from capital invested in State banking corporations, because it was provided that State taxation should not exceed that imposed on moneyed capital in the hands of individual citizens, or that imposed "upon the shares in any of the banks organized under the authority of the State." If it had been intended to include shares in such corporations as are referred to, it seems that some more comprehensive expression would have been employed. The idea of Congress seems to have been to place national-bank shares on an equality with State-bank shares, and the capital employed in State banks. *First Nat. Bank v. Waters*, 19 Blatch. 242, 247. The exemption of shares of various corporations from taxation by a State statute does not exempt "moneyed capital in the hands of individual citizens" within the meaning of this section. *First Bank of Utica v. Waters*, 7 F. R. 152.

The terms of this section include shares of stock or other interests owned by individuals in all enterprises in which the capital employed in carrying on its business is money, where the object of the business is the making of profit by its use as money. The moneyed capital thus employed is invested for that purpose in securities by way of loan, discount, or otherwise, which are from time to time, according to the rules of business, reduced again to money and reinvested. It includes money in the hands of individuals employed in a similar way, invested in loans, or in securities for the payment of money, either as an investment of a permanent character, or temporarily with a view to sale or repayment and reinvestment. In this way the moneyed capital in the hands of individuals is distinguished from what is known as personal property. All capital the value of which is measured in terms of money is not included. Neither does the statute necessarily include all forms of investment in which the interest of the owner is expressed in money. Shares of stock in railroad, mining, and manufacturing companies and other corporations are not necessarily moneyed capital, and their business may not consist in any kind of dealing in money or commercial representatives thereof. *Mercantile Bank v. New York*, 121 U. S. 138; *McMahon v. Palmer*, 102 N. Y. 176.

"Other moneyed capital" means taxable capital. Hence the stockholders of a national bank are not entitled to a deduction from the value of their shares because the capital of the bank is invested in non-taxable government bonds, although such deduction is made under State laws in favor of citizens and corporations. *People v. Commissioners*, 4 Wall. 244, 256. The property to be taxed is property which, according to the law of the State, is the subject of taxation within its jurisdiction. *Mercantile Bank v. New York*, *supra*; *Exchange Nat. Bank v. Miller*, 19 F. R. 372. The undivided profits of a national bank, beyond the amount required by law to be kept as a surplus fund, are taxable, though invested in government bonds. *First Nat. Bank v. Concord*, 59 N. H. 75. See *Maguire v. Board of Revenue*, 71 Ala. 401.

*Taxation must be upon the shares.* — This section limits the States to taxation upon the shares in national banks, as distinguished from taxation of the banks *ex nomine* upon their property or capital. Hence a State cannot evade its restrictions by requiring the value of the property of the bank to be added to the value of the shares otherwise ascertained. *St. Louis Nat. Bank v. Papin*, 4 Dillon, 29; *Sumter County v. Bank of Gainesville*, 62 Ala. 464. A tax upon the capital of the bank is a tax upon the bank, and when the capital is invested in the securities of the government it cannot be taxed, nor can the corporation be taxed as the owner of such securities. But on the other hand the shareholders may be taxed by the States on stock or shares so held by them, although all the capital of the bank be invested in Federal securities, provided the taxation does not violate the rule prescribed by this section. *National Bank v. Commonwealth*, 9 Wall. 353; *Morseman v. Younkin*, 27 Iowa, 350. Where a State statute provides for taxing the capital of a bank, a tax cannot be levied on the shares of the stockholders as provided for in this section; for a tax on the capital is not the same thing as a tax on the shares of which



the capital is composed. *Bradley v. The People*, 4 Wall. 459. Stock of the United States, constituting a part or the whole of the capital stock of a bank, is not subject to State taxation. *Bank of Commerce v. New York City*, 2 Black, 620.

*Information on which to base tax.* — A State statute which requires the cashier of each national bank within the State, and the cashiers of all other banks, to transmit to the clerks of the several towns in the State in which any stock or share holder of such banking association shall reside, a true list of the names of such stock or share holders, with the number of shares standing against the name of each on the books of such association, together with the amount of money actually paid in on such share on a given date, is not invalid. *Waite v. Dowley*, 94 U. S. 527.

*Legislative power to cure defective assessment.* — Irregularities in the assessment of national-bank shares, such as the failure to make entry of an assessment within the time prescribed by law, and a defective oath annexed to the assessment roll, may be cured by subsequent legislative action, if intervening rights are not impaired. *Williams v. Supervisors*, 122 U. S. 154; 21 F. R. 99. But if an assessment is void because the persons assessed were not afforded the opportunity which the law gave them to examine and correct their assessments, a curative act which gives them a right to a review of the assessments made upon the single ground that they are at a higher proportionate valuation than other property put on the same roll by the same officers, and does not provide for a challenge of the assessment upon the ground of general over-valuation, nor permit them to make the same deductions as other taxpayers are allowed to make, is void. *Albany City Nat. Bank v. Maher*, 9 F. R. 884.

## CHAPTER IV.

### DISSOLUTION AND RECEIVERSHIP.

SECT. 5220. — *Richmond v. Irons*, 121 U. S. 27, 47. See §§ 6, 7 of St. 1882, stated in note § 5133, *ante*. St. June 30, 1876, ch. 156 (19 St. 63) provides —

“That whenever any national banking association shall be dissolved, and its rights, privileges, and franchises declared forfeited, as prescribed in Revised Statutes, § 5239, or whenever any creditor of any national banking association shall have obtained a judgment against it in any court of record, and made application, accompanied by a certificate from the clerk of the court stating that such judgment has been rendered and has remained unpaid for the space of thirty days, or whenever the Comptroller shall become satisfied of the insolvency of a national banking association, he may, after due examination of its affairs, in either case, appoint a receiver, who shall proceed to close up such association, and enforce the personal liability of the shareholders, as provided in § 5234 of said statutes.

“SEC. 2. That when any national banking association shall have gone into liquidation under the provisions of § 5220 of said statutes, the individual liability of the shareholders provided for by § 5151 of said statutes may be enforced by any creditor of such association, by bill in equity, in the nature of a creditor's bill, brought by such creditor on behalf of himself and of all other creditors of the association, against the shareholders thereof, in any court of the United States having original jurisdiction in equity for the district in which such association may have been located or established.

“SEC. 3. That whenever any association shall have been or shall be placed in the hands of a receiver, as provided in § 5234 and other sections of said statutes, and when, as provided in § 5236 thereof, the Comptroller shall have paid to each and every creditor of such association, not including shareholders who are creditors of such association, whose claim or claims as such creditor shall have been proved or allowed as therein prescribed, the full amount of such claims and all expenses of the receivership, and the redemption of the circulating notes of such association shall have been provided for by depositing lawful money of the United States with the Treasurer of the United States, the Comptroller of the Currency shall call a meeting of the shareholders of such association by giving notice thereof for 30 days in a newspaper published in the town, city, or county where the business of such association was carried on, or if no newspaper is there published, in the newspaper



published nearest thereto, at which meeting the shareholders shall elect an agent, voting by ballot, in person or by proxy, each share of stock entitling the holder to one vote; and when such agent shall have received votes representing at least a majority of the stock in value and number of shares, and when any of the shareholders of the association shall have executed and filed a bond to the satisfaction of the Comptroller of the Currency, conditioned for the payment and discharge in full of any and every claim that may hereafter be proved and allowed against such association by and before a competent court, and for the faithful performance and discharge of all and singular the duties of such trust, the Comptroller and the receiver shall thereupon transfer and deliver to such agent all the undivided or uncollected or other assets and property of such association then remaining in the hands or subject to the order or control of said Comptroller and said receiver, or either of them; and for this purpose, said Comptroller and said receiver are hereby severally empowered to execute any deed, assignment, transfer, or other instrument in writing that may be necessary and proper; whereupon the said Comptroller and the said receiver shall, by virtue of this act, be discharged and released from any and all liabilities to such association, and to each and all of the creditors and shareholders thereof; and such agent is hereby authorized to sell, compromise or compound the debts due to such association upon the order of a competent court of record or of the United States circuit court for the district where the business of the association was carried on. Such agent shall hold, control, and dispose of the assets and property of any association which he may receive as hereinbefore provided for the benefit of the shareholders of such association as they, or a majority of them in value or number of shares, may direct, distributing such assets and property among such shareholders in proportion to the shares held by each; and he may, in his own name or in the name of such association, sue and be sued, and do all other lawful acts and things necessary to finally settle and distribute the assets and property in his hands. In selecting an agent as hereinbefore provided, administrators or executors of deceased shareholders may act and sign as the decedent might have done if living, and guardians may so act and sign for their ward or wards.

"SEC. 4. That the last clause of § 5205 of said statutes is hereby amended by adding to the said section the following proviso: '*And provided, That if any shareholder or shareholders of such bank shall neglect or refuse, after three months' notice, to pay the assessment, as provided in this section, it shall be the duty of the board of directors to cause a sufficient amount of the capital stock of such shareholder or shareholders to be sold at public auction (after thirty days' notice shall be given by posting such notice of sale in the office of the bank, and by publishing such notice in a newspaper of the city or town in which the bank is located, or in a newspaper published nearest thereto), to make good the deficiency, and the balance, if any, shall be returned to such delinquent shareholder or shareholders.*'

"SEC. 5. That all United States officers charged with the receipt or disbursement of public moneys, and all officers of national banks, shall stamp or write in plain letters the word 'counterfeit,' 'altered,' or 'worthless,' upon all fraudulent notes issued in the form of, and intended to circulate as money, which shall be presented at their places of business: and if such officers shall wrongfully stamp any genuine note of the United States, or of the national banks, they shall, upon presentation, redeem such notes at the face-value thereof.

"SEC. 6. That all savings banks or savings and trust companies organized under authority of any act of Congress shall be, and are hereby, required to make, to the Comptroller of the Currency, and publish, all the reports which national banking associations are required to make and publish under the provisions of §§ 5211, 5212, 5213, and shall be subject to the same penalties for failure to make or publish such reports as are therein provided; which penalties may be collected by suit before any court of the United States in the district in which said savings banks or savings and trust companies may be located. And all savings or other banks now organized, or which shall hereafter be organized, in the District of Columbia, under any act of Congress, which shall have capital stock paid up in whole or in part, shall be subject to all the provisions of the Revised Statutes, and of all acts of Congress applicable to national banking associations, so far as the same may be applicable to such savings or other banks: *Provided, That such savings banks now established shall not be required to have a paid-in capital exceeding \$100,000.*"

A national bank in voluntary liquidation under this section is not dissolved as a corporation, but may sue and be sued by name for the purpose of winding up its business. *Central Bank v. Conn. Mut. Life Ins. Co.*, 104 U. S. 54. In such case, it is liable to a creditor's bill to reach a fund held by the president. *Merchants' Bank v. Masonic Hall Trustees*, 65 Ga. 603; 63 Ga. 549; *Wright v. Merchants' Bank*, 1 Flippin, 568. A national bank cannot be proceeded against under the bankrupt law. If insolvent, it can be wound up only in the manner provided by this title. *Re Manufacturers' Nat. Bank*, 5 Biss. 499. It seems that Congress did not by the act of June 30, 1876, leave the



comptroller authority over the assets of a national bank which has gone into voluntary liquidation under this section after a court of competent jurisdiction has, under a creditor's bill, appointed a receiver and taken possession of the assets and initiated proceedings to enforce the liability of stockholders. Where a creditor's bill is pending under said act to enforce the liability of stockholders, an action brought by the comptroller against one of the stockholders will be abated. *Harvey v. Lord*, 10 F. R. 236. The personal property of an insolvent national bank in the control of a receiver is exempt from State taxation. *Rosenblatt v. Johnston*, 104 U. S. 462.

Under the last part of § 6 of St. 1876, a savings-bank in the District of Columbia, having a capital of less than \$100,000, may be converted into a national bank; and the certificate of the Comptroller of the Currency is conclusive as to the regularity of the proceedings by which such conversion is made. *Keyser v. Hitz*, 2 Mackey (D. C.), 473. Section 2 of St. 1876 creates no new liability, since the liability existing was enforceable in equity before as well as after that act. *Irons v. Manufacturers' Bank*, 17 F. R. 308; *Harvey v. Lord*, 10 Id. 236; *Richmond v. Irons*, 121 U. S. 49. A bill filed under that section stops the running of the statute of limitations upon all claims against the bank. *Irons v. Manufacturers' Bank*, 27 F. R. 591.

SECT. 5222. — 13 A. G. Op. 56. See § 6 of St. 1882, stated in note to § 5133, *ante*; and § 4 of St. 1874, stated in note to § 5191, *ante*.

SECT. 5223. — The act of 1870 contained no reference to the proviso in § 42 of St. 1864, but it was regarded as broader than its language disclosed, and as meant as a substitute for said § 42 on the subject of the lawful money deposit, so that consolidating banks were not called upon for such deposit at any time. 2 Com. D. 2494.

SECT. 5224. — See the above § 6 of St. 1882. Amended by 18 St. 320, ch. 80, by adding the following: —

"And if any such bank shall fail to make the deposit and take up its bonds for thirty days after the expiration of the time specified, the Comptroller of the Currency shall have power to sell the bonds pledged for the circulation of said bank, at public auction in New York City, and, after providing for the redemption and cancellation of said circulation and the necessary expenses of the sale, to pay over any balance remaining to the bank or its legal representative."

SECT. 5225. — See the above § 6 to St. 1882; and note to § 3581, *ante*. 19 St. 252, ch. 69, changes "six" to "five" in the second line.

SECT. 5226. — *Roberts v. Hill*, 23 F. R. 311. See § 3 of 1874 stated in note to § 5191, *ante*. After a circulating note of a national bank had been protested for failure to redeem it in lawful money, an attachment from a State court was levied on moneys of that bank deposited in another national bank to secure a debt to A. Subsequently, a receiver of the first bank was appointed, and without becoming a party to the suit applied to the State court to dissolve the attachment, which motion was denied. He then brought suit against A., the second bank, and the sheriff, to assert his title to such deposit; and it was held that the levy was void, and the receiver entitled to relief. *Harvey v. Allen*, 16 Blatch. 29.

SECT. 5228. — Amended by 18 St. 320, ch. 80, by changing the words "of forfeiture of the bonds" in the third line to "thereof." The phrase "deliver special deposits" recognizes the bank's power to receive them. *Carlisle Bank v. Graham*, 100 U. S. 699. Such deposits are not confined to securities held as collateral to loans, but embrace the public securities of the United States; if the deposit is negligently lost, whether received gratuitously or otherwise, the bank is liable. *Id.*; *Pattison v. Syracuse Bank*, 80 N. Y. 82; *Chattahoochee Nat. Bank v. Schley*, 58 Ga. 369. See *Wiley v. Brattleboro Bank*, 47 Vt. 546; 50 Vt. 388.

SECT. 5230. — *Woodward v. Ellsworth*, 4 Col. 580; *Schmidt v. National Bank of Selma*, 22 La. Ann. 314.



SECT. 5234. — Depositors' claims at the time of the suspension, if proved to the comptroller's satisfaction, are placed upon the same footing as if they were reduced to a judgment. *Commonwealth Nat. Bank v. Mechanics' Nat. Bank*, 94 U. S. 437.

SECT. 5235. — *Richmond v. Irons*, 121 U. S. 27, 47; *Davis v. Stevens*, 17 Blatch. 259; *Eaton v. Pacific Bank*, 144 Mass. 260; *Wright v. Merchants' Bank*, 3 Cent. L. J. 351; *Shoe & L. Bank v. Mechanics' Nat. Bank*, 89 N. Y. 440; *Johnston v. United States*, 17 Ct. Cl. 157, 168; *Jackson v. United States*, 20 Id. 298; *Chemical Nat. Bank v. Bailey*, 12 Blatch. 480; *Venango Nat. Bank v. Taylor*, 56 Penn. St. 14; *Turner v. First Nat. Bank*, 26 Iowa, 562; *Van Antwerp v. Hulburd*, 7 Blatch. 426, 437; *Price v. Abbott*, 17 F. R. 506; *Hendee v. Conn. & P. R. R.*, 26 Id. 677; *Burton v. Burley*, 13 Id. 811; *Frelinghuysen v. Baldwin*, 12 Id. 395; *Armstrong v. Scott*, 36 Id. 63, 65. See §§ 1, 3 of St. 1876 stated in note, § 5220, *supra*.

St. March 29, 1886, ch. 28 (24 St. 8), enacts —

"That whenever the receiver of any national bank duly appointed by the Comptroller of the Currency, and who shall have duly qualified and entered upon the discharge of his trust, shall find it in his opinion necessary, in order to fully protect and benefit his said trust, to the extent of any and all equities that such trust may have in any property, real or personal, by reason of any bond, mortgage, assignment, or other proper legal claim attaching thereto, and which said property is to be sold under any execution, decree of foreclosure, or proper order of any court of jurisdiction, he may certify the facts in the case, together with his opinion as to the value of the property to be sold, and the value of the equity his said trust may have in the same, to the Comptroller of the Currency, together with a request for the right and authority to use and employ so much of the money of said trust as may be necessary to purchase such property at such sale.

"SEC. 2. That such request, if approved by the Comptroller of the Currency, shall be, together with the certificate of facts in the case, and his recommendation as to the amount of money which, in his judgment, should be so used and employed, submitted to the Secretary of the Treasury, and if the same shall likewise be approved by him, the request shall be by the Comptroller of the Currency allowed, and notice thereof, with copies of the request, certificate of facts, and indorsement of approvals, shall be filed with the Treasurer of the United States.

"SEC. 3. That whenever any such request shall be allowed as hereinbefore provided, the said Comptroller of the Currency shall be, and is, empowered to draw upon and from such funds of any such trust as may be deposited with the Treasurer of the United States for the benefit of the bank in interest, to the amount as may be recommended and allowed and for the purpose for which such allowance was made. *Provided, however*, That all payments to be made for or on account of the purchase of any such property and under any such allowance shall be made by the Comptroller of the Currency direct, with the approval of the Secretary of the Treasury, for such purpose only and in such manner as he may determine and order."

By St. March 3, 1887, ch. 373 (24 St. 554), and by St. August 13, 1888, ch. 866 (25 St. 436), it is provided —

"That whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the State in which such property shall be situated in the same manner the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who shall wilfully violate the provisions of this section shall be deemed guilty of a misdemeanor, and shall, on conviction thereof be punished by a fine not exceeding three thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

"SEC. 3. That every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice.

"SEC. 4. That all national banking associations established under the laws of the United States shall, for the purposes of all actions by or against them, real, personal or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located; and in such cases the circuit and



district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same State. The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank."

The appointment of a receiver by the comptroller under § 5234 is presumably made by and with the concurrence of the head of the Treasury department, within art. 2, § 2 of the Constitution of the United States; and such receiver is an agent and officer of the United States with respect to suits brought by him. *Price v. Abbott*, 17 F. R. 506; *Brinckerhoff v. Bostwick*, 23 Hun, 237; *Stanton v. Wilkeson*, 8 Ben. 357. The certificate of the comptroller is sufficient evidence of his appointment in an action brought by him. *Platt v. Beebe*, 57 N. Y. 339. He may bring suit in his own name as receiver, or in the name of the bank. He needs no authorization from the comptroller for the purpose of suing for an ordinary debt due the bank, though otherwise as to a suit against the stockholders. *Bank v. Kennedy*, 17 Wall. 19. But see remarks of Blodgett, J., in *Irons v. Manufacturers' Nat. Bank*, 6 Biss. 301. The receiver may sue the directors in a State court for losses occasioned by their mismanagement, if no proceeding is pending under the national bankrupt act for forfeiture of the bank's charter. *Brinckerhoff v. Bostwick*, 88 N. Y. 52. Suits brought by the receiver for the exclusive benefit of the bank's creditors do not come within the letter or the reason of the proviso to § 4 of St. 1882 (note to § 5133, *ante*), the purpose of which is to leave to the jurisdiction of the State courts suits by or against national banks, "except suits between them and the United States, or its officers or agents," where the domicile of the parties does not give jurisdiction to the Federal courts. *Price v. Abbott*, *supra*. A receiver of a national bank may maintain an action in the circuit court, without reference to the citizenship of the parties, or the amount involved. *Armstrong v. Trautman*, 36 F. R. 275.

Where an agent has been substituted for the receiver of an insolvent national bank, he seems to stand in the same legal relation as the receiver. *McConville v. Gilmour*, 36 F. R. 277. A suit brought by the receiver cannot be compounded by the comptroller without leave of court. *Case v. Small*, 4 Woods, 78; 10 F. R. 722. A court has no power to order a receiver to compound debts, which are not bad or doubtful, and such a composition is ineffectual. *Price v. Yates*, 19 Alb. L. J. 295; 7 W. N. C. 51. Otherwise, if the debts are doubtful. *Re Platt*, 1 Ben. 534. A receiver who is directed to sell the assets has no power to exchange, barter, or trade them. *Ellis v. Little*, 27 Kan. 707. A State court cannot order a receiver to pay a judgment recovered against the bank before his appointment. *Ocean Bank v. Carll*, 7 Hun, 237. Where a receiver of a bank and counsel for the United States compromised suits, the compromise will not be afterward opened if no fraud is shown. *Henderson v. Myers*, 11 Phila. 616.

The comptroller's decision as to the bank's insolvency is conclusive for the purpose of enabling the receiver to sue, although not evidence of the fact of insolvency in an action by the receiver. *Bowden v. Morris*, 1 Hughes, 378.

If the receiver sells property of the bank under § 5234, in pursuance of an order of court, it is a judicial sale, and will not thereafter be set aside before confirmation on account of a higher bid, where a former sale of the same property has been set aside for inadequacy of price. *Re Third Nat. Bank*, 4 F. R. 775; *Re Illinois Bank*, 9 Biss. 535. A district court is competent to order a sale under this section. *Re Platt*, 1 Ben. 534.

The managers of an insolvent bank, when personally sued by the receiver for their alleged mismanagement, are not liable for not requiring in their discretion a bond from the president for the faithful discharge of his official duties, nor for unsafe or irregular investments made without their knowledge or complicity, they not being on the committee of investments; and they may set up the statute of limitations for illegal investments and overdrafts made by the president more than six years before. *Williams v. Halliard*, 38



N. J. Eq. 373. They are, however, liable if they receive deposits when they know, or may readily learn, that the bank is insolvent. *Delano v. Case*, 17 Ill. App. 531; *Cragie v. Hadley*, 99 N. Y. 131; *Cragie v. Smith*, 14 Abb. N. Cas. 409.

The receiver of a national bank has no greater right in enforcing the collection of the bank's assets than the bank itself would have had, for he holds only the estate and title of the bank in its assets. *Casey v. Credit Mobilier*, 2 Woods, 77.

"Under the direction of the Comptroller" means no more than that the receiver shall be subject to the direction of the comptroller, but it does not mean that he shall do no act without special instructions. It is his duty to collect the assets and debts of the association, and as to these no special direction is needed. *Bank of Kennedy*, 17 Wall. 19. In an action by the receiver against a stockholder, the authorization of the comptroller must be averred. *Id.*

"Debts." — This word includes the contracts, debts, and engagements mentioned in Rev. Stats. § 5151. *Stanton v. Wilkeson*, *supra*. The personal property of an insolvent national bank in the hands of a receiver is exempt from taxation under State laws. *Rosenblatt v. Johnston*, 104 U. S. 462. A county treasurer may not levy upon the property of a national bank to satisfy a tax levied after the bank has become insolvent against a claim for the property by a receiver subsequently appointed. *Woodward v. Ellsworth*, 4 Col. 580. The comptroller, though he is a party to a suit, cannot submit the government to the jurisdiction of the ordinary courts, to determine the conflicting claims of it and other creditors in the funds of a national bank. *Case v. Terrell*, 11 Wall. 199. The powers conferred upon the Comptroller of the Currency by § 5234 does not exclude the authority of a competent tribunal to appoint a receiver in other cases, for in cases not within the special provisions of this title a national bank may be proceeded against in the same manner as any other debtor or corporation. *Irons v. Manufacturers' Nat. Bank*, *supra*.

A court may appoint a receiver upon a judgment-creditor's bill in a case where the comptroller is not authorized to make an appointment. *Wright v. Merchants' Nat. Bank*, 1 Flippin, 568. It is doubted whether the comptroller has authority to appoint a receiver after one has been appointed by the court, to enforce the stockholders' liability under the statute of 1876. *Harvey v. Lord*, 11 Biss. 144; 10 F. R. 236. A court of equity will appoint a receiver on the application of a depositor if it appears that the bank officers have been making preferential payments. *Irons v. Manufacturers' Nat. Bank*, *supra*. A receiver appointed by the comptroller is not liable in equity to the owner of real estate for rents thereof which have been received by him in his official capacity and paid into the Treasury. *Hitz v. Jenks*, 123 U. S. 297.

The bank does not cease to be a corporation upon the appointment of a receiver, for the association as a legal entity continues to exist, and it may sue and be sued, complain and defend, in all cases where it may be necessary that the corporate name of the association shall be used for that purpose in closing its business and winding up its affairs under the provisions of the act which created it. *Bank of Bethel v. Pahquioque Bank*, 14 Wall. 383.

If mortgages among the assets of a national bank were given in violation of the insolvency law of the State, they are governed by such law and the bank takes them subject to the limitations thereof. *Witters v. Sowles*, 32 F. R. 758. The debtors of a bank when sued by a receiver cannot inquire into the legality of his appointment. It is sufficient for the purposes of such a suit that he has been appointed, and is receiver in fact. As to debtors, the action of the comptroller in making the appointment is conclusive until set aside on the application of the bank. The bank may move in that behalf, but debtors cannot. *Cadle v. Baker*, 20 Wall. 650.

SECT. 5236. — *Eastern Townships Bank v. Vermont Bank of St. Albans*, 22 F. R. 186; *Armstrong v. Scott*, 36 Id. 63, 65; *Price v. Abbott*, 17 Id. 506; *Roberts v. Hill*, 24 Id. 371; *Jackson v. United States*, 20 Ct. Cl. 298. See §§ 1, 3 of St. 1876, stated in note to § 5220.



*supra*. This section does not repeal the statutes which give to the government priority over other creditors. *United States v. Cook County Bank*, 9 Biss. 55. The only claims the comptroller can recognize in the settlement of the affairs of the bank are those which are shown by proof satisfactory to him or by the adjudication of a competent court to have had their origin in something done before the insolvency. It is clearly his duty, in paying dividends, to take the value of the claim at that time as the basis of distribution. Where the claim is established by judgment, after the comptroller has refused to allow it, the claimant is entitled to share in dividends upon the debt and interest included in the judgment as of the day the bank failed; not upon the basis of the judgment, if it provides for interest subsequent to its rendition. *White v. Knox*, 111 U. S. 784. A receiver's decision upon the validity of a claim presented to him for a dividend is not final. The creditor may proceed against the bank in a proper State court to have the validity of his claim judicially determined. *Bank of Bethel v. Pahquioque Bank*, 14 Wall. 383.

"*Court of competent jurisdiction.*" — A district court of the United States is such a court. *Re Platt*, 1 Ben. 534. Claims of depositors when proved to the satisfaction of the comptroller have the same efficacy as judgments, and bear interest from the time demand was made. An action may be maintained to recover the interest. *National Bank v. Mechanics' Nat. Bank*, 94 U. S. 437. If the bank, by its default, initiated proceedings which resulted in a transfer of the money of its depositors to a receiver, and thus put it out of its own power to pay its depositors when called upon to do so, they are entitled to interest without having made a demand. Interest should be allowed by the comptroller if a sufficient fund is realized to pay all claims against the bank before the surplus is appropriated to stockholders. *Chemical Nat. Bank v. Bailey*, 12 Blatch. 480. Interest may be recovered in an action of *assumpsit* against the bank, but not against the receiver or comptroller. *Id.* The language that "after full provision has been first made for refunding to the United States any such deficiency in redeeming the notes of such association," excludes the idea of priority in favor of the government over private creditors in the assets of a national bank for payment of deposits made therein to the credit of United States officers, including the treasurer, a disbursing officer, and the register of a district court, after the fund which may be realized from the bonds held by the United States as security for such deposits is exhausted. 13 A. G. Op. 528.

SECT. 5237. — *Hendee v. Conn. & P. R. R.*, 26 F. R. 677; *Witters v. Foster*, *Id.* 737.

SECT. 5238. — *Gibson v. Peters*, 35 F. R. 721.

SECT. 5239. — See §§ 1, 3 of St. 1876, stated in note to § 5220, *supra*. *Movius v. Lee*, 24 Blatch. 291; 30 F. R. 298; *Stephens v. Monongahela Bank*, 88 Penn. St. 157; *Cadle v. Tracy*, 11 Blatch. 101. A shareholder cannot maintain a suit against the president and directors of the bank for their mismanagement and negligence, which causes the bank to become insolvent and his stock worthless. *Conway v. Halsey*, 44 N. J. L. 462. But where the bank and its receiver and the Comptroller of the Currency refuse to bring or sanction a suit for this cause, a stockholder, who had contributed to pay the debts of the bank, was held entitled to bring such suit in a State court. *Nelson v. Burrows*, 9 Abb. N. Cas. 280. And where the receiver was one of the directors charged with fault, it was held that the suit was maintainable by the stockholders in a State court, or by one or more of them, on behalf of all, if numerous. *Brinckerhoff v. Bostwick*, 88 N. Y. 52.

Bank officers are not liable for errors of judgment in making loans and discounts in good faith and for what they deemed to be the best interests of the bank. *Witters v. Sowles*, 31 F. R. 1.

SECT. 5240. — Amended by St. Feb. 19, 1875, ch. 89 (18 St. 329), by striking out all after the first sentence of the section, and substituting therefor the following: —

"That all persons appointed to be examiners of national banks not located in the redemption-cities specified in section five thousand one hundred and ninety-two of the Revised Statutes of the United States,



or in any one of the States of Oregon, California, and Nevada, or in the Territories, shall receive compensation for such examinations as follows: For examining national banks having a capital less than \$100,000, \$20; those having a capital of \$100,000, and less than \$300,000, \$25; those having a capital of \$300,000, and less than \$400,000, \$35; those having a capital of \$400,000 and less than \$500,000, \$40; those having a capital of \$500,000 and less than \$600,000, \$50; those having a capital of \$600,000 and over, \$75, — which amounts shall be assessed by the Comptroller of the Currency upon, and paid by, the respective associations so examined; and shall be in lieu of the compensation and mileage heretofore allowed for making said examinations. And persons appointed to make examination of national banks in the cities named in Rev. Stats. § 5192, or in any one of the States of California, Oregon, and Nevada, or in the Territories, shall receive such compensation as may be fixed by the Secretary of the Treasury upon the recommendation of the Comptroller of the Currency; and the same shall be assessed and paid in the manner hereinbefore provided."

A bank examiner represents the government, and is not an officer or agent of the bank, and cannot bind it by any act done or undertaken in its behalf. *Witters v. Sewles*, 32 F. R. 762.

SECT. 5241. — This section implies that courts may exercise visitatorial powers over national banks; and as these powers are usually, if not always, exerted through the agency of a receiver, they are to be regarded as justifying the appointment of one in cases where the comptroller is not authorized to appoint. *Wright v. Merchants' Nat. Bank*, 1 *Flippin*, 568. Visitation in law is the act of a superior or superintending officer, who visits a corporation to examine into its manner of conducting business, and to enforce an observance of its laws or regulations. It means inspection, superintendence, direction, regulation. This section does not prohibit the service upon the officers of a national bank of compulsory State process to obtain the names of its depositors with a view to assessing them for the purposes of taxation. *First Nat. Bank v. Hughes*, 6 F. R. 737.

SECT. 5242. — *Armstrong v. Scott*, 36 F. R. 63, 65; *Citizens' Bank v. Dowd*, 35 *Id.* 340, 342; *Wright v. Merchants' Bank*, 3 *Cent. L. J.* 351; *National Shoe & L. Bank v. Mechanic Nat. Bank*, 89 N. Y. 467; *Venango Nat. Bank v. Taylor*, 56 *Penn. St.* 14; *Stewart v. Nat. Union Bank*, 2 *Abb. U. S.* 424. The meaning of this section is not different from the meaning of St. June 3, 1864, ch. 106, § 52. *National Security Bank v. Butler*, 129 U. S. 223. The latter part prohibiting attachment is not repealed by § 4 of St. 1882 (*ante*, note to § 5133). *Raynor v. Pacific Bank*, 93 N. Y. 371.

Insolvency is such a condition of affairs that the firm or concern is unable to meet its obligations as they mature in the usual course of business. An act of insolvency takes place when this state of affairs is demonstrated, and the firm or concern has actually failed to meet some of its obligations. *Roberts v. Hill*, 24 F. R. 571. A bank is in contemplation of insolvency when it becomes reasonably apparent to its officers that it will presently be unable to meet its obligations and will be obliged to suspend its ordinary operations. *Id.* "Insolvency" as used in this section means the same as it does in the bankruptcy act. If the bank is in contemplation of insolvency it is not necessary that the party to whom the transfer is made should be aware of it. *Case v. Citizens' Bank*, 2 *Woods*, 23. "Insolvency," as here used, means such an act as would be an act of insolvency on the part of an individual banker. *Irons v. Manufacturers' Nat. Bank*, 6 *Ess.* 301. A bank commits an act of insolvency simply by refusing to pay its obligations. *Market Bank v. Pacific Bank*, 30 *Hun*, 50.

*Preference. Intent.* — An intent to give a preference is presumed when a payment is made to a creditor by a bank whose officers know of its insolvency, and therefore know that it cannot pay all its creditors in full. This intent is not rebutted by showing that the debtor has also another motive, as an expectation of pecuniary or other benefit to himself; or by postponing the failure of the bank. *Roberts v. Hill*, *supra*, overruling 23 F. R. 311. In order to create a preference it must be given to secure or pay a pre-existing debt, and the giving of security to a person who loans money to the bank knowing it to be in



\* an embarrassed condition is not a preference over other creditors. *Casey v. Credit Mobilier*, 2 Woods, 77. As to preferences, see further *Security Bank v. Price*, 22 F. R. 697.

The transfer or payment, in order to be void, must be made after the commission of an act of insolvency, or in contemplation thereof, and with a view of giving a preference to one creditor over another, or with a view to prevent the application of the assets as provided by law. If the directors of a bank have voted to close it and go into liquidation, any transfer of its assets thereafter to a creditor, whereby he secures a preference, is presumed to be made with an intent to prefer him. *National Security Bank v. Price*, 22 F. R. 697. With respect to unrecorded transfers of the shares, no registry being required by statute, the failure to record is not evidence of fraud; and such a transfer will take precedence over a subsequent attachment in behalf of a creditor without notice. *Continental Nat. Bank v. Elliott Nat. Bank*, 7 F. R. 369; *Scott v. Pequonnock Nat. Bank*, 15 Id. 494. Where a bank cashier was also an executor, and in the latter capacity bought accepted bills of exchange which he deposited in the bank in a box belonging to the estate, the bills were held not to be assets of the bank upon its subsequent failure, and their transfer was not invalidated by this section. *Tuttle v. Frelinghuysen*, 38 N. J. Eq. 12. It is sufficient under this section to invalidate a transfer of assets that it is made in contemplation of insolvency, with a view to prevent their application in the manner prescribed in this chapter, or with a view to the preference of one creditor over another, and it is not necessary to such invalidity that there should be any knowledge or suspicion on the part of the creditor that the debtor is insolvent or contemplates insolvency. *National Security Bank v. Butler*, 129 U. S. 223.

No attachment can issue from a circuit court of the United States in an action against a national bank before judgment. And if such attachment is made on mesne process and then dissolved by a bond with sureties, the bond is void and the sureties discharged. If the sureties have received indemnity from the bank, a bill may be maintained against them by the receiver to compel them to transfer their collateral to him. *Pacific Nat. Bank v. Mixer*, 124 U. S. 721, reversing *Price v. Coleman*, 22 F. R. 694; *Bank of Montreal v. Fidelity Nat. Bank*, 1 N. Y. Suppl. 852; *First Nat. Bank v. La Due*, 40 N. W. (Minn.) 367. No attachment can be issued from a State court against a national bank before final judgment, whether such bank be located in this State or not. *Central Nat. Bank v. Richland Nat. Bank*, 52 How. Pr. 136; *Rhoner v. First Nat. Bank of Allentown*, 14 Hun, 126. See however *Southwick v. Nat. Bank of Memphis*, 7 Hun, 96. *Contra*, *Holmes v. Bank of Wilmington*, 18 S. C. 31; *Robinson v. Bank of New Berne*, 58 How. Pr. 306; 81 N. Y. 385. In the last case the prohibition was held to apply only to insolvent corporations or to such as are about to become so. In *Cracken v. Covington City Nat. Bank*, 4 F. R. 602, it was questioned whether the provision in § 5242 against attachments by State courts before final judgment is general and applicable to all national banking associations. That provision does not give the receiver a greater right of property than the bank possessed against the owner. *Corn Exchange Bank v. Blye*, 101 N. Y. 303; 37 Hun, 473. Under this section an attachment, invalid by reason of the bank's insolvency, is not made valid by further capital being afterwards acquired by the bank, and it is not estopped from questioning the validity of the attachment by paying in full a large amount of its debts after the attachment issued. *Raynor v. Pacific Bank*, 93 N. Y. 371; *Shoe & Leather Bank v. Mechanics' Bank*, 89 N. Y. 467. See *Harvey v. Allen*, 16 Blatch. 29, in notes to § 5226. The property of a national bank organized under this title, attached at the suit of an individual creditor, after the bank has become insolvent, cannot be subjected to sale for the payment of his demand, against the claim for the property by a receiver of the bank subsequently appointed. *National Bank v. Colby*, 21 Wall. 609.

The complaint, in an action brought by a receiver to recover the value of certain notes of a national bank which the defendant was alleged to have wrongfully converted, averred,



in one count, that one of the officers of the bank surreptitiously took the notes from its vaults and delivered them to the defendant, which he took with knowledge of the circumstances; in another count that the bank, in contemplation of insolvency, and with a view to prevent the application of its assets in the way prescribed by law, transferred them to the defendant, and it was held that there was no misjoinder of causes of action, nor an attempt to unite a common-law cause of action with a cause of action under the statute; the second count is not objectionable because it states merely conclusions of law. *Brown v. Carbonate Bank*, 34 F. R. 776.

In *Roberts v. Hill*, 23 Blatch. 191; 23 F. R. 311, which was a receiver's bill to set aside a pledge of a promissory note made by the officers of a national bank to the defendant's testate to secure a deposit, Wheeler, J., said: "The right to have the pledge set aside and recover the note or its proceeds depends entirely upon Rev. Stat. § 5242. There is no question about the validity of the deposit, nor but that the pledge would be good to secure it at common law. . . . What would be an act of insolvency is not defined, but would be the failure to redeem the circulating notes according to § 5226, as that is the only thing which would authorize the Comptroller of the Currency, before the act of June 30, 1876 (19 St. 63), to take possession of a national bank and appoint a receiver."



## TITLE LXIII.

## RIVERS AND HARBORS.

22 St. 7, ch. 22, provides for continuing the improvements of Galveston Harbor, Texas. 22 St. 30, ch. 44, provides for continuing the work on Davis Island Dam in the Ohio River. 22 St. 58, ch. 119, provides for the removal of obstructions at Hell Gate, New York; and by 25 St. 209, ch. 496, provision is made to prevent obstructive and injurious deposits in the harbor and adjacent waters of New York City. 22 St. 107, ch. 231, provides for the government and control of the harbor of refuge at Sand Beach, Lake Huron, Michigan. See also the river and harbor appropriation acts, 22 St. 191; 23 St. 133, 147, 148; 24 St. 310, 335; 25 St. 423; 21 St. 37 (see also 23 St. 1). 24 St. 329 creates the Mississippi River Commission, and 23 St. 144 creates the Missouri River Commission. By 23 St. 181, the Secretary of War is to report to Congress, each year, in his annual estimates, the number of persons employed in the office of Chief of Engineers to carry into effect the various appropriations for rivers and harbors, and the amount paid to each. As to the deflection of currents by piers, &c., see 25 St. 423. St. June 14, 1880, ch. 211 (21 St. 197), provides —

“SEC. 4. Whenever hereafter the navigation of any river, lake, harbor, or bay, or other navigable water of the United States, shall be obstructed or endangered by any sunken vessel or water-craft, it shall be the duty of the Secretary of War, upon satisfactory information thereof, to cause reasonable notice, of not less than 30 days, to be given, personally or by publication, at least once a week in the newspaper published nearest the locality of such sunken vessel or craft, to all persons interested in such vessel or craft, or in the cargo thereof, of the purpose of said Secretary, unless such vessel or craft shall be removed as soon thereafter as practicable by the parties interested therein, to cause the same to be removed. If such sunken vessel or craft and cargo shall not be removed by the parties interested therein as soon as practicable after the date of the giving of such notice by publication, or after such personal service of notice, as the case may be, such sunken vessel or craft shall be treated as abandoned and derelict, and the Secretary of War shall proceed to remove the same. Such sunken vessel or craft and cargo and all property therein when so removed shall, after reasonable notice of the time and place of sale, be sold to the highest bidder or bidders for cash, and the proceeds of such sales shall be deposited in the Treasury of the United States to the credit of a fund for the removal of such obstructions to navigation, under the direction of the Secretary of War, and to be paid out for that purpose on his requisition therefor. The provisions of this act shall apply to all such wrecks whether removed under this act or under any other act of Congress. Such sum of money as may be necessary to execute this section of this act is hereby appropriated, out of any money in the Treasury of the United States not otherwise appropriated, to be paid out on the requisition of the Secretary of War.”

By St. Aug. 2, 1882, ch. 375 (22 St. 208), the power and authority granted under and by virtue of this § 4 —

“are enlarged so that the Secretary of War may, in his discretion, sell and dispose of any such sunken craft, vessel, or cargo, or property therein, before the raising or removal thereof, according to the same regulations that are in the said act prescribed for the sale of the same after the removal thereof; and all laws and parts of laws inconsistent herewith are hereby repealed. No tolls or operating charges whatsoever shall be levied or collected upon any vessel boats, dredges, craft, or other water-craft passing through any canal or other work for the improvement of navigation belonging to the United States.”

St. April 24, 1888, ch. 194 (25 St. 94), provides, —

“That the Secretary of War may cause proceedings to be instituted, in the name of the United States, in any court having jurisdiction of such proceedings, for the acquirement by condemnation of any



land, right of way, or material needed to enable him to maintain, operate or prosecute works for the improvement of rivers and harbors for which provision has been made by law; such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted: *Provided, however,* That when the owner of such land, right of way, or material shall fix a price for the same, which in the opinion of the Secretary of War, shall be reasonable, he may purchase the same at such price without further delay: *And provided further,* That the Secretary of War is hereby authorized to accept donations of lands or materials required for the maintenance or prosecution of such works."

22 St. 213, ch. 375 (see also 23 St. 153), provides —

"That in every case where surveys are made, the report thereon shall embrace such information concerning the commercial importance, present and prospective, of the improvement contemplated thereby and such general commercial statistics as the Secretary of War may be able to procure: *Provided,* That no survey shall be made of any of the above harbors or rivers until the Chief of Engineers shall have directed a preliminary examination of the same by the local engineer in charge of the district, and then only when such local engineer shall have made such examination and shall have reported to said Chief of Engineers that in his judgment said harbor or river is worthy of improvement and that the work is a public necessity."

23 St. 147, 148, §§ 4, 8 (see also 25 St. 497), provides —

"SEC. 4. That no tolls or operating charges whatsoever shall be levied or collected upon any vessel or vessels, dredges, or other passing water-craft through any canal or other work for the improvement of navigation belonging to the United States; and for the purpose of preserving and continuing the use and navigation of said canals, rivers, and other public works without interruption, the Secretary of War, upon the application of the chief engineer in charge of said works, is hereby authorized to draw his warrant or requisition from time to time upon the Secretary of the Treasury to pay the actual expenses of operating and keeping said works in repair, which warrants or requisitions shall be paid by the Secretary of the Treasury, out of any money in the Treasury not otherwise appropriated: *Provided, however,* That an itemized statement of said expenses shall accompany the annual report of the Chief of Engineers."

"SEC. 8. That whenever the Secretary of War shall have good reason to believe that any railroad or other bridge now or hereafter to be constructed over any of the navigable waters of the United States, under authority of the United States or of any State or Territory, is an obstruction to the free navigation of such waters, by reason of difficulty in passing the draw-opening or the raft-span of said bridge, by rafts, steamboats, or other water-craft, it shall be the duty of the said Secretary, on satisfactory proof thereof, to require the company or persons owning, controlling, or operating said bridge to cause such aids to the passage of said draw-opening or of said raft-span, or of both said draw-opening and raft-span to be constructed, placed, and maintained, at their own cost and expense, in the form of booms, dikes, piers, or other suitable and proper structures for the guiding of said rafts, steamboats, and other water-craft safely through said opening or span, or both said opening or span, as shall be specified in his order in that behalf; and on failure of the company or persons aforesaid to make and establish such additional structures within a reasonable time, the said Secretary shall proceed to cause the same to be built or made at the expense of the United States, and shall refer the matter without delay to the Attorney-General of the United States, whose duty it shall be to institute, in the name of the United States, proceedings in any circuit or district court of the United States in which such bridge, or any part thereof, is located, for the recovery of the cost thereof; and all moneys accruing from such proceedings shall be covered into the Treasury of the United States: *Provided,* That no greater sum than \$15,000 shall be required to be expended upon any one bridge in a single year: *Provided further,* That such sum of money as may be necessary to execute the provisions of this act is hereby appropriated, out of any money in the Treasury of the United States not otherwise appropriated, to be paid on the requisition of the Secretary of War."

24 St. 329 (see also 25 St. 209), prohibits by § 3, deposits in New York Harbor, except for improvements, and provides by § 2 —

"SEC. 2. That in places where harbor-lines have not been established, and where deposits of debris of mines or stamp works can be made without injury to navigation, within lines to be established by the Secretary of War, said officer may, and is hereby authorized to, cause such lines to be established; and within such lines such deposits may be made, under regulations to be from time to time prescribed by him."



SECT. 5244. — There being no constitutional grant to the general government of the shores of navigable waters and the soil under them, these were reserved to the States respectively at the time of Revolution; and the new States have the same rights, sovereignty, and jurisdiction over this subject as the original States. *Pollard v. Hagan*, 3 How. 212; *Martin v. Waddell*, 16 Pet. 367; *Pennsylvania v. Wheeling Bridge Co.*, 13 How. 518; *McCready v. Virginia*, 94 U. S. 391.

SECT. 5249. — 18 St. 506, ch. 166, was repealed by 25 St. 21.

SECT. 5254. — 22 St. 52, adds, after "River" in the first line, "and the Saint Croix River in the States of Wisconsin and Minnesota." See 18 St. 50, ch. 201; 23 St. 154, ch. 231; 25 St. 424, 443.

SECT. 5255. — 18 St. 43, ch. 165, provides for the payment of the bonds of this canal; directs the Secretary of War to take possession thereof, and make it free of toll, except to pay expenses, &c. By 21 St. 141, ch. 95, no tolls are to be charged or collected at the canal, but the Secretary of War is authorized to draw his warrants upon the Secretary of the Treasury to pay the actual expenses of operating and keeping the canal in repair. The latter act clearly implies authority in the Secretary of the Treasury to pay the warrants. 16 A. G. Op. 557.



## TITLE LXIV.

## RAILWAYS.

By 24 St. 554, §§ 2, 3; 25 St. 436, §§ 2, 3, provision is made as to receivers managing property according to the laws of the State in which the property is situated, with penalty for violation; and as to suits being brought against them without leave of court. By act of Oct. 1, 1888, ch. 1063 (25 St. 501), a board of arbitration or commission is created "for settling controversies and differences between railroad corporations and other common carriers engaged in interstate and Territorial transportation of property or passengers and their employees." By 25 St. 787, § 20, a party obstructing the track, or destroying any part, of a railroad, or the works thereof, &c., in the Indian Territory, shall be deemed guilty of malicious mischief; and also of murder, if any one is killed because of said obstruction, &c.

The Interstate Commerce act of Feb. 4, 1887, ch. 104 (24 St. 379), with the changes made by the act of March 2, 1889, ch. 382 (25 St. 855), is given below with the few decisions of the courts. See "The Annual Reports" of the Commission; "Interstate Commerce Commission Reports;" also "Interstate Commerce Reports" of The Lawyers' Co-operative Publishing Company. See also *Kentucky Bridge Co. v. Louisville R. Co.*, 37 F. R. 567; *Chicago R. Co. v. Burlington R. Co.*, 34 Id. 481; *Fargo v. Michigan*, 121 U. S. 230, 239; *Pennsylvania R. Co. v. Baltimore R. Co.*, 37 F. R. 129.

"That the provisions of this act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment, from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country: *Provided, however*, That the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State, and not shipped to or from a foreign country from or to any State or Territory as aforesaid.

"The term 'railroad' as used in this act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term 'transportation' shall include all instrumentalities of shipment or carriage.

"All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful. [*Ex parte Koehler*, 12 Sawyer, 341: 30 F. R. 667.]

"SEC. 2. That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and



declared to be unlawful. [*Ex parte Koehler*, 12 Sawyer, 446 ; 31 F. R. 315 ; *United States v. Tozer*, 37 F. R. 635.]

"SEC. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

"Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines ; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business. [*State v. Chicago R. Co.*, 33 F. R. 391 ; *United States v. Tozer*, *supra*.]

"SEC. 4. That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance ; but this shall not be construed as authorizing any common carrier within the terms of this act to charge and receive as great compensation for a shorter as for a longer distance : *Provided, however*, That upon application to the Commission appointed under the provisions of this act, such common carrier may, in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property ; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this act. [*Ex parte Koehler*, 12 Sawyer, 446 ; 31 F. R. 315 ; *United States v. Tozer*, *supra*.]

"SEC. 5. That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof ; and in any case of an agreement for the pooling of freights as aforesaid, each day of its continuance shall be deemed a separate offense.

"SEC. 6. That every common carrier subject to the provisions of this act shall print and keep for public inspection schedules showing the rates and fares and charges for the transportation of passengers and property which any such common carrier has established and which are in force at the time upon its railroad, as defined by the first section of this act. The schedules printed as aforesaid by any such common carrier shall plainly state the places upon its railroad between which property and passengers will be carried, and shall contain the classification of freight in force upon such railroad, and shall also state separately the terminal charges and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates and fares and charges. Such schedules shall be plainly printed in large type, of at least the size of ordinary pica, and copies for the use of the public shall be kept in every depot or station upon any such railroad, in such places and in such form that they can be conveniently inspected.

"Any common carrier subject to the provisions of this act receiving freight in the United States to be carried through a foreign country to any place in the United States shall also in like manner print and keep for public inspection, at every depot where such freight is received for shipment, schedules showing the through rates established and charged by such common carrier to all points in the United States beyond the foreign country to which it accepts freight for shipment ; and any freight shipped from the United States through a foreign country into the United States, the through rate on which shall not have been made public as required by this act, shall, before it is admitted into the United States from said foreign country, be subject to customs duties as if said freight were of foreign production ; and any law in conflict with this section is hereby repealed.

"No advance shall be made in the rates, fares, and charges which have been established and published as aforesaid by any common carrier in compliance with the requirements of this section, except after ten days' public notice, which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the increased rates, fares, or charges will go into effect ; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept for public inspection. Reductions in such published rates, fares, or charges may be made without previous public notice ; but whenever any such reduction is made, notice of the same shall immediately be publicly posted and the changes made shall immediately be made public by printing new schedules, or shall immediately be plainly indicated upon the schedules at the time in force and kept for public inspection.



"And when any such common carrier shall have established and published its rates, fares, and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith, than is specified in such published schedule of rates, fares, and charges as may at the time be in force.

"Every common carrier subject to the provisions of this act shall file with the Commission herein-after provided for copies of its schedules of rates, fares, and charges which have been established and published in compliance with the requirements of this section, and shall promptly notify said Commission of all changes made in the same. Every such common carrier shall also file with said Commission copies of all contracts, agreements, or arrangements with other common carriers in relation to any traffic affected by the provisions of this act to which it may be a party. And in cases where passengers and freight pass over continuous lines or routes operated by more than one common carrier, and the several common carriers operating such lines or routes establish joint tariffs of rates or fares or charges for such continuous lines or routes, copies of such joint tariffs shall also, in like manner, be filed with said Commission. Such joint rates, fares, and charges on such continuous lines so filed as aforesaid shall be made public by such common carriers when directed by said Commission, in so far as may, in the judgment of the Commission, be deemed practicable; and said Commission shall from time to time prescribe the measure of publicity which shall be given to such rates, fares, and charges, or to such part of them as it may deem it practicable for such common carriers to publish, and the places in which they shall be published; but no common carrier party to any such joint tariff shall be liable for the failure of any other common carrier party thereto to observe and adhere to the rates, fares, or charges thus made and published.

"If any such common carrier shall neglect or refuse to file or publish its schedules or tariffs of rates, fares, and charges as provided in this section, or any part of the same, such common carrier shall, in addition to other penalties herein prescribed, be subject to a writ of mandamus, to be issued by any circuit court of the United States in the judicial district wherein the principal office of said common carrier is situated or wherein such offense may be committed, and if such common carrier be a foreign corporation, in the judicial circuit wherein such common carrier accepts traffic and has an agent to perform such service, to compel compliance with the aforesaid provisions of this section; and such writ shall issue in the name of the people of the United States, at the relation of the Commissioners appointed under the provisions of this act; and failure to comply with its requirements shall be punishable as and for a contempt; and the said Commissioners, as complainants, may also apply, in any such circuit court of the United States, for a writ of injunction against such common carrier, to restrain such common carrier from receiving or transporting property among the several States and Territories of the United States, or between the United States and adjacent foreign countries, or between ports of transshipment and of entry and the several States and Territories of the United States, as mentioned in the first section of this act, until such common carrier shall have complied with the aforesaid provisions of this section of this act." [United States v. Tozer, *supra*.]

The first paragraph of the above § 6 is amended by 25 St. 855, § 1, by substituting in the second line "open to" for "for," and in the fifth line "route" for "railroad as defined by the first section of this act;" in the ninth line by striking out "upon such railroad," and by substituting for the last sentence the following:—

"Such schedules shall be plainly printed in large type, and copies for the use of the public shall be posted in two public and conspicuous places, in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected."

The second paragraph is amended by the same act in the fourth line by substituting "open to" for "for," and inserting "or office" after "depot."

The third paragraph is amended by striking out in the tenth line all after the word "charges," and substituting "shall only be made after three days' previous public notice to be given in the same manner that notice of an advance in rates must be given."

The fifth paragraph is amended by striking out in the twenty-first line all after "shall be published," and inserting—

"No advance shall be made in joint rates, fares, and charges, shown upon joint tariffs, except after ten days' notice to the Commission, which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the increased rates, fares, or charges will go into effect. No



reduction shall be made in joint rates, fares, and charges, except after three days' notice, to be given to the Commission as is above provided in the case of an advance of joint rates. The Commission may make public such proposed advances, or such reductions, in such manner as may, in its judgment, be deemed practicable, and may prescribe from time to time the measure of publicity which common carriers shall give to advances or reductions in joint tariffs. It shall be unlawful for any common carrier, party to any joint tariffs, to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of persons or property, or for any services in connection therewith, between any points as to which a joint rate, fare or charge is named thereon, than is specified in the schedule filed with the Commission in force at the time. The Commission may determine and prescribe the form in which the schedule required by this section to be kept open to public inspection shall be prepared and arranged, and may change the form from time to time as shall be found expedient."

"SEC. 7. That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being and being treated as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage or to evade any of the provisions of this act.

"SEC. 8. That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

"SEC. 9. That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt. In any such action brought for the recovery of damages the court before which the same shall be pending may compel any director, officer, receiver, trustee, or agent of the corporation or company defendant in such suit to attend, appear, and testify in such case, and may compel the production of the books and papers of such corporation or company party to any such suit; the claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

"SEC. 10. That any common carrier subject to the provisions of this act, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall wilfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this act prohibited or declared to be unlawful, or who shall aid or abet therein, or shall willingly omit or fail to do any act, matter, or thing in this act required to be done, or shall cause or willingly suffer or permit any act, matter, or thing so directed or required by this act to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this act, or shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed \$5000 for each offense." [United States v. Tozer, *supra*.]

The above § 10 is amended by said 25 St. 857, § 2, by adding thereto the following:—

"*Provided*, That if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination in rates, fares, or charges, for the transportation of passengers or property, such person shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court.



"Any common carrier subject to the provisions of this act, or, whenever such common carrier is a corporation, any officer or agent thereof, or any person acting for or employed by such corporation, who, by means of false billing, false classification, false weighing, or false report of weight, or by any other device or means, shall knowingly and willfully assist, or shall willingly suffer or permit, any person or persons to obtain transportation for property at less than the regular rates then established and in force on the line of transportation of such common carrier, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding \$5000, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense.

"Any person and any officer or agent of any corporation or company who shall deliver property for transportation to any common carrier, subject to the provisions of this act, or for whom as consignor or consignee any such carrier shall transport property, who shall knowingly and willfully, by false billing, false classification, false weighing, false representation of the contents of the package, or false report of weight, or by any other device or means, whether with or without the consent or connivance of the carrier, its agent or agents, obtain transportation for such property at less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud, which is hereby declared to be a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject for each offense to a fine of not exceeding \$5000 or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court.

"If any such person, or any officer or agent of any such corporation or company, shall, by payment of money or other thing of value, solicitation, or otherwise, induce any common carrier subject to the provisions of this act, or any of its officers or agents, to discriminate unjustly in his, its, or their favor as against any other consignor or consignee in the transportation of property, or shall aid or abet any common carrier in any such unjust discrimination, such person, or such officer or agent of such corporation or company, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding \$5000, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense; and such person, corporation, or company shall also, together with said common carrier, be liable, jointly or severally, in an action on the case to be brought by any consignor or consignee discriminated against in any court of the United States of competent jurisdiction for all damages caused by or resulting therefrom."

"SEC. 11. That a Commission is hereby created and established to be known as the Inter-State Commerce Commission, which shall be composed of five Commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. The Commissioners first appointed under this act shall continue in office for the term of two, three, four, five, and six years, respectively, from the first day of January, anno Domini eighteen hundred and eighty-seven, the term of each to be designated by the President; but their successors shall be appointed for terms of six years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the Commissioner whom he shall succeed. Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. Not more than three of the Commissioners shall be appointed from the same political party. No person in the employ of or holding any official relation to any common carrier subject to the provisions of this act, or owning stock or bonds thereof, or who is in any manner pecuniarily interested therein, shall enter upon the duties of or hold such office. Said Commissioners shall not engage in any other business, vocation, or employment. No vacancy in the Commission shall impair the right of the remaining Commissioners to exercise all the powers of the Commission.

"SEC. 12. That the Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; and for the purposes of this act the Commission shall have power to require the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation, and to that end may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section.

"And any of the circuit courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any common carrier subject



to the provisions of this act, or other person, issue an order requiring such common carrier or other person to appear before said Commission (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying; but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding."

The above § 12 is amended by 25 St. 858, § 3, by substituting for the last sentence beginning with "and for the purposes" in the seventh line the following:—

"And the Commission is hereby authorized and required to execute and enforce the provisions of this act; and, upon the request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute, under the direction of the Attorney-General of the United States, all necessary proceedings for the enforcement of the provisions of this act, and for the punishment of all violations thereof; and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and for the purposes of this act the Commission shall have power to require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation, and in case of disobedience to a subpoena, the Commission, or any party to a proceeding before the Commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section."

"SEC. 13. That any person, firm, corporation, or association, or any mercantile, agricultural, or manufacturing society, or any body politic or municipal organization complaining of anything done or omitted to be done by any common carrier subject to the provisions of this act in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the charges thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time, to be specified by the Commission. If such common carrier, within the time specified, shall make reparation for the injury alleged to have been done, said carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

"Said Commission shall in like manner investigate any complaint forwarded by the railroad commissioner or railroad commission of any State or Territory, at the request of such commissioner or commission, and may institute any inquiry on its own motion in the same manner and to the same effect as though the complaint had been made.

"No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

"SEC. 14. That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall include the findings of fact upon which the conclusions of the Commission are based, together with its recommendation as to what reparation, if any, should be made by the common carrier to any party or parties who may be found to have been injured; and such findings so made shall thereafter, in all judicial proceedings, be deemed prima facie evidence as to each and every fact found.

"All reports of investigations made by the Commission shall be entered of record, and a copy thereof shall be furnished to the party who may have complained, and to any common carrier that may have been complained of."

The above § 14 is amended by 25 St. 859, § 4, by adding thereto the following:—

"The Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and such authorized publications shall be competent evidence of the reports and decisions of the Commission therein contained, in all courts of the United States, and of the several States, without any further proof or authentication thereof. The Commission may also cause to be printed for early distribution its annual reports."

"SEC. 15. That if in any case in which an investigation shall be made by said Commission it shall be made to appear to the satisfaction of the Commission, either by the testimony of witnesses or other



evidence, that anything has been done or omitted to be done in violation of the provisions of this act, or of any law cognizable by said Commission, by any common carrier, or that any injury or damage has been sustained by the party or parties complaining, or by other parties aggrieved in consequence of any such violation, it shall be the duty of the Commission to forthwith cause a copy of its report in respect thereto to be delivered to such common carrier, together with a notice to said common carrier to cease and desist from such violation, or to make reparation for the injury so found to have been done, or both, within a reasonable time, to be specified by the Commission; and if, within the time specified, it shall be made to appear to the Commission that such common carrier has ceased from such violation of law, and has made reparation for the injury found to have been done, in compliance with the report and notice of the Commission, or to the satisfaction of the party complaining, a statement to that effect shall be entered of record by the Commission, and the said common carrier shall thereupon be relieved from further liability or penalty for such particular violation of law.

"SEC. 16. That whenever any common carrier, as defined in and subject to the provisions of this act, shall violate or refuse or neglect to obey any lawful order or requirement of the Commission in this act named, it shall be the duty of the Commission, and lawful for any company or person interested in such order or requirement, to apply, in a summary way, by petition, to the circuit court of the United States sitting in equity in the judicial district in which the common carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience, as the case may be; and the said court shall have power to hear and determine the matter, on such short notice to the common carrier complained of as the court shall deem reasonable; and such notice may be served on such common carrier, his or its officers, agents, or servants, in such manner as the court shall direct; and said court shall proceed to hear and determine the matter speedily as a court of equity, and without the formal pleadings and proceedings applicable to ordinary suits in equity, but in such manner as to do justice in the premises; and to this end such court shall have power, if it think fit, to direct and prosecute, in such mode and by such persons as it may appoint, all such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition; and on such hearing the report of said Commission shall be *prima facie* evidence of the matters therein stated, and if it be made to appear to such court, on such hearing or on report of any such person or persons, that the lawful order or requirement of said Commission drawn in question has been violated or disobeyed, it shall be lawful for such court to issue a writ of injunction or other proper process, mandatory or otherwise, to restrain such common carrier from further continuing such violation or disobedience of such order or requirement of said Commission, and enjoining obedience to the same; and in case of any disobedience of any such writ of injunction or other proper process, mandatory or otherwise, it shall be lawful for such court to issue writs of attachment, or any other process of said court incident or applicable to writs of injunction or other proper process, mandatory or otherwise, against such common carrier, and if a corporation, against one or more of the directors, officers, or agents of the same, or against any owner, lessee, trustee, receiver, or other person failing to obey such writ of injunction or other proper process, mandatory or otherwise; and said court may, if it shall think fit, make an order directing such common carrier or other person so disobeying such writ of injunction or other proper process, mandatory or otherwise, to pay such sum of money not exceeding for each carrier or person in default the sum of \$100 for every day after a day to be named in the order that such carrier or other person shall fail to obey such injunction or other proper process, mandatory or otherwise; and such moneys shall be payable as the court shall direct, either to the party complaining, or into court to abide the ultimate decision of the court, or into the Treasury; and payment thereof may, without prejudice to any other mode of recovering the same, be enforced by attachment or order in the nature of a writ of execution, in like manner as if the same had been recovered by a final decree in personam in such court. When the subject in dispute shall be of the value of \$2000 or more, either party to such proceeding before said court may appeal to the Supreme Court of the United States, under the same regulations now provided by law in respect of security for such appeal; but such appeal shall not operate to stay or supersede the order of the court or the execution of any writ or process thereon; and such court may, in every such matter, order the payment of such costs and counsel fees as shall be deemed reasonable. Whenever any such petition shall be filed or presented by the Commission it shall be the duty of the district attorney, under the direction of the Attorney-General of the United States, to prosecute the same; and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States. For the purposes of this act, excepting its penal provisions, the circuit courts of the United States shall be deemed to be always in session."

The above § 16 is amended by 25 St. 889, § 5 in the second line by inserting after "obey" the words "or perform;" in the third line by substituting for "in this act named" the words "created by this act, not founded upon a controversy requiring a trial by jury



as provided by the seventh amendment to the Constitution of the United States;" in the fourth line by substituting for "the duty of" the words "lawful for;" and by substituting for "and lawful" the word "or;" and in the twenty-first line by inserting before "report" the words "findings of fact in the"; and by inserting before the last sentence the following:—

"If the matters involved in any such order or requirement of said Commission are founded upon a controversy requiring a trial by jury, as provided by the seventh amendment to the Constitution of the United States, and any such common carrier shall violate or refuse or neglect to obey or perform the same, after notice given by said Commission as provided in the fifteenth section of this act, it shall be lawful for any company or person interested in such order or requirement to apply in a summary way by petition to the circuit court of the United States sitting as a court of law in the judicial district in which the carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience as the case may be; and said court shall by its order then fix a time and place for the trial of said cause, which shall not be less than twenty nor more than forty days from the time said order is made, and it shall be the duty of the marshal of the district in which said proceeding is pending, to forthwith serve a copy of said petition, and of said order, upon each of the defendants, and it shall be the duty of the defendants to file their answers to said petition within ten days after the service of the same upon them as aforesaid. At the trial of the findings of fact of said Commission as set forth in its report shall be *prima facie* evidence of the matters therein stated, and if either party shall demand a jury or shall omit to waive a jury the court shall, by its order, direct the marshal forthwith to summon a jury to try the cause; but if all the parties shall waive a jury in writing, then the court shall try the issues in said cause and render its judgment thereon. If the subject in dispute shall be of the value of \$2000 or more either party may appeal to the Supreme Court of the United States under the same regulations now provided by law in respect to security for such appeal; but such appeal must be taken within twenty days from the day of the rendition of the judgment of said circuit court. If the judgment of the circuit court shall be in favor of the party complaining, he or they shall be entitled to recover a reasonable counsel or attorney's fee, to be fixed by the court, which shall be collected as part of the costs in the case."

"SEC. 17. That the Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. A majority of the Commission shall constitute a quorum for the transaction of business, but no Commissioner shall participate in any hearing or proceeding in which he has any pecuniary interest. Said Commission may, from time to time, make or amend such general rules or orders as may be requisite for the order and regulation of proceedings before it, including forms of notices and the service thereof, which shall conform, as nearly as may be, to those in use in the courts of the United States. Any party may appear before said Commission and be heard, in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of either party interested. Said commission shall have an official seal, which shall be judicially noticed. Either of the members of the Commission may administer oaths and affirmations. [Amended by 25 St. 861, § 6, by adding to the end thereof the words 'and sign subpoenas.']

"SEC. 18. That each Commissioner shall receive an annual salary of \$7500, payable in the same manner as the salaries of judges of the courts of the United States. The Commission shall appoint a secretary, who shall receive an annual salary of \$3500, payable in like manner. The Commission shall have authority to employ and fix the compensation of such other employees as it may find necessary to the proper performance of its duties, subject to the approval of the Secretary of the Interior.

"The Commission shall be furnished by the Secretary of the Interior with suitable offices and all necessary office supplies. Witnesses summoned before the Commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

"All of the expenses of the Commission, including all necessary expenses for transportation incurred by the Commissioners, or by their employees under their orders, in making any investigation in any other places than in the city of Washington, shall be allowed and paid, on the presentation of itemized vouchers therefor approved by the chairman of the Commission and the Secretary of the Interior. [Amended by 25 St. 861, § 7, by striking out in the third line the words 'salaries of,' and in the eighth line the words 'subject to the approval of the Secretary of the Interior,' by inserting in place of the first sentence of the second paragraph the words 'until otherwise provided by law, the Commission may hire suitable offices for its use, and shall have authority to procure all necessary office supplies,' and in the sixteenth line by inserting after 'investigation' the words 'or upon official business;' and by striking out the last words 'and the Secretary of the Interior.']



"SEC. 19. That the principal office of the Commission shall be in the city of Washington, where its general sessions shall be held; but whenever the convenience of the public or of the parties may be promoted or delay or expense prevented thereby, the Commission may hold special sessions in any part of the United States. It may, by one or more of the Commissioners, prosecute any inquiry necessary to its duties, in any part of the United States, into any matter or question of fact pertaining to the business of any common carrier subject to the provisions of this act.

"SEC. 20. That the Commission is hereby authorized to require annual reports from all common carriers subject to the provisions of this act, to fix the time and prescribe the manner in which such reports shall be made, and to require from such carriers specific answers to all questions upon which the Commission may need information. Such annual reports shall show in detail the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same; the dividends paid, the surplus fund, if any, and the number of stockholders; the funded and floating debts and the interest paid thereon; the cost and value of the carrier's property, franchises, and equipment; the number of employees and the salaries paid each class; the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance-sheet. Such reports shall also contain such information in relation to rates or regulations concerning fares or freights, or agreements, arrangements, or contracts with other common carriers, as the Commission may require; and the said Commission may, within its discretion, for the purpose of enabling it the better to carry out the purposes of this act, prescribe (if in the opinion of the Commission it is practicable to prescribe such uniformity and methods of keeping accounts) a period of time within which all common carriers subject to the provisions of this act shall have, as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept.

"SEC. 21. That the Commission shall, on or before the first day of December in each year, make a report to the Secretary of the Interior, which shall be by him transmitted to Congress, and copies of which shall be distributed as are the other reports issued from the Interior Department. This report shall contain such information and data collected by the Commission as may be considered of value in the determination of questions connected with the regulation of commerce, together with such recommendations as to additional legislation relating thereto as the Commission may deem necessary."

The above § 21 is amended by 25 St. 862, § 8, by striking out in the second line the words "to the Secretary of the Interior," and in the third line the words "by him," in the fourth line by striking out "issued from the Interior Department," and substituting "transmitted to Congress," and by adding to the end thereof the words "and the names and compensation of the persons employed by said Commission."

"SEC. 22. That nothing in this act shall apply to the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the issuance of mileage, excursion, or commutation passenger tickets; nothing in this act shall be construed to prohibit any common carrier from giving reduced rates to ministers of religion; nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees, and nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies: *Provided*, That no pending litigation shall in any way be affected by this act." [*Ex parte Koehler*, 12 Sawyer, 440; 34 F. R. 315.]

Amended by 25 St. 862, § 9, by substituting "prevent" for "apply to" in the first line; by inserting after "thereat" in the fourth line the words "or the free carriage of destitute and homeless persons transported by charitable societies, and the necessary agents employed in such transportation;" and by inserting after "religion" in the seventh line the words —

"or to municipal governments for the transportation of indigent persons, or to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers and of Soldiers' and Sailors' Orphan Homes, including those about to enter and those returning home after discharge, under arrangements with the boards of managers of said homes."



Section 10 of 25 St. 862, is new, and is as follows : —

“That the circuit and district courts of the United States shall have jurisdiction upon the relation of any person or persons, firm, or corporation, alleging such violation by a common carrier, of any of the provisions of the act to which this is a supplement and all acts amendatory thereof, as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper, to issue a writ or writs of mandamus against said common carrier, commanding such common carrier to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the writ: *Provided*, That if any question of fact as to the proper compensation to the common carrier for the service to be enforced by the writ is raised by the pleadings, the writ of peremptory mandamus may issue, notwithstanding such question of fact is undetermined, upon such terms as to security, payment of money into the court, or otherwise, as the court may think proper, pending the determination of the question of fact: *Provided*, That the remedy hereby given by writ of mandamus shall be cumulative, and shall not be held to exclude or interfere with other remedies provided by this act or the act to which it is a supplement.”

By 25 St. 530 it is provided —

“That hereafter it shall be the duty of the Interstate Commerce Commission to include in their annual report to Congress a statement showing in detail their expenditures for each fiscal year, including the number of persons employed and the amount of compensation to each.”

25 St. 954 provides “that hereafter expenses of the Interstate Commerce Commission shall be audited by the proper accounting officers of the Treasury.” 25 St. 382, ch. 772 (see p. 978) provides that subsidized railroads shall maintain telegraph lines affording equal facilities to connecting lines, &c.; and the Interstate Commerce Commission is given liberal powers as to compelling compliance, &c.

SECT. 5256. — See note, § 5263. The appropriation act, 19 St. 121, ch. 246, provides that before conveyance of any land granted to any railroad company by the United States, payment shall be made into the United States Treasury of the cost of surveying, selecting, and conveying the same, unless the company is exempted by law therefrom. This is general legislation. *N. O. P. R. Co. v. United States*, 124 U. S. 128. 24 St. 488, ch. 345, provides for a commission to investigate the books, accounts, and methods of railroads which have received aid from the United States, &c. By 18 St. 111, ch. 331, officers or agents of the Pacific railroads who refuse to operate and use the roads and telegraphs under their respective control as continuous lines, and to allow equal advantages, &c., to each road are guilty of a misdemeanor; the Union Pacific road and its branches, upon failure to comply with the act, are made liable in damages to parties aggrieved, &c. See *United States v. Union Pacific R. Co.*, 3 Dillon, 524. 18 St. 482, ch. 152, grants to railroads duly organized under the laws of any State or Territory, except the District of Columbia, or by Congress, upon filing proofs of their organization with the Secretary of the Interior, the right of way through the United States public lands. See note § 2353, *ante*; *Red River R. Co. v. Sture*, 32 Minn. 95; *United States v. Chaplin*, 12 Sawyer, 604; 31 F. R. 890. 20 St. 169, ch. 316, establishes the office of Auditor of Railroad Accounts as a bureau of the Interior Department. 20 St. 56, ch. 96, provides as to the earnings, payments, and sinking fund of the Pacific roads and the enforcement of the rights of the United States. See, also, 18 St. 200, ch. 414, which requires these roads to pay the five per cent on net earnings due the United States. As to the transmission of telegrams by railroad companies having telegraph lines, see 21 St. 31, ch. 35. Upon the Pacific Railroad system, see *W. U. Tel. Co. v. U. P. R. Co.*, 3 F. R. 1; *U. P. R. Co. v. Burlington R. Co.*, Id. 106; *C. B. U. P. R. Co. v. W. U. Tel. Co.*, Id. 417; *W. U. Tel. Co. v. U. P. R. Co.*, Id. 423, 721; *Hughes v. N. P. R. Co.*, 18 Id. 106; *United States v. C. P. R. Co.*, 118 U. S. 235; *U. P. R. Co. v. United States*, 99 Id. 700; *U. P. R. Co. v. Hall*, 91 Id. 343; *United States v. U. P. R. Co.*, Id. 72; 11 Ct. Cl. 1; *United States v. U. P. R. Co.*, 98 U. S. 569;



11 Blatch. 385; *D. P. R. Co. v. United States*, 12 Ct. Cl. 237; *U. P. R. Co. v. United States*, 13 Ct. Cl. 401; *U. P. R. Co. v. Leavenworth R. Co.*, 29 F. R. 728.

SECT. 5258. — *Hardy v. Atchison R. Co.*, 5 Pac. Rep. 6. The intention was to remove trammels upon transportation between different States, and to prevent their creation in future. It was not intended, even if competent for Congress to authorize any such proceeding, to invade the domain of private contracts, and annul all such as had been made on the basis of existing legislation and means of interstate communication. *Railroad Company v. Richmond*, 19 Wall. 584. See *Kentucky Co. v. Louisville Co.*, 37 F. R. 567, 629, 633.

SECT. 5260. — 16 A. G. Op. 516. 20 St. 420, ch. 183, provides for the settlement of the accounts of the Pacific roads, for government transportation, at the Treasury Department.

SECT. 5261. — These suits are within the operation of the general rules of the Supreme Court regulating appeals from the Court of Claims. *U. P. R. Co. v. United States*, 116 U. S. 154.

SECT. 5262. — The Union Pacific Railroad Company may, without reference to the citizenship of the adverse party, sue and be sued in the circuit court of the United States for the district of Nebraska. *Bauman v. Union Pacific R. Co.*, 3 Dillon, 367. The circuit court for the district of Iowa has jurisdiction in mandamus to compel the Union Pacific Railroad Company to operate its road as required by law, if any part of the road is in the district of Iowa, and under the act of June 20, 1874, service of process may be made upon the president or general superintendent of the company, found in the district of Iowa. *United States v. Union Pacific R. Co.*, 3 Dillon, 524; 2 Id. 527. There must be jurisdiction over the company by service upon it. *Hall v. Union Pacific R. Co.*, 3 Dillon, 515. *Quære*: Whether the circuit court for the district of Iowa can acquire jurisdiction over the Union Pacific Railroad Company under this act. Id. The sanction of the Attorney-General of the United States is not necessary in order to enable private persons who suffer damage and inconvenience from the failure of the company to operate its road as required by law, to institute proceedings under this section. Id.; 91 U. S. 343.



## TITLE LXV.

## TELEGRAPHS.

THE provisions of this title are an appropriate regulation of commercial intercourse among the States within the power entrusted to Congress to regulate commerce and its power over the postal service, and are not limited to such military and post roads as are upon the public domain. *Pensacola Tel. Co. v. W. U. Tel. Co.*, 96 U. S. 1; 2 Woods, 643; *W. U. Tel. Co. v. Atlantic Tel. Co.*, 5 Nev. 102. The right granted under them is not such a franchise as exempts the telegraph company from taxes or excises imposed by a State in which its lines are constructed and operated. *W. U. Tel. Co. v. Massachusetts*, 125 U. S. 530. By accepting them, the company becomes an agent of the United States for government business, and State laws taxing messages beyond the State, or government messages, are invalid. *Leloup v. Mobile*, 127 U. S. 640; *Telegraph Co. v. Texas*, 105 Id. 460; *W. U. Tel. Co. v. Pendleton*, 122 Id. 347. A municipal license tax on such company is valid. *Osborne v. Mobile*, 16 Wall. 479; *Mobile v. Leloup*, 76 Ala. 401. And so is a State tax upon the shares of its capital stock (*A. G. v. W. U. Tel. Co.*, 33 F. R. 129); or upon its property located within the State. *Telegraph Co. v. Massachusetts*, 125 U. S. 530. Under them, a railroad cannot grant to a telegraph company the exclusive right to construct a line over its right of way as against other telegraph companies. *Pensacola Tel. Co. v. W. U. Tel. Co.*, 96 U. S. 1; 2 Woods, 643; *W. U. Tel. Co. v. American U. Tel. Co.*, 9 Biss. 72; *Same v. K. & P. R. Co.*, 4 F. R. 284; *Same v. B. & O. Tel. Co.*, 19 F. R. 660; 22 F. R. 133. See *Cal. Tel. Co. v. Alta Tel. Co.*, 22 Cal. 398. As to the taxation of telegraph companies, see *Ratterman v. W. U. Tel. Co.*, 127 U. S. 411.

SECT. 5263. — See note, § 3964, and 25 St. 382, authorizing subsidized railroad companies to maintain telegraph lines. 21 St. 30, ch. 35, authorizes telegrams to be transmitted by railroad companies which may have telegraph lines and which file their written acceptance of Rev. Stats. Tit. 65, at rates fixed by the government according to said Tit. 65. 22 St. 173, 371, amended by 23 St. 50, provides for telegraph cables across the Atlantic. Such cables, terminating upon our territory, come within the regulating power of Congress, which may prescribe the rules upon which they shall be operated, and fix for them a tariff of charges. 12 A. G. Op. 337; 14 Id. 63. Notwithstanding § 5263, telegraph companies must acquire their right of way by purchase or contract, if the State law does not allow condemnation. *Am. U. Tel. Co. v. M. & C. R. Co.*, 5 Cinn. L. Bul. 858. As to obstructing navigation, see *Stephens Trans. Co. v. W. U. Tel. Co.*, 8 Ben. 502. As to obstructing or injuring telegraphs in the Indian Territory, see 25 St. 787, § 21. As to the protection of submarine cables, see 25 St. 41.

SECT. 5266. — The act of June 8, 1872, was deemed to supersede the cited provision of 1866. 2 Com. D. 2518. See 14 A. G. Op. 123, 278; 15 Id. 579.

SECT. 5267. — See note, § 223. The remedy here provided for does not apply in the absence of the written acceptance. 15 A. G. Op. 555.

SECT. 5268. — A telegraph company, which has not filed such acceptance, has no right to carry its line over a bridge across navigable water. *Chicago & A. B. Co. v. Pacific M. T. Co.*, 36 Kan. 113.

SECT. 5269. — 19 St. 252 adds at the end of this section —

“to be recovered by an action or actions at law in any district court of the United States.”



## TITLE LXVI.

## EXTRADITION.

INTERNATIONAL extradition of fugitives is a matter of comity, and, apart from treaty stipulations, it is the settled policy of this country not to make such extradition. 6 A. G. Op. 85, 431; 2 Id. 559; 3 Id. 661; 2 Id. 452, 559; 1 Id. 509; *Holmes's Case*, 14 Pet. 593; *United States v. Watts*, 8 Sawyer, 370; *Re Metzger*, 5 How. 176; *United States v. Davis*, 2 Sumner, 483; *Re Dos Santos*, 2 Brock. 493; *Re British Prisoners*, 1 Wood. & M. 66; *Adrianse v. Lagrave*, 59 N. Y. 110; *Re Washburn*, 4 Johns. Ch. 105; 1 Kent, Com. 36; *Com. v. Hawes*, 13 Ky. 697; *United States v. Rauscher*, 119 U. S. 407; *Benson v. McMahon*, 127 U. S. 457. It is not the right of individuals, but only of the foreign government. *Re Ferrelle*, 28 F. R. 878; 24 Blatch. 155. The several States have no means of negotiation with foreign nations and cannot exercise the power of international extradition. *Holmes v. Jennison*, 14 Pet. 540; *Ex parte Holmes*, 12 Vt. 631; 3 A. G. Op. 559; *Ableman v. Booth*, 21 How. 506; *Tarble's Case*, 13 Wall. 397; *Re Metzger*, 5 How. 176; *Ex parte Morgan*, 20 F. R. 298; *People v. Curtis*, 50 N. Y. 321. As to who is a fugitive from justice, see *Roberts v. Reilly*, 116 U. S. 80; *Ex parte Rengel*, 114 U. S. 642; *Ex parte Brown*, 28 F. R. 653; *Re Roberts*, 24 Id. 132; *State v. Burner*, 37 Minn. 436; *Jones v. Leonard*, 50 Iowa, 106; *Kingsbury's Case*, 106 Mass. 223. Legislation in restraint of liberty, especially when summary, is strictly construed. *Ex parte Morgan*, 20 F. R. 298.

SECT. 5270. — The thirty-eight words following "government" in second line are substituted for the following in the cited act: "It shall and may be lawful for any of the justices of the Supreme Court or judges of the several district courts of the United States, and the judges of the several State courts, and the commissioners authorized so to do by any of the courts of the United States, are hereby severally vested with power, jurisdiction, and authority." If a person has been discharged, he may be rearrested in a proper case under the warrant of another judge with a view to the re-examination of the case. 10 A. G. Op. 501. Evidence of insanity is admissible in proceedings before a commissioner for the extradition of one who is charged with an extraditable offence under the treaty of 1842 with Great Britain and §§ 5270, 5320, to explain what has been proved in support of the charge. 16 A. G. Op. 642.

SECT. 5271. — St. Aug. 3, 1882, ch. 378 (22 St. 215), repeals the substitute for this section contained in 19 St. 59, ch. 133, and so much of this section as is inconsistent therewith, and provides —

"That all hearings in cases of extradition under treaty stipulation or convention shall be held on land, publicly, and in a room or office easily accessible to the public.

"SEC. 2. That the following shall be the fees paid to commissioners in cases of extradition under treaty stipulation or convention between the government of the United States and any foreign government, and no other fees or compensation shall be allowed to or received by them: For administering an oath, 10 cents. For taking an acknowledgment, 25 cents. For taking and certifying depositions to file, 20 cents for each folio. For each copy of the same furnished to a party on request, 10 cents for each folio. For issuing any warrant or writ, and for any other service, the same compensation as is allowed clerks for like services. For issuing any warrant under art. 10 of the treaty of Aug. 9, 1842, between the United States and the Queen of the United Kingdom of Great Britain and Ireland, against any person charged with any crime or offense as set forth in said article, §2. For issuing any warrant under the



provision of the convention for the surrender of criminals, between the United States and the King of the French concluded at Washington Nov. 9, 1843, §2. For hearing and deciding upon the case of any person charged with any crime or offense, and arrested under the provisions of any treaty or convention, \$5 a day for the time necessarily employed.

"SEC. 3. That on the hearing of any case under a claim of extradition by any foreign government, upon affidavit being filed by the person charged setting forth that there are witnesses whose evidence is material to his defense, that he cannot safely go to trial without them, what he expects to prove by each of them, and that he is not possessed of sufficient means, and is actually unable to pay the fees of such witnesses, the judge or commissioner before whom such claim for extradition is heard may order that such witnesses be subpoenaed; and in such cases the costs incurred by the process, and the fees of witnesses, shall be paid in the same manner that similar fees are paid in the case of witnesses subpoenaed in behalf of the United States.

"SEC. 4. That all witness fees and costs of every nature in cases of extradition, including the fees of the commissioner, shall be certified by the judge or commissioner before whom the hearing shall take place to the Secretary of State of the United States, who is hereby authorized to allow the payment thereof out of the appropriation to defray the expenses of the judiciary; and the Secretary of State shall cause the amount of said fees and costs so allowed to be reimbursed to the government of the United States by the foreign government by whom the proceedings for extradition may have been instituted.

"SEC. 5. That in all cases where any depositions, warrants, or other papers or copies thereof shall be offered in evidence upon the hearing of any extradition case under Rev. Stats. Tit. 66, such depositions, warrants, and other papers, or the copies thereof, shall be received and admitted as evidence on such hearing for all the purposes of such hearing, if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that any deposition, warrant, or other paper or copies thereof, so offered, are authenticated in the manner required by this act."

The word "trial" in § 3 of St. 1882, is confined to such preliminary hearing only as was already allowable under the existing practice. *Re Wadge*, 15 F. R. 864.

The words "similar purposes," in § 5 of St. 1882, mean proof of criminality; and whether the original or a copy is offered, it is inadmissible unless receivable in proof of criminality. *Re McPhun*, 24 Blatch. 254; 30 F. R. 57; *Re Herres*, 33 Id. 165. That section restores, in substance, the provisions of 12 St. 84. *Re Behrendt*, 23 Blatch. 40; 22 F. R. 699. Under Rev. Stats. § 5596, sect. 5271 was in force in lieu of § 2 of St. 1848, and not in lieu of the act of 1860. *Re Stupp*, 12 Blatch. 501, 523; *Re Ross*, 2 Bond, 252. The United States diplomatic officer's certificate, if in proper form, is absolute proof. Id.; *Re Fowler*, 18 Blatch. 430; 4 F. R. 303; *Ex parte Lane*, 6 Id. 34. And oral proof will also serve to authenticate the documents or depositions. Id.; *Re Wadge*, 21 Blatch. 300; 15 F. R. 864; 16 Id. 332. So any depositions, or other documentary evidence, or copies of them, are competent, if so authenticated as to show that the tribunals of the country where the offence was committed would receive them in support of the same criminal charge. Id.; *Re Heinrich*, 5 Blatch. 414; *Re Farez*, 7 Id. 345; *Re Kelley*, 25 F. R. 268; *Re Charleston*, 34 Id. 531. The proof of proper authentication may be given orally by an expert. *Re Benson*, 34 F. R. 649. See 6 A. G. Op. 270; 8 Id. 420; 10 Id. 501.

If a United States treaty conflicts with a State law, the latter is void. *Ware v. Hylton*, 3 Dall. 199; *Owings v. Norwood*, 5 Cranch, 344; *Fairfax v. Hunter*, 7 Id. 603; *Hopkins v. Bell*, 3 Id. 453, 457; *Worcester v. Georgia*, 6 Pet. 515; *Pollard v. Kibbe*, 14 Id. 412; *Fisher v. Harden*, 1 Paine, 55; *Gordon v. Halliday*, 1 Wash. 291. If it conflicts with an act of Congress, the latter is void if it antedates the treaty, but valid if later in time. The Cherokee Tobacco Case, 11 Wall. 616; *United States v. The Peggy*, 1 Cranch, 103; *United States v. Tobacco Factory*, 1 Dillon, 266; *Ropes v. Clinch*, 8 Blatch. 304; *Gray v. Clinton Bridge*, 1 Woolw. 150; *Taylor v. Morton*, 2 Curtis, 454; *Re Vandervelpen*, 14 Blatch. 137; *Fisher v. Harnden*, 1 Paine, 55. As to forcible abductions, see *Ker v. Illinois*, 119 U. S. 436; *Ex parte Brown*, 28 F. R. 653.



Judges of United States courts and commissioners appointed by them are authorized to issue warrants for the apprehension of persons accused of committing crimes in a foreign country, without being first thereto authorized by the President. *Re Kaine*, 14 How. 103. But see s. c. 3 Blatch. 9; *Re Henrich*, 5 Id. 414, 425, which required that such authority should first be obtained. But these cases are not followed in *Ex parte Ross*, 2 Bond, 252; *Re Kelley*, 2 Lowell, 339; *Re Thomas*, 12 Blatch. 370. Unless the treaty requires that a preliminary mandate shall issue from the executive, the judge or commissioner may exercise jurisdiction without it. *Castro v. De Uriarte*, 16 F. R. 93; *Re Kelly*, 26 Id. 852. The treaty of 1842 with Great Britain does require it. *Re Harris*, 32 Id. 583. *Contra*, s. c. 33 Id. 165. Judges and commissioners are bound to decide on the sufficiency of the affidavits on which warrants of arrest are founded, and are compelled to determine as to the right to further prosecute in every step of the proceeding, and are also authorized to decide on the prosecutor's authority to institute the proceeding. *Re Kaine*, 14 How. 103. See s. c. 3 Blatch. 9; *Re Henrich*, 5 Id. 414, 425. A commissioner needs have special authority conferred upon him in order to exercise the powers granted by this statute. 14 How. 142, 143; *Re Henrich*, 5 Blatch. 414, 425. If a proper application and complaint are made, the question whether proceedings have been authorized by the foreign government need not be considered by the judge or commissioner. The only question for him to pass upon is the criminality of the accused. *Re Dugan*, 2 Lowell, 367. If a treaty requires that a warrant be issued by the executive department before other proceedings are had, the issue of it by the Secretary of State satisfies the condition. *Re Van Hoven*, 4 Dillon, 411. Under the treaty with Belgium a warrant issued by the proper judicial officer, instead of by the President, is good. s. c. Id. 415.

The courts will not permit a man to be rearrested if it appears that the examinations are instituted and carried on with a view of enforcing personal spite and private malice. But the mere fact that one examination has failed by reason of a lack of sufficient testimony is not a bar in law to a second. If the executive has said that the alleged offence does not come within the scope of the extradition treaty, or that he is satisfied that the prosecution is instituted for political reasons, or to gratify private malice, and therefore the offender shall not be extradited, all further inquiry by a court is concluded. But when the executive determines that the testimony is insufficient, there can be a second inquiry, without any mandate to that effect. *Re Kelly*, 26 F. R. 852. But if a commitment is made on a second examination without stronger testimony than was given on the first, the circuit court will review it and correct the error. Id.

The merits of the decision made by the commissioner will not be reviewed, either as to the law or facts, on *habeas corpus* proceedings. *Ex parte Aernam*, 3 Blatch. 160. But on a *habeas corpus* in conjunction with a writ of *certiorari*, the action of a commissioner may be revised, and the court will look into the evidence and pass upon its weight and competency. *Re Henrich*, 5 Blatch. 414. In the exercise of this power the judgment of the commissioner will not be reversed upon trifling grounds, or for mere errors in form. When designated by the court, he is fully empowered to hear and decide the question of criminality, and, where he has legal evidence before him, his judgment will not be reversed, except for substantial error in law or for such manifest error in fact as would warrant a court in granting a new trial for a verdict against evidence. Id. Various cases arising at earlier periods in the same district held that on *habeas corpus* the decision of the commissioner on the question of fact could not be reviewed. *Re Veremaitre*, 9 N. Y. Leg. Obs. 137; *Re Kaine*, 10 Id. 257; *Re Heilbronn*, 12 Id. 65. On *habeas corpus* the court will determine whether the commissioner acquired jurisdiction by complying with the treaty and the statute, whether he kept within his jurisdiction, and whether he had legal or competent evidence on which to base his judgment. But the effect of legal evidence before him will not be determined upon, nor will the accused be released because illegal



or incompetent evidence was introduced. *Re Stupp*, 12 Blatch. 501; *Re Fowler*, 4 F. R. 303. Under a treaty which provided, as to the proof required for the delivery upon requisition of parties charged with crime, that this shall only be done when the fact of the commission of the crime shall be so established as that the laws of the country in which the fugitive or the person so accused shall be found, would justify his apprehension and commitment for trial if the crime or offence had there been committed, and this section of the statutes, it was ruled that the proceeding before the commissioner is not to be regarded as in the nature of a final trial by which the prisoner could be convicted or acquitted of the crime charged against him, but rather of the character of those preliminary examinations which take place every day in this country before an examining or committing magistrate for the purpose of determining whether a case is made out which will justify the holding of the accused, either by imprisonment or under bail, to ultimately answer to an indictment, or other proceeding, in which he shall be finally tried upon the charge made against him. *Benson v. McMahon*, 127 U. S. 457; *Re Herres*, 33 F. R. 165. On a proceeding in *habeas corpus*, questions concerning the introduction of evidence or the sufficiency of the authentication of documents received will not be considered. *Id.* It is not a necessary preliminary step to an investigation here, under an extradition treaty, that a warrant of arrest should have been issued, or proceedings had against the accused in the foreign jurisdiction. *Re Thomas*, 12 Blatch. 370. See 7 A. G. Op. 6.

*Adjournment; Construction of act of 1882.* — The language in § 3 of the act of 1882, that the accused cannot safely go to trial without them, does not give a right to a full trial in violation of treaty stipulations; but it must be confined to such a preliminary hearing only as was allowable under the practice existing when that statute was enacted. *Re Wadge*, 15 F. R. 864. Adjournments may be granted at the request of either party to the proceedings. *Re Ludwig*, 32 F. R. 774; *Re Macdonnell*, 11 Blatch. 100.

*Treaty or Convention.* — Independently of a treaty or convention there is no law authorizing one government to call upon another for the surrender of one who has committed a crime within it and has escaped; neither is the judiciary invested with power to detain in custody or surrender one who has committed a crime and made his escape. *Re Jose Ferreira dos Santos*, 2 Brock. 493; *United States v. Davis*, 2 Sumner, 482. In the absence of treaty obligations, it is optional with a government upon which demand is made for the surrender of persons found therein, on account of crimes committed abroad, to comply or not. *The British Prisoners*, 1 Wood. & M. 66; *United States v. Rauscher*, 119 U. S. 407. Unless a treaty excludes surrender for crimes committed before it took effect, such crimes are included if not expressly excluded. *Re Angelo De Giacomo*, 12 Blatch. 391. The various treaties are examined on this point. *Id.* It is not a necessary preliminary that proceedings should have been had against the accused in the foreign jurisdiction. *Re Thomas*, 12 Blatch. 370; *Tullis v. Fleming*, 69 Ind. 15; *Ex parte Romanes*, 1 Utah Ter. 23; *Ex parte Rosenblat*, 51 Cal. 285. A United States commissioner's decision as to the fact of criminality cannot be reviewed by the circuit court on *habeas corpus*. *Re Fowler*, 4 F. R. 303; *Re Wahl*, 15 Blatch. 334; *Re Vendervelpen*, 14 Id. 137; *Re Wiegand*, Id. 370. The commissioner may adjourn the hearing, and the prisoner is not entitled to a discharge on *habeas corpus*, if the discretion as to the length of the adjournment is not abused. *Re Ludwig*, 32 F. R. 774; *Re Macdonnell*, 11 Blatch. 79, 170. But his refusal to adjourn the hearing to enable the accused to obtain the depositions of foreign witnesses cannot be remedied by *habeas corpus*. *Re Wadge*, 15 F. R. 864; 16 Id. 332. The accused, if discharged by the commissioner, may be again arrested for the same offence without issuance of a second mandate. *Re Kelly*, 26 F. R. 852; *Re Fergus*, 30 Id. 607.

*The complaint.* — The complaint should set forth briefly and clearly the substance of the offence charged, and the substantial, material features thereof. *Re Heinrich*, 5 Blatch.



414; *Re Van Hoven*, 4 Dillon, 411, 415; *Re Macdonnell*, 11 Blatch. 79; *Ex parte Hibbs*, 26 F. R. 421; *State v. Stundahl*, 34 Minn. 115. It is sufficient if it describes the offence in general terms only, such as are used in the statute or treaty. *Castro v. De Uriarte*, 16 F. R. 93; *Re Roth*, 15 Id. 506. It is fatally defective if it does not show upon its face that the person making it was an agent or representative of a foreign government (*Re Harris*, 32 F. R. 583), or that the commissioner issuing the warrant was duly empowered so to do. *Ex parte Lane*, 6 F. R. 34; *Re Kelley*, 25 Id. 268. The offence is properly charged if made by the officer officially, without averring his personal knowledge of the facts. *Re Farez*, 7 Blatch. 345; *Re Jackson*, 2 Flippin, 183; *Re Kelley*, 26 F. R. 852. Upon a complaint by a private individual, his authority to act for the foreign executive must appear. *Re Ferrelle*, 24 Blatch. 155; 28 F. R. 878. Upon a complaint under oath, the judge is to examine only the evidence of criminality, without regard to the authorization of the application by a foreign government (*Re Dugan*, 2 Lowell, 367; *Ex parte Van Aernam*, 3 Blatch. 160); and without previous application made to the President. *Re Kelley*, 2 Lowell, 339; *Ex parte Kaine*, 3 Blatch. 1; *Castro v. De Uriarte*, 16 F. R. 93; *Re Ross*, 2 Bond, 252.

If the crime charged is forgery, the complaint may charge more than one offence. *Re Henrich*, 5 Blatch. 414. The complaint should set forth clearly, but briefly, the substance of the offence charged, so that the court can see that one or more of the particular crimes enumerated in the treaty is alleged to have been committed. It is not required that it be drawn with the formal precision and nicety of an indictment. *Id.* It is not essential that the complaint should recite that a mandate had issued by the executive for the arrest of the alleged fugitive. The statute only requires that the allegations of the complaint should be addressed to the commission of the offence. *Re Macdonnell*, 11 Blatch. 79. The complaint is sufficient if it shows a *prima facie* case of a crime within the treaty. It need not negative matters of defence. *Id.* A complaint made by a consul in his official capacity is good if it alleges the crime properly, although the averments are not made on his personal knowledge of the facts. *Re Farez*, 7 Blatch. 345. See *Ex parte Lane*, 6 F. R. 34, 39.

*The Warrant.* — A warrant issued by the governor of the State on which the demand is made is *prima facie* evidence that all necessary legal prerequisites have been complied with. *Davis's Case*, 122 Mass. 324; *Kelly v. State*, 13 Tex. App. 158; *Ex parte Sheldon*, 34 Ohio St. 319. And the recitals in the warrant of the governor of the demanding State are conclusive that the accused stands charged with crime in that State. *Leary's Case*, 6 Abb. N. Cas. 43; *Ex parte Swearingen*, 13 S. C. 74; *People v. Pinkerton*, 17 Hun, 129; *Hibler v. State*, 43 Texas, 197; *Johnston v. Riley*, 13 Ga. 97. See *Hartman v. Aveline*, 63 Ind. 344; 13 Am. Law Rev. 181. Such governor may revoke his warrant. *Work v. Corrington*, 34 Ohio St. 64. And parol evidence is admissible that the accused was not actually present in the demanding State. *Wilcox v. Nolze*, 34 Ohio St. 520. The warrant is sufficient if its face shows every fact requisite to the jurisdiction of the officer; that such jurisdiction has been regularly and formally invoked for the arrest of the alleged fugitive; and declares in terms the special authority upon which the proceeding is based to be the treaty, the act of Congress, and the appointment of the officer to execute the law, the demand of the foreign government, the mandate of this, and the offence charged. It is not necessary that the particulars required to be proved, in order to establish the offence mentioned in the treaty, should be specified in the warrant; nor is it any part of its province to disclose the details, in order that the prisoner may be informed thereof. *Re Macdonnell*, 11 Blatch. 79. A warrant is good if it describe the crime in the words used in the statute or treaty. *Castro v. De Uriarte*, 16 F. R. 93. Under the treaty with Great Britain of 1842 and the statute of 1848, the warrant must disclose the commissioner's authority to issue it. *Re Kelley*, 25 F. R. 268. If the warrant first issued is of doubtful sufficiency, and no order



is made thereon or under the complaint upon which it was based, a second warrant may issue upon a new complaint. *Re Fergus*, 30 F. R. 607. If the warrant does not disclose for what forgery the accused is wanted, resort may be had to the proceedings before the committing magistrate to remove the uncertainty. *Ex parte Hibbs*, 26 F. R. 421. The complaint need not allege that a warrant was issued against the accused in the country from which he fled, nor show that the commissioner who issued the warrant was authorized to issue the warrant issued in the particular proceedings, if it appears that he was authorized to issue warrants in such proceedings, embracing the one in question. *Re Farez*, 7 Blatch. 345. The complaint before a commissioner ought to describe him as a commissioner of the circuit court of the United States, specially authorized by said court to take cognizance of applications for extradition, or by words of similar import, since his general appointment as commissioner does not authorize him to assume jurisdiction of this class of cases. *Re Lane*, 6 F. R. 34. The commissioner, it seems, cannot make a valid alteration in the complaint, so as to show such authority, after the evidence has been taken, without the assent of the accused. *Id.* The omission to allege that the Province of Ontario is within the territorial domain of Great Britain is immaterial, judicial notice being taken of that fact. *Id.* A complaint which alleges an offence at common law is not bad because it concludes with the allegation that it was committed against the statute in such case made and provided. *Ex parte Lane*, 6 F. R. 34. A complaint made by a private person is fatally defective if the allegations of fact are made upon the best knowledge, information, and belief of the complainant. *Id.* Where a complaint, made by a consul, stated "that the complainant is informed and believes that one R., &c., is charged with the crime of embezzlement of public funds," &c., without making the charge in direct language, and stated in another part that "the precise amount of the moneys so embezzled and appropriated by the said R. is not yet ascertained, but, as complainant is informed and believes, it was about 14,000 francs," an offence within the treaty was held charged. *Re Roth*, 15 F. R. 506. Under a treaty which provides that complaints shall issue upon mutual requisitions by the parties thereto, or their ministers, officers, or authorities, any person who may be thereto authorized by the Attorney-General or member of the executive department of a foreign government may make the complaint. *Re Kelly*, 26 F. R. 852. The words "upon complaint made under oath" mean such a complaint in behalf of the foreign government that is authorized by the existing treaty to have the surrender made. The government which is a party to the treaty must be the promoter of the proceeding. The act was not intended to give a private person the authority to institute a proceeding upon his own option merely. *Re Ferrelle*, 28 F. R. 878. See *Re Kelly*, 26 *Id.* 852. A complaint is fatally defective unless it shows that it was made by an agent or representative of the government which demands the surrender of the accused. *Re Herris*, 32 F. R. 583. The fact that the complainant was authorized to institute proceedings may be shown elsewhere than in the complaint. s. c. 33 *Id.* 165. If a complaint alleging that the crime of forgery was committed sets out the note alleged to have been forged, the amount and date thereof, the names of the parties and of the bank which discounted, nothing more is necessary. *Re Charleston*, 34 F. R. 531. A complaint made by an officer upon information and belief must be so full in its statement of the facts which constitute the crime alleged as would authorize the arrest of an American citizen. Hence, a complaint for forgery which does not specify the kind of documents forged, or their character, &c., is defective. *Ex parte Van Hoven*, 4 Dillon, 411. But see s. c. *Id.* 415, where the complaint was held good. The State department is not authorized to issue a warrant until the facts are judicially ascertained and certified. 9 A. G. Op. 379. A foreign *mandat et arrêt*, setting forth the offence of a fugitive within the terms of any treaty, coming through the proper political channel, authorizes the issue of a warrant. 7 A. G. Op. 285.

Under the earlier statute of 1860 each piece of documentary evidence offered by the



agents of the foreign government in support of the charge of criminality should be accompanied by a certificate of the principal diplomatic or consular officer of the United States, resident in the foreign country from which the fugitive escaped, stating clearly that it is properly and legally authenticated, so as to entitle it to be received in evidence in support of the same criminal charge by the tribunals of such foreign country. *Re Henrich*, 5 Blatch. 414, 425. The parties seeking the extradition of the fugitive should be required by the commissioner to furnish an accurate translation of every document offered in evidence which is in a foreign language, accompanied by an affidavit of the translator, made before him or some other United States commissioner, or a judge thereof, that the same is correct. *Re Henrich*, 5 Blatch. 414, 426. This section supersedes § 2 of the act of 1848, but not the act of 1860. *Re Stupp*, 12 Blatch. 501, 523. But see the amendment made to this section by the act of 1876. If the records certified to by an American minister are records from the tribunals of a government to which he is accredited, and are authenticated by the officers of such government, and are certified to be so authenticated as to entitle them to be received in evidence in support of the criminal charges mentioned therein, the omission of words naming the tribunals of the country in which they are so admissible is immaterial under the act of 1860. *Id.*; *Re Farez*, 7 Blatch. 345. Under the act of 1860, where foreign depositions are offered in evidence in a case where forgery is the offence charged, and they show that the forged instruments were seen and deposed to by the deponents, such instruments need not be introduced here. Under that act papers are admissible in evidence although they were not used to procure the warrant of arrest issued abroad. *Re Farez*, 7 Blatch. 345. If the papers in a case form substantially one proceeding and one document, each of them referring to those which precede it, and they are all as much connected together as are the papers which form the record in a court of the United States, one authentication of them is enough. *Id.* The act of 1860 enlarged the class of documentary evidence allowed to be produced beyond that admissible under the act of 1848, by including depositions, warrants, or other papers or copies thereof, so authenticated as to be admissible for the same purpose in the tribunals of the country where the offence was committed. *Re Henrich*, 5 Blatch. 414. A slight inadvertence in the certificate of authentication will not be regarded. *Re Roth*, 15 F. R. 506. As amended by the act of 1876, this section provides for two classes of documentary evidence: 1st, "depositions, warrants, or other papers," which means original depositions, original warrants, and original other papers,—the depositions, &c., themselves, and not copies of them; 2d, copies of "any such depositions, warrants, or other papers." The first class must be documents which would be entitled to be received in the tribunals of the foreign country as evidence of the criminality of the person, in respect to the offence charged against him as committed there, if the inquiry as to his criminality in respect of such offence were being had in such foreign tribunals, and such originals must be authenticated in such a proper and legal manner as would entitle them to be received as such evidence in the tribunals referred to. The second class must be copies of original documents which would be entitled to be received in the tribunals referred to for the same purpose as is stated concerning the first class. There appears to be a distinction made in the section between originals and copies. A certificate made by an American minister that the documents "are authenticated in the manner required by the statute of the United States," is not sufficient. It should certify, as to the originals, that they are properly and legally authenticated, so as to entitle them to be received as evidence of the criminality of the person apprehended by the tribunals of Great Britain; and, in respect to the copies, that the originals of which they are copies would be received as such evidence, and that such copies are authenticated according to the law of Great Britain. *Re Fowler*, 4 F. R. 303; 18 Blatch. 430. If the documents are authenticated in the language of § 5 of the act of 1862, and by the proper officers, and the signature of the magistrate is verified by oral proof, and it is shown that the documents



were authenticated for the purpose of being used in extradition proceedings, nothing more is required. *Re Wadge*, 15 F. R. 864; *Re Herres*, 33 Id. 165; *Re Benson*, 34 Id. 649; *Re Charleston*, Id. 531. A vice-consul is authorized to certify to papers under the act of 1882. *Re Herres*, 33 F. R. 165. Under § 5 act of 1882, other proof may be resorted to to assist the certificate, and it need not appear that the depositions or documentary evidence would be competent evidence upon the trial of the accused in the foreign tribunal, if sufficient to authorize his arrest. *Re Wadge*, 16 F. R. 332. Sect. 5 of the act of 1882 restores in substance the provisions of the act of 1860 as respects the mode of authentication, and supersedes the provisions on that subject incorporated in § 5271, as well as those of the amendatory act of 1876. A certificate by the proper officer of a foreign government that the judicial proceeding certified to is valid according to the laws of such government, is sufficient under the act of 1882; and a certification by the United States minister in the language of that act is good. *Re Behrendt*, 22 F. R. 699. The words "similar purposes" in § 5 of the act of 1882 are to be construed as in the act of 1860, and refer to the words in the previous line, "for all the purposes of such hearing;" that is, to proof of criminality, which is the purpose of the hearing. The act of 1882 requires the same conditions as respects copies that it requires as respects originals, and whichever is offered it must be legally authenticated so as to be entitled to be received as evidence of criminality by the tribunals of the foreign country. Under the act of 1882 the prosecution may rely upon the certificate of the diplomatic or consular officer, which, if in conformity with the statute, is absolute proof that the papers certified are receivable in the foreign country in proof of criminality. If such certificate is not in conformity therewith, resort may then be had to oral or other proof that is competent to show that the copies offered are so authenticated as to be admissible as evidence of criminality in a proceeding for commitment or transportation for trial, in the country from which the accused shall have escaped. *Re McPhun*, 30 F. R. 57. A consul's certificate which merely states that the depositions authenticated were so authenticated as to enable them to be used in evidence, and as proof that the originals were duly received in evidence of the criminality of the accused, is insufficient under the act of 1882. *Id.* In a case arising under the treaty with Great Britain the accused is not entitled to the right to face the witnesses against him. Evidence is admissible if it is in the form authorized by the laws of the government which makes the demand. *Re Dugan*, 2 Lowell, 367.

The commission under which the foreign magistrate who issued the warrant acted need not be produced to the judge or commissioner here, nor need its contents be proved, proof that he publicly discharged the duties of his office being *prima facie* evidence of his official character, and giving rise to the presumption that he was rightfully appointed. *Ex parte Kaine*, 14 How. 103.

*Right of accused to testify.* — If the proceedings are held in a State the laws of which give the accused in all criminal proceedings the right to testify, that right should be accorded him. *Re Farez*, 7 Blatch. 345. *Contra*, *Re Dugan*, 2 Lowell, 367. And if the local law gives the accused the right to examine witnesses in his own behalf, it is error to refuse him that right, under a treaty which provides that the person charged shall be delivered upon such evidence as, according to the laws of the place where he shall be found, would justify his apprehension and commitment for trial if the crime had there been committed. *Re Kelley*, 25 F. R. 268.

SECTS. 5272, 5275. — Under these provisions, which have reference to all treaties made by the United States, the person accused is not now to be delivered up to be tried for any other offence than that charged in the extradition proceedings. *United States v. Rauscher*, 119 U. S. 423; *Kerr v. Illinois*, Id. 436; *Com. v. Hawes*, 13 Bush, 697; *Blandford v. State*, 10 Texas App. 627; *State v. Vanderpool*, 39 Ohio St. 273; *United States v. Watts*, 8 Sawyer, 370; 14 F. R. 130; *Ex parte Hibbs*, 11 Sawyer, 452; 26 F. R.



421; *Adriance v. Lagrave*, 59 N. Y. 110; *United States v. Caldwell*, 8 Blatch. 131; *United States v. Lawrence*, 13 Id. 295; 15 A. G. Op. 504; *Re Miller*, 23 F. R. 32; *Re Kelly*, 26 Id. 852; *Re Noyes*, 17 Alb. L. J. 407; *People v. Gray*, 5 Pac. Rep. 346; *Ex parte McCoy*, 32 F. R. 911; *State v. Vanderpool*, 16 Chicago L. News, 34; *Ex parte Ker*, 18 F. R. 167. In this respect the comity between foreign nations appears to be exercised less liberally than between the several States. *Id.*; *Harland v. Territory*, 13 Pac. Rep. 453; *State v. Stewart*, 60 Wis. 587; *Re Cannon*, 47 Mich. 481; *Re Miles*, 52 Vt. 906; *Ham v. State*, 4 Tex. App. 645; *Dow's Case*, 18 Penn. St. 37; *Williams v. Bacon*, 10 Wend. 636; *Browning v. Abrams*, 51 How. Pr. 172; *Re Noyes*, 17 Alb. L. J. 407. A person extradited from a foreign nation cannot be put on trial for another crime until after the lapse of a reasonable time from the expiration of the term of his sentence. *State v. Vanderpool*, 39 Ohio St. 273. A surrendered fugitive cannot in the tribunals of his own country question the good faith of the extradition proceedings. *Re Miller*, 23 F. R. 32.

"To be tried for the crime of which such person shall be so accused." — The obvious meaning of §§ 5572, 5275, which have reference to all treaties of extradition made by the United States, is that the party shall not be delivered up by this government to be tried for any other offence than that charged in the extradition proceedings; and that, when brought into this country upon similar proceedings, he shall not be arrested or tried for any other offence than that with which he was charged in those proceedings, until he has had a reasonable time to return unmolested to the country from which he was brought. *United States v. Rauscher*, 119 U. S. 407, 423; *United States v. Watts*, 8 Sawyer, 370; 14 F. R. 130; *Ex parte Hibbs*, 26 Id. 421; *Ex parte Coy*, 32 Id. 911. *Contra*, *United States v. Lawrence*, 13 Blatch. 295; *United States v. Caldwell*, 8 Id. 131; 12 A. G. Op. 75. The principle stated is not inapplicable because the magistrate abroad who delivered the accused up for murder also found him guilty of inflicting cruel and unusual punishment on the person for whose murder he was charged. *United States v. Rauscher*, *supra*. One who has been improperly tried for another offence than that for which he was extradited cannot waive his privilege under the treaty. *Ex parte Coy*, 32 F. R. 911. Under this and § 5270 the President has the right to refuse to surrender the accused, even though a warrant of commitment for his surrender is issued by the examining magistrate, and his certificate that the evidence is sufficient to sustain the charge is laid before the President, although the latter would have no right to surrender the accused in the absence of such certificate. The discretion which the President has a right to exercise, as to surrendering or not surrendering the accused, is to be exercised on a consideration of the testimony in the case. *Re Stupp*, 12 Blatch. 501. See *Re Kelly*, 26 F. R. 852, in § 5270.

SECT. 5278. — This is constitutional, Congress having power to make "all needful rules and regulations" in respect to the Territories, and implied power to enact an extradition law between them, or between any of them and the States. *Prigg v. Com.*, 16 Pet. 439; *Re Roberts*, 24 F. R. 132; *Re Mahon*, 34 Id. 525; *Ex parte Morgan*, 20 Id. 298; *Ex parte Smith*, 3 McLean, 121; *Re Romaine*, 23 Cal. 585; *Roberts v. Reilly*, 116 U. S. 94; *Kentucky v. Dennison*, 24 How. 104; *Re Titus*, 8 Ben. 411; *Ex parte Ammons*, 34 Ohio St. 518; *Re Briscoe*, 51 How. Pr. 422; *Re Voorhees*, 32 N. J. L. 141. *Contra*, *State v. Loper*, Ga. Dec. Pt. 2, 33. But the executive is not authorized to make a demand unless the party was charged in the regular course of judicial proceedings. *Kentucky v. Dennison*, 24 How. 66, 104; *State v. Hufford*, 23 Iowa, 391; *Ex parte White*, 49 Cal. 443. And there can be no demand before complaint. *Malcomson v. Gibbons*, 56 Mich. 459. Crime embraces every species of offence made punishable as crime by the laws of the demanding State, though it was not such by the common law or the laws of other States, and was made such in said State subsequent to the adoption of the Constitution and the



enactment of this statute. *Re Leary*, 10 Ben. 197. The words "treason, felony, or other crime" (in this section and in U. S. Const., sec. 2, art. 4), embrace every act forbidden or made punishable by the laws of the demanding State, including misdemeanors. *Ex parte Reggel*, 114 U. S. 642; *Kentucky v. Dennison*, 24 How. 66, 99; *Morton v. Skinner*, 48 Ind. 123; *Re Leary*, 10 Ben. 197; *State v. Jackson*, 36 F. R. 258; *Brown's Case*, 112 Mass. 409; *State v. Stewart*, 60 Wis. 587; *Re Hooper*, 52 Id. 699; *People v. Brady*, 56 N. Y. 182; *People v. Donohue*, 84 Id. 438; 13 Am. L. Rev. 181. See *Re Robb*, 19 F. R. 26. The State and Federal courts have concurrent jurisdiction, under this provision, to determine, by writ of *habeas corpus*, the lawfulness of the arrest and imprisonment. *Id.*; *Robb v. Connolly*, 111 U. S. 624; *Re Doo Woon*, 18 F. R. 898; *Ex parte Brown*, 28 F. R. 653; *Re Roberts*, 24 Id. 132; *Re Mohr*, 73 Ala. 503; *Malcomson v. Gibbons*, 56 Mich. 459; *Work v. Corrington*, 34 Ohio St. 64. The Cherokee nation is a part of the Indian country, and not a State or Territory within the act. *Ex parte Morgan*, 20 F. R. 298. But the District of Columbia is within the meaning of the act. *Re Buell*, 3 Dillon, 116. The person authorized by the executive of the demanding State to demand the extradition and surrender of the fugitive is not, *pro hac vice*, a United States agent or officer, but merely the agent of the demanding State. *Robb v. Connolly*, 111 U. S. 624; *Robb's Case*, 9 Sawyer, 568; *Re Titus*, 8 Ben. 411; *Re Mohr*, 73 Ala. 503; *Pettus v. State*, 42 Ga. 358. The prisoner may be arrested and tried for another offence before he has an opportunity of returning to the State from which he was brought, if there is no compact between the States that this shall not occur. *State v. Stewart*, 60 Wis. 587.

*Indictment.* — If the indictment against the fugitive is framed in substantial accord with the laws of the State which makes the demand for his return, the executive upon whom demand is made cannot deny a requisition because it is not drawn according to the technical rules of criminal pleading. *Ex parte Reggel*, 114 U. S. 642. The sufficiency of the indictment is to be determined by the courts of the State which makes the demand, not by the executive upon whom it is made. *Kentucky v. Dennison*, 24 How. 66, 107. It is a question of law whether the person demanded is substantially charged with a crime against the laws of the State from whose justice he is alleged to have fled; and this question is always open upon the face of the papers to judicial inquiry, on an application for a discharge under a writ of *habeas corpus*. If the indictment is certified by the demanding governor to be authentic and to be duly authenticated, and charges a crime under and against the laws of the State from which the accused has fled, it is sufficient, although a certified copy of such laws was not furnished the governor upon whom demand was made. *Roberts v. Reilly*, 116 U. S. 80. An objection to an indictment on the ground that it does not appear that the corporation averred to be the owner of the property which is the subject of the larceny charged is a person capable in law of such ownership, is not matter of law arising upon its face, but can arise only at the trial upon the evidence. Neither is the question affected if the facts alleged to constitute the crime charged show that it is a crime in the State upon the governor of which demand is made. *Roberts v. Reilly*, *supra*.

"*It shall be the duty.*" — These words, in ordinary legislation, imply the assertion of the power to command and coerce obedience. But they are not here used as mandatory and compulsory, but as declaratory of the moral duty created by this statute. *Kentucky v. Dennison*, 24 How. 66, 107. The governor is not relieved of his duty to deliver up a fugitive because he was induced to come into the jurisdiction by the trickery and fraud of private persons, which did not amount to a crime. *Ex parte Brown*, 28 F. R. 653.

"*The agent of such authority.*" — The agent provided for by this section is not an officer of the United States within the meaning of former decisions of the Supreme Court denying the power of State courts to issue writs of *habeas corpus* to United States officers for the discharge of prisoners held by them. *Robb v. Connolly*, 111 U. S. 624.



Federal and State courts have concurrent jurisdiction over persons who are arrested on extradition process. *Robb v. Connolly*, 111 U. S. 80, 95; *Ex parte Brown*, 28 F. R. 653.

*"State or Territory."* — The Cherokee Nation is not a State or Territory within the meaning of this section, and its governor cannot demand the extradition of one who is a fugitive from the justice thereof. *Ex parte Morgan*, 20 F. R. 298.

*"Charging the person demanded."* — These words mean charged in the regular course of judicial proceedings. One cannot be so charged when there is no jurisdiction to try him. The fact that he is so legally charged means that he is charged by an authority having a right to try. *Ex parte Morgan*, 20 F. R. 298.

*"Fugitive from justice."* — The statute does not prescribe the character of the proof which must be adduced to show that the person demanded is a fugitive from justice; but such proof must be made before a writ can issue. The executive of the State or Territory in which the accused is found must determine, in some legal mode, whether he is a fugitive from the justice of the demanding State. *Ex parte Reggel*, 114 U. S. 642. Whether the person demanded is a fugitive from justice or not is a question of fact which the governor upon whom demand is made must decide, upon such evidence as he may deem satisfactory. How far his decision may be reviewed judicially in proceedings in *habeas corpus*, or whether it is not conclusive, are unsettled questions. *Roberts v. Reilly*, 116 U. S. 80. To be a fugitive from justice it is not necessary that the party charged should have left the State in which the crime is alleged to have been committed, after an indictment found, or for the purpose of avoiding a prosecution anticipated or begun, but simply that having within a State committed that which by its laws constitutes a crime, when he is sought to be subjected to its criminal process to answer for his offence he has left its jurisdiction, and is found within the territory of another. *Id.*; *Ex parte Brown*, 28 F. R. 653.

*The Warrant.* — The warrant of the demanding governor is conclusive evidence in a *habeas corpus* proceeding that the party named in the warrant stands charged with crime in the State on whose behalf demand is made. *Re Leary*, 10 Ben. 197. The evidence that the person has fled from justice must not only be satisfactory to the governor, but must be legally sufficient before the executive authority can be exercised. If the warrant fails to recite or state any conclusion of the executive issuing it that the person charged has fled, and recites only that the demanding governor has so represented, the warrant is not sufficient to authorize an arrest. *Re Jackson*, 2 Flippin, 183.

*"An indictment found or an affidavit made."* — Unless a copy of an indictment or an affidavit accompanies the warrant, the latter is void, and the governor upon whom demand is made has no jurisdiction to act. *Re Doo Woon*, 18 F. R. 898; *Ex parte Morgan*, 20 F. R. 298. The affidavit must be so explicit and certain that if it were laid before a magistrate it would justify him in committing the accused to answer the charge. *Ex parte Morgan, supra.* Unless the affidavit alleges that the crime was committed in the State which demands the return of the accused, the governor upon whom demand is made is without jurisdiction. *Ex parte Smith*, 3 McLean, 121, 133. It must also be alleged that the accused committed the crime; an allegation based on suspicions is not good. *Id.*

SECT. 5280. — This is the only remedy provided in case of foreign seamen deserting. *United States v. Minges*, 5 Hughes, 494. It applies only to desertion when the vessel was in a United States port, and the deserter is not an American citizen. 16 A. G. Op. 358.



## TITLE LXVII.

## NEUTRALITY.

THE United States courts have authority, under the general law of nations, and in the absence of any act of Congress, to decree restitution of property captured in violation of their neutrality. *The Estrella*, 4 Wheat. 298; *The Gran Para*, 7 Id. 471. The furnishing of money to be used on behalf of a foreign people struggling for independence, but not in supplying arms and munitions of war, is not in contravention of the neutrality laws. *Bailey v. O'Mahoney*, 33 N. Y. Supr. Ct. 239. Such laws in the United States and Great Britain do not forbid and punish combinations to aid or abet foreign rebellions, which combinations are a violation of national comity (8 A. G. Op. 216, 375, 472); nor do they prohibit vessels going to sea from being armed for defence. *British Consul v. The Mermaid*, Bee Adm. 69. Commanders and officers of foreign vessels who violate these laws, may be prosecuted in our courts. 4 A. G. Op. 336; 3 Id. 747. The neutrality act has been uniformly treated by the executive department and by judges of the United States courts as embracing warlike enterprises set on foot in this country against a friendly power at peace with all the world. The language of the act warrants that interpretation. *United States v. O'Sullivan*, 9 N. Y. Leg. Obs. 257.

SECT. 5281. — *United States v. Williams*, 3 Cranch, 83, n. See 4 Hall's L. J. 361.

SECT. 5282. — *Stoughton v. Taylor*, 2 Paine, 665, 667; *United States v. Hertz*, 3 Pitts. L. J. 194. This applies to foreign consuls raising troops here for the military service of Great Britain. 7 A. G. Op. 367; 4 Id. 336. It does not apply to those who go abroad for foreign enlistment, or to those who transport such persons. *United States v. Kazinski*, 2 Sprague, 7. But if an association is originated beyond the sea to concert an expedition thence to commit hostilities against a friendly power, it is unimportant whether the persons engaged therein take the whole vessels themselves or depart hence as passengers. *Ex parte Needham*, Pet. C. C. 487.

One does not violate § 5282 by leaving this country with intent to enlist in the military service of a foreign government. Neither is it an offence under it to transport persons out of this country with their own consent, they having an intention to so enlist. But if such persons were hired or retained to go abroad with the intent to be so enlisted, it would be otherwise. The word "soldier" must be understood in its ordinary sense as one enlisted to serve on land in a land army. An indictment which charges several persons jointly in the same count with enlisting contrary to this section is bad. *United States v. Kazinski*, 2 Sprague, 7.

SECT. 5283. — The phrase "any foreign prince or state" does not include a pretended foreign state, not yet recognized by our government or that to which the new state belongs. *Gelston v. Hoyt*, 3 Wheat. 246. To come under this section, the expedition may be organized and dispatched from our ports in separate parts. *United States v. The Mary N. Hogan*, 18 F. R. 529. See Id. 88; 17 F. R. 813; *United States v. 200 Boxes*, 20 F. R. 50; *The Alfred*, 3 Dall. 307. Where a vessel built, equipped, and owned in the United States captures the property of subjects of a nation in peace with the United States, such capture is illegal; and the property, if brought within our territorial limits, will be restored to the original owners. *La Conception*, 6 Wheat. 235; *The Gran Para*, 7 Id. 471; *The Santa Maria*, Id. 490; *The Arrogante Barcelones*, Id. 496. This section prohibits



only hostile voyages, not commercial ventures, such as the carrying of arms for a belligerent's use to a port in its possession. *The Santissima Trinidad*, 7 Wheat. 283, 340; 1 Kent Com. 142; *The City of Mexico*, 24 F. R. 33, 25 Id. 924; *United States v. 214 Boxes of Arms*, 20 Id. 50. Nor does it apply to gunboats building in our ports for Spain, to be employed against Cuba. 13 A. G. Op. 177. This section does not prohibit the landing of a cargo contraband of war on the shores of one belligerent at a point not blockaded. *The Florida*, 4 Ben. 452. Nor does a vessel, by merely engaging in *bona fide* contraband trade, violate the statute or our neutral obligations, even if the trade be in armed vessels. *The Bermuda*, 3 Wall. 551; *The Carondelet*, 37 F. R. 799. To constitute an offence, the vessel must be fitted out and armed with the specified intent. The statute does not prohibit the sale of unarmed vessels. *United States v. Skinner*, 1 Brun. Coll. Cases, 446; 2 Wheeler's Crim. Cas. 232. This section includes all cases of vessels armed within American ports by one of the belligerent powers, to act as cruisers against another belligerent power with which the United States are at peace. Converting a merchant ship into a vessel of war must be deemed an original outfit. *United States v. Guinet*, 2 Dall. 321; 5 A. G. Op. 92; 3 Id. 738, 741. The intention with respect to the employment of the vessel must be formed before she leaves the country, and this must be a fixed intention. *United States v. Quincy*, 6 Pet. 445; *Mossie v. The Alfred*, 3 Dall. 307, 319; *United States v. Guinet*, 2 Id. 321; *The Meteor*, 1 Am. L. Rev. 401. But it is not necessary that the vessel should be armed or manned for the purpose of committing hostilities before so leaving, if she is intended to be so fitted subsequently. *The City of Mexico*, 28 F. R. 148. And if the government files two libels against the same vessel, the one in prize, and the other in forfeiture, it cannot be required to elect between them. Id.

An informer, in the legal as well as the ordinary sense of the term, is he who gives the information which leads directly to the seizure and condemnation, regardless of the questions of evidence furnished or interest taken in the prosecution. If the officer informed seizes upon the information given, that act vests an inchoate right in the informer who has given the information upon which the seizure was made, which is consummated by a condemnation. Officers who conveyed information received by them in their capacities as such to other officers, and gave no other information, have no rights as informers. *The City of Mexico*, 32 F. R. 105.

The entire crew of a vessel may share as informers; but United States naval officers, or consular agents who merely investigate in pursuance of orders, and report the knowledge thus acquired, do not gain the rights of informers. Id.; *Sawyer v. Steele*, 3 Wash. 464; *The Chapman*, 4 Sawyer, 501.

SECT. 5285. — An augmentation of force, under this section, includes the taking on of a crew either of native American citizens or foreigners domiciled here (*The Alerta v. Moran*, 9 Cranch, 359); also the increase here of the number or calibre of a foreign cruiser's guns, but not the repair of such vessel or her bottom. 4 A. G. Op. 336; *United States v. Grassin*, 3 Wash. 65. It is immaterial whether the persons enlisted by a foreign armed vessel were native American citizens or foreigners domiciled within the United States, since neither the law of nations nor the acts of Congress recognize any distinction, except in respect to subjects of the state in whose service they are so enlisted, transiently within the United States. *The Alerta*, 9 Cranch, 359.

SECT. 5286. — 1 A. G. Op. 57. There must be an overt act. *United States v. Lemaden*, 1 Bond, 5; *United States v. Pirates*, 5 Wheat. 184. It is an offence against this section for the officers of an American vessel who are informed of the character of the cargo with which she is loaded, and the purpose thereof, to transport arms from a port of the United States to a foreign port to be used against a power with which this government is at peace, and to take on men after leaving that port. *United States v. Rand*, 17 F. R. 142.



*"To be carried on from thence."* — These words are employed in the sense of carrying out, or forward, from thence. *United States v. Rand*, 17 F. R. 142.

SECT. 5287. — *Stoughton v. Dimick*, 3 Blatch. 356 ; 29 Vt. 535. 18 St. 320 adds to this section by inserting as the first sentence thereof —

"The district courts shall take cognizance of all complaints, by whomsoever instituted, in cases of captures made within the waters of the United States, or within a marine league of the coasts or shores thereof."

SECT. 5289. — *United States v. Quincy*, 6 Pet. 445 ; *United States v. Quitman*, 2 Am. L. Reg. 645.

SECT. 5291. — 19 St. 252 substitutes "enlists" for "enlist" in the third line.



## TITLE LXVIII.

## FINES, PENALTIES, AND FORFEITURES

"FINES, penalties, and disabilities, are not incurred, and do not accrue in the technical sense of the terms until judgment." *Per* Thompson, J., in *United States v. Morris*, 10 Wheat. 299.

SECT. 5292. — See notes, §§ 2491, 2900, 2984, 3091, 5293, pp. 607, 608; S. T. D. 8112. Amended by 19 St. 252, by inserting, after "vessels" in the sixth line, "and for regulating the same," and by inserting "as" before "he" in the twenty-third line. 18 St. 186, ch. 391 (see note, § 2837), provides, by §§ 17, 18, proceedings for the relief of persons charged with incurring fines (see 16 A. G. Op. 473; by § 19, for the punishment of officers compromising or abating any fine, penalty, or forfeiture arising under the customs laws; by § 20, applicants for the remission of fines, or the refund of duties, when the amount involved is not less than \$1000, shall notify the district attorney and the collector of the district, who shall furnish the Secretary of the Treasury information to protect the interests of the United States. Sect. 19 of this act, by 18 St. 303, is not to affect the power of any court, judge, or district attorney, to discontinue proceedings to obtain the testimony of accomplices in crimes. See 14 A. G. Op. 511. 18 St. 463, ch. 136, restricts the power of the Secretary of the Treasury to refund customs duties paid. 28 St. 59, ch. 121, § 26, provides —

"That whenever any fine, penalty, forfeiture, exaction, or charge arising under the laws relating to vessels or seamen has been paid to any collector of customs or consular officer, and application has been made within one year from such payment for the refunding or remission of the same, the Secretary of the Treasury, if on investigation he finds that such fine, penalty, forfeiture, exaction, or charge was illegally, improperly, or excessively imposed, shall have the power, either before or after the same has been covered into the Treasury, to refund so much of such fine, penalty, forfeiture, exaction, or charge as he may think proper, from any moneys in the Treasury not otherwise appropriated."

As to remitting penalties under 18 St. 125, see § 13 of that act; see note, § 4242. As to remitting penalties under §§ 5, 6, 7, 8, 9, of 24 St. 81, see notes, §§ 4153, 4177, 4371, 4500. As to penalties under statutes before the Revision, see note, § 5598.

Under § 5292, the officer must be competent, under United States laws, to administer the oath. *United States v. Madison*, 21 F. R. 629. Remission of the forfeiture does not legalize the illegal contract, and forfeiture of cargo imposed as penalty under § 4347 can only be remitted as here prescribed. *Petrel Guano Co. v. Jarnette*, 25 F. R. 675. The repeal of the law imposing the penalty is of itself a remission. *State v. B. & O. R. Co.*, 3 How. 552. And a revenue officer or informer has no such right of contract or vested interest in the subject-matter of the suit as to preclude the government from discharging the forfeiture. *Confiscation Cases*, 7 Wall. 454; *Yeaton v. United States*, 5 Cranch 281. About 25,000 Gallons, 1 Ben. 367. The Secretary's remission of an entire forfeiture extinguishes the interest of the customs officers in the property; his power to remit may be exercised after judgment of condemnation, and does not infringe the President's pardoning power. *United States v. Morris*, 10 Wheat. 246; 1 Paine, 269; *The Laura*, 114 U. S. 411; 19 Blatch. 562; 8 F. R. 617; 5 Id. 133; *United States v. Griswold*, 24 Id. 365; see note, § 3469; *MLane v. United States*, 6 Pet. 404; *United States v. Lancaster*, 4 Wash. 64; *The Hollen*, 1 Mason, 431; *United States v. Harris*, 1 Abb.



U. S. 117; *United States v. Collier*, 3 Blatch. 346; *United States v. Three Parcels*, 3 Ware, 76. See also 1 A. G. Op. 176; 2 Id. 278, 329; 4 Id. 182, 273; 5 Id. 508, 658, 723; 12 Id. 103, 558. The President's pardon remits all forfeitures, so far as the right accrues to the United States, and except where the rights of third persons have intervened. *Kirk v. Lewis*, 4 Woods, 100; 9 F. R. 645; *Armstrong's Foundry*, 6 Wall. 766. In *The Cotton Planter*, 1 Paine, 23, the court, in considering a question of forfeiture, disregarded a refusal of the Secretary of the Treasury to remit the penalty. See *Gallego v. United States*, 1 Brock. 439; *The Palo Alto, Daveis*, 343; 2 Ware, 344. The Secretary has no power to remit penalties in cases not expressly provided for by law. *The Margaretta*, 2 Gall. 515; 11 A. G. Op. 124. But from his exercise of such power no appeal lies to the Court of Claims or to any other court. *Dorsheimer v. United States*, 7 Wall. 166; 2 Ct. Cl. 103; *Macheca v. United States*, 26 F. R. 845. See *Re Weimer*, 7 Repr. 38; *United States v. Roelle*, 24 Int. Rev. Rec. 332; 6 Repr. 550. He may remit upon a condition consistent with law, such for instance as the payment of costs; and he may remit a part as well as the whole of the forfeiture. *Jungfluth v. Redfield*, 4 Blatch. 219; *The Palo Alto, supra*; *Murray v. Arthur*, 13 Blatch. 429. As to stating the facts, &c., see *The Margaretta*, 2 Gall. 515. After a remission, he may revoke the *remittitur* at any time before the final execution of the precept by the delivery of the property to the claimant, except that if the remission is conditional the Secretary cannot revoke it after the condition has been performed. *The Palo Alto, supra*. See this case for a discussion of the effect of remission. Where conditions are imposed in a warrant remitting a forfeiture, their fulfilment is equivalent to a satisfaction of the cause of action which constituted the ground of forfeiture. *Murray v. Arthur*, 13 Blatch. 429. For a case arising under the act of July 13, 1861 (12 St. 255), see *The Gray Jacket*, 5 Wall. 342. For a case of a joint interest between citizens of this country and Great Britain, see *Gallego v. United States*, 1 Brock. 439. See further, *United States v. One Case*, 1 Paine, 400; *Sinn v. United States*, 14 Blatch. 550; *Elmes on Customs*, §§ 586-588, 832-857.

SECT. 5293. — 14 A. G. Op. 454. See note, § 5292. Amended by 19 St. 253, by striking out the first subdivision and transposing the fourth subdivision to its place. See *Cotzhausen v. Nazro*, 107 U. S. 215, 220; S. T. D. 8103, 8150; *United States v. One Case, supra*.

SECT. 5294. — See notes, §§ 4399 *et seq.*, 4465, 5292. This section is not an invasion of the President's constitutional power of pardon. *The Laura, supra*. It gives the Secretary power to remit a penalty after a suit to recover it has been instituted by a private person. The inchoate interest of an informer is subject to the Secretary's power to remit the penalty before his right thereto is ascertained and established by the judgment of the proper court. Id. 416. The person who sues for the penalty under this section is the "informer" referred to in it. Id. See this case, 114 U. S. 415, note, for a collection of statutes relating to a remission of fines, &c.

SECT. 5295. — See notes, §§ 5292, 5293. Sect. 8 of 18 St. 186, ch. 391, § 8, which amends the customs-revenue laws and repeals moiety, makes provision as to witnesses.

SECT. 5296. — *Kie v. United States*, 27 F. R. 356.



## TITLE LXIX.

## INSURRECTION.

SECT. 5297. — See note, § 1094. Where two persons claim to be governor of the same State, the President or Congress must determine, before giving the required aid, which is the lawful incumbent. 14 A. G. Op. 391. See 8 Id. 8, 445; Prize Cases, 2 Black. 697; The Hiawatha, Blatch. Pr. Cas. 13; Dodge v. Woolsey, 18 How. 373; *Ex parte Field*, 5 Blatch. 63; *Ex parte Milligan*, 4 Wall. 129.

While war continues, the President may institute temporary government within insurgent districts occupied by Federal troops, or take measures, in any State, for the restoration of State government faithful to the general government, employing only such means and agents as are authorized by constitutional laws. *Texas v. White*, 7 Wall. 730; *White v. Hart*, 13 Id. 646.

SECT. 5299. — The President is constituted the judge of the existence of the exigency in the first instance, and is bound to act according to his belief of the facts. No appeal lies from his conclusion. When he exercises the authority vested in him, the presumption is that he exercised it in pursuance of law. *Martin v. Mott*, 12 Wheat. 19, 31; *Luther v. Borden*, 7 How. 1, 43.

SECT. 5301. — *Commissioners v. Newell*, 64 Ga. 699. The original act was not a temporary provision. The Reform, 3 Wall. 617. The act applies where a citizen domiciled in loyal territory voluntarily goes through the lines, without change of domicile, to carry on commercial intercourse with the enemy; but not where a citizen domiciled in loyal territory is involuntarily detained in the insurrectionary district. *Ealer's Case*, 5 Ct. Cl. 708; *Mitchell's Case*, 10 Id. 120; *Desmare's Case*, Id. 385; 93 U. S. 605; *Quigley's Case*, 13 Ct. Cl. 367; The D. F. Keeling, Blatch. Pr. Cases, 92; *Carson v. Dunham*, 121 U. S. 421; *Bond v. Moore*, 93 Id. 593; *Matthews v. McStea*, 91 Id. 7; *Hamilton v. Dillin*, 21 Wall. 73; *Montgomery v. United States*, 15 Id. 395; *Gay's Gold*, 13 Id. 358; *Small v. Lumpkin*, 28 Gratt. 832; *Snell v. Dwight*, 120 Mass. 9; *Shacklett v. Polk*, 51 Miss. 378; *Mitchell v. Nodaway County*, 80 Mo. 257.

For a construction of the act of 1861, see *The Venice*, 2 Wall. 258; *The Hampton*, 5 Id. 372; The Reform, 3 Id. 617; *The Ouachita Cotton*, 6 Id. 521; *Cutner v. United States*, 17 Id. 517. And of the same act in connection with the statute of 1864, *Hamilton v. Dillin*, 21 Wall. 73.

SECT. 5304. — A department commander, a special agent of the Treasury Department and acting collector of customs, cannot license such intercourse, that being the right of the President alone. *The Sea Lion*, 5 Wall. 630; *The Ouachita Cotton*, 6 Id. 521; *Coppell v. Hall*, 7 Id. 542; *United States v. Lane*, 8 Id. 185. Gold coin is included in the words "goods, wares, or merchandise." *United States v. A Canoe*, 5 Hughes, 490; *Gay's Gold*, 13 Wall. 358. The act of 1861 is construed in *The Sea Lion*, 5 Wall. 630; *The Ouachita Cotton*, 6 Id. 521; *Coppell v. Hall*, 7 Id. 542; *McKee v. United States*, 8 Id. 163.

SECT. 5308. — Real estate seized and condemned divests the owner's title to the fee. *Kirk v. Lewis*, 4 Woods, 100; 9 F. R. 645. The act makes no discrimination between the property of citizens and that of aliens, and extends to all kinds of property, real or



personal, on land or on water. *Id.*; *Union Ins. Co. v. United States*, 6 Wall. 759; *United States v. Athens Armory*, 2 Abb. U. S. 129. Its sole effect was to declare the purpose of Congress to enforce a belligerent right, and it adds nothing to the right already possessed by the government, in civil as well as foreign war, to seize and dispose of all property used in aid of its enemies. *Id.*; *Miller v. United States*, 11 Wall. 268; *Tyler v. Defrees*, *Id.* 331; *Osborn v. United States*, 91 U. S. 477; *United States v. Shares*, 5 Blatch. 231. The proceedings under the act conform, in the case of seizures on navigable waters, to the practice in admiralty; as to seizures on land, to the course of the common law, are *in rem*, and reviewable only on writ of error. *Armstrong's Foundry*, 6 Wall. 766; *Morris's Cotton*, 8 *Id.* 507; *Pasteur v. Lewis*, 39 La. Ann. 9. The acts of 1861 and 1862 did not authorize the confiscation of property of a corporation. *Planters' Bank v. Union Bank*, 6 Wall. 496; *Risley v. Phenix Bank*, 83 N. Y. 335; *Ellis v. Phenix Nat. Bank*, 12 Daly, 177.

SECT. 5309. — Amended by 19 St. 253, ch. 69, by inserting "may" in the third line after "same." In *Union Ins. Co. v. United States*, 6 Wall. 759, it was held that the circuit court had jurisdiction in admiralty of such cases, and that, where the seizure was made on navigable waters, the course of admiralty must be strictly pursued, and the cause tried without a jury.

SECT. 5311. — The informer has no vested interest in the suits. *Confiscation Cases*, 7 Wall. 454; note, § 5292. He cannot claim to share as such after proceedings begun by the Attorney-General alone, issue joined, and proofs furnished by other parties. *Francis v. United States*, 5 Wall. 338.

SECT. 5313. — See 24 St. 15, ch. 60.

SECT. 5320. — Under the act of April 25, 1808, § 11, the circuit court has power to issue a *mandamus* to a collector, commanding him to grant a clearance. *Gilchrist v. Collector*, 1 Hall's L. J. 429.



## TITLE LXX.

## CRIMES.

## CHAPTER I.

## GENERAL PROVISIONS.

SECT. 5323. — There is no act of Congress punishing an accessory before the fact to murder or robbery committed on land, and an indictment therefor will be quashed or the judgment arrested. *United States v. Ramsay*, Hempst. 481; *United States v. Terrel*, Id. 411; Opinion of Judge Wells, Id. 413; 1 West. J. 246. This section, in which aiders and abettors are mentioned, does not make the aiding and abetting a murder by personal presence a separate and distinct offence. The more probable interpretation of these terms is that they apply to accessories before the fact. It is not to be inferred that they were employed in the statutes to distinguish such aiders and abettors from the principal murderers. *United States v. Douglass*, 2 Blatch. 207.

SECT. 5324. — See Opinion of Judge Wells, *supra*.

SECT. 5326. — *United States v. Coppersmith*, 4 F. R. 198; 10 Rep. 517.

SECT. 5328. — This section recognizes the jurisdiction of State courts to punish the passing, &c., of counterfeit coin (*Ex parte Geisler*, 4 Woods, 381); or the forgery of a national bank draft (*Hoke v. People*, 13 N. East. Rep. (Ill.) 823); but the Federal courts have exclusive jurisdiction over the offence of passing counterfeit national bank bills, and one imprisoned on such charge by a State court may be released on *habeas corpus*. *Ex parte Houghton*, 7 F. R. 657; 8 Id. 897; 24 Alb. L. J. 145; 2 Crim. L. Mag. 759; *Ex parte Ballinger*, 5 Hughes, 387, see note, § 5370.

SECT. 5330. — If one, convicted of crime and sentenced to pay a fine, is granted a full and unconditional pardon, after payment of the fine, but before the money has been covered into the Treasury, the fine should be restored to him though the pardon does not express words of restitution. 16 A. G. Op. 1. If the money has reached the Treasury, and rights in favor of third persons have attached, the person pardoned cannot claim a restitution of the fine. 8 A. G. Op. 281; 10 Id. 1; *Knote v. United States*, 95 U. S. 142. And the fine may be remitted after the death of the offender. 11 A. G. Op. 35. See also 14 Id. 124; and as to re-enfranchisement by pardon, 9 Id. 478.

## CHAPTER II.

## CRIMES AGAINST THE EXISTENCE OF THE GOVERNMENT.

SECT. 5331. — Treason is a breach of allegiance and can be committed only by one who owes allegiance, perpetual or temporary. The words "owing allegiance to the United States" do not affect the sense of the section. The construction would be precisely the same were they omitted. *United States v. Wiltberger*, 5 Wheat. 76, 97. Treason against the United States may be committed by any one resident or sojourning within its terri-



tory and under the protection of its laws, whether a citizen or an alien. *Re Charge to Grand Jury*, 5 Penn. L. J. Rep. 55; 4 Am. L. J. 83. Aliens domiciled here owe a temporary allegiance to the government, and being bound to obey such of its laws as do not immediately relate to citizenship, are equally amenable with citizens, so long as they reside here, for any infraction thereof. Aliens domiciled in this country prior to the Civil War, who gave aid and comfort to the insurgents, were subject to prosecution for treason. The manufacture of saltpetre in Alabama by aliens domiciled there, and its sale to the Confederate States with knowledge that it was to be used by them in prosecuting the war, was treason or misprision thereof. *Carlisle v. United States*, 16 Wall. 147; *Hanauer v. Doane*, 12 Id. 342. But aiding, assisting, and abetting another nation engaged in a maritime war with the United States is not treason in an alien within the United States if he is commissioned by the other power. 1 A. G. Op. 84. That an unnaturalized alien cannot commit treason, see *United States v. Villato*, 2 Dall. 370.

Levying war embraces any combination, or conspiring together, or insurrection to prevent, or oppose by force, or intimidation, the enforcement of any provision of the Constitution, or for the purpose of resisting the execution of the laws of the United States, or overthrowing the government, or rebelling against its authority, if the opposition in pursuance of the combination is forcible. *Re Charge to Grand Jury*, 5 Penn. L. J. Rep. 55; 4 Am. L. J. 83; *United States v. Mitchell*, 2 Dall. 348; *Shortridge v. Macon*, Chase's Dec. 136. The assemblage of a body of armed men, large or small, in military array for a treasonable purpose, and every step taken by any one of them in part performance of such purpose, are overt acts of treason in levying war. Of such a nature is the occupation of a fortress belonging to the government, on the part of each and every one engaged in the undertaking, though such occupation was not resisted. *United States v. Greiner*, 4 Phila. 396. So is the assemblage of a body of men for the purpose of forcefully revolutionizing the government established in any of the Territories, though such assembling be for some other project to be thereafter accomplished. *Re Bollman*, 4 Cranch, 75; *United States v. Burr*, 1 Burr's Trial, 14. The meeting of particular bodies of men and their going from a place of partial, to one of general, rendezvous is also a levying of war. *Id.* If war has been levied, all who aid in its prosecution by performing any act to promote the common purpose are guilty of treason. The minuteness of such act, or the remoteness from the scene of activities of the person who performs it, does not affect his guilt. *United States v. Great-house*, 2 Abb. C. C. 364. One may commit treason without being a personal actor in any violence. If he directs, aids, abets, counsels, or countenances it, he is guilty, although he is not present in person at the time of the actual perpetration. *United States v. Burr*, 2 Burr's Trial, 405; *Re Charge to Grand Jury*, *supra*. But the mere enlistment of men for the purpose of serving against the government is not a levying of war. *United States v. Burr*, 1 Burr's Trial, 14; *Re Bollman*, *supra*. Nor is a bare conspiracy without an overt act. *United States v. Mitchell*, *supra*. Nor is a conspiracy to resist the execution of a law in particular instances, as for a personal or private purpose, notwithstanding the numbers engaged or the force they may employ. *United States v. Hoxie*, 1 Paine, 265.

"*Adheres to their enemies.*" — One who went from the British squadron to the American shore, for the purpose of peaceably procuring food for the British, was not guilty of treason. The crime cannot be committed by the will alone. But if there was an intent to join in hostilities against the United States, going towards the shore would have been an overt act of adhering to the enemy though no other act was done. And so would the act of carrying provisions towards the enemy with intent to supply him, though such intention should be defeated. *United States v. Pryor*, 3 Wash. 234.

"*Giving them aid and comfort.*" — A citizen of a loyal State, who voluntarily joined in the rebellion, and bore arms against the general government, gave aid and comfort to its



enemies. *Gearing v. United States*, 3 Ct. Cl. 165. Purchasing a vessel, guns, and ammunition, preparing the vessel for sea and for service in aid of the enemies of the government, after war has been levied against it, are overt acts of treason. It is presumed that such acts, done in furtherance of the purposes of such enemies, give them aid and comfort, whether the vessel in fact sails or not, or whether, if she sails, her cruise is successful or not. It is no defence that such acts were done under a letter of marque issued by an assumed government, so long as such government has not been recognized by the United States. *United States v. Greathouse*, 2 Abb. C. C. 364. Delivering prisoners and deserters to the enemy is treason, and a treasonable act is excusable only when it is performed under personal fear of death. *United States v. Greiner*, 4 Phila. 396; *United States v. Hodges*, 1 Brun. Coll. Cas. 465; 2 Wheeler Cr. Cas. 477. So long as acts are treasonable it is immaterial whether they are committed within the United States or elsewhere. *United States v. Craig*, 28 F. R. 795. The constitutional provision that there shall be no conviction for treason, unless upon the testimony of two witnesses, or on confession, does not apply to preliminary hearings and commitment. *United States v. Greiner*, *supra*. For a further discussion of the law of treason, see generally Whart. St. Tr. 102 *et seq.*; 2 Curtis, 630; *Re Bollman*, 4 Cranch, 75; *United States v. Hanway*, 2 Wall. Jr. 139.

SECT. 5332. — The effect of this section (12 St. 589, ch. 195, §§ 1, 3), upon the act of 1790 is discussed and determined in *United States v. Greathouse*, 2 Abb. C. C. 364.

SECT. 5333. — *United States v. Wiltberger*, *supra*.

SECT. 5334. — It is sufficient if an indictment follows the language of the statute, and it is unnecessary now to use the specific term "levying war." *United States v. Greathouse*, 2 Abb. C. C. 364. An acquittal before a court-martial cannot be pleaded in bar of an indictment under this section, though the offence charged in both be substantially the same. *United States v. Cashiel*, 1 Hughes, 552. The act of despatching an American vessel in ballast from a port of the United States with an immediate destination to a neutral port, and an ulterior destination with cargo taken in at such neutral port to a blockaded port, is an offence against the United States under this section. 10 A. G. Op. 515.

SECT. 5335. — *United States v. Craig*, 28 F. R. 795, 801.

SECT. 5336. — This section is constitutional, and it includes a conspiracy or agreement of two or more persons to drive the Chinese out of the United States, or to maltreat or intimidate them with a view of constraining them to depart therefrom. *Re Impanelling Grand Jury*, 11 Sawyer, 522; 26 F. R. 749. The first clause of this section implies force against the government as a government. To constitute an offence under it the authority of the government must be opposed; force must be brought to resist some positive assertion of authority by the government. A mere violation of law is not enough; there must be an attempt to prevent the actual exercise of authority. Where force is exerted in opposition to a class of persons who have a right to look to the government for protection against such wrongs, and not in opposition to the government while actually engaged in the attempt to afford that protection, the case is not within the first clause. *Baldwin v. Franks*, 120 U. S. 678. Under the second clause the government must be prevented, hindered, or delayed in executing its laws. It is not enough to bring a case within it that the laws were set at defiance. There must be a forcible resistance to the authority of the United States while endeavoring to carry the laws into execution. Force exerted against a class of people contrary to law is not such an offence. *Id.*, reversing *Re Baldwin*, 37 F. R. 187.



## CHAPTER III.

## CRIMES ARISING WITHIN THE MARITIME AND TERRITORIAL JURISDICTION OF THE UNITED STATES.

SECT. 5339. — *United States v. Meagher*, 37 F. R. 875; *United States v. Terrel*, Hempst. 411, 413; 1 West. L. J. 246; *United States v. Leonard*, 2 F. R. 669; *United States v. Burlington Ferry Co.*, 21 Id. 331, 336; *Ex parte Crow Dog*, 109 U. S. 556, see note, § 2145; *United States v. Rauscher*, 119 U. S. 407, see note § 5347. Where Congress has denounced an offence by its common-law name, as murder in this section and rape in § 5345, it stands as if the common law had been re-enacted *totidem verbis*, and the common law must therefore be resorted to for a definition of the crime. *United States v. Coppersmith*, 4 F. R. 198; 10 Rep. 517; *United States v. Outerbridge*, 5 Sawyer, 620. At common law the crime of murder is committed when a person of sound memory and discretion unlawfully and feloniously kills any human being in the peace of the sovereign with malice prepense or aforethought, express or implied. *United States v. King*, 34 F. R. 302. The legal meaning of malice aforethought in homicide is not limited to homicide committed in cold blood with design and premeditation, but embraces all cases where the act was done with such cruel circumstances and means as indicate a wicked, depraved, and malignant spirit; as where the punishment inflicted by a person is inhuman in its nature and duration and wholly disproportioned to the offence, though there may have been provocation. *United States v. Cornell*, 2 Mason, 91.

One may be a principal in murder if he is present and aids and abets the act, though he is not actuated by any particular malice against the deceased. If a number conspire together to do an unlawful act, and death results from the prosecution of their design, all are guilty of murder, though death happens collaterally; as where several persons conspired to seize and run away with a vessel, and, if need be, to kill any one who opposed the execution of their purpose, and death ensued, all who were present aiding and abetting were guilty. *United States v. Ross*, 1 Gall. 624; *United States v. Douglass*, 2 Blatch. 207, see note, § 5323. If a seaman is debilitated and exhausted, so that he cannot go aloft without endangering his life, and the master, with knowledge thereof, compels him by moral or physical force to go aloft, malignantly insisting upon obedience, and the seaman thereby comes to his death, the master is guilty of murder if he was actuated by malice, and of manslaughter if he was not so actuated. *United States v. Freeman*, 4 Mason, 505. The wilful killing of a soldier by the sergeant of the guard while on duty is not necessarily a justifiable homicide, and the order of a superior military officer to an inferior will not of itself justify the wilful killing of another. *United States v. Carr*, 1 Woods, 480. This section does not define the crime of murder, and there is no designation of degrees of murder in the laws of the United States. *United States v. Outerbridge*, 5 Sawyer, 620. If, when one commits homicide, he is insane he does not commit murder, although his insanity was remotely caused by excessive intoxication. *United States v. Drew*, 5 Mason, 28.

*Jurisdiction.* — This section is applicable to murder committed within the District of Columbia (*United States v. Guiteau*, 1 Mackey, 498, 530; see also Id. 560, 563, 566); and within the Territory of Alaska to the exclusion of the laws of Oregon on this subject under 23 St. 24, § 7 (see note, § 1954); (*Kie v. United States*, 11 Sawyer, 579; 27 F. R. 351); and to murder committed by an Indian upon a white man in the Indian country within the boundaries of the Territory of New Mexico (*United States v. Monte*, 3 Pac. Rep. 45); and upon the reservation occupied by the Ute Indians under the treaty of March 2, 1868, which was not repealed by 18 St. 474, admitting Colorado to the Union (*United States v. Berry*, 4 F. R. 779); and to murder committed by an Indian upon a white man on the Umatilla reserva-



tion within the district of Oregon, being made applicable to the Indian country by Rev. Stats. § 2145 (*United States v. Martin*, 14 F. R. 817); and to murder committed within a fort purchased by the United States with the consent of the legislature of the State within which it is situated, although in the cession of the property the State reserved the right to execute its civil and criminal process there. *United States v. Cornell*, 2 Mason, 91. In such case State courts have no jurisdiction of murder or manslaughter, though the person struck or wounded therein dies out of the fort. *State v. Kelly*, 75 Maine, 331. And where, upon an indictment for murder committed by a white man upon a white man in the Indian country, the accused pleaded that he and the deceased had become citizens of and had been adopted by an Indian tribe, and that he was not subject to the jurisdiction of the circuit court of the United States, but was within the proviso of 4 St. 733, § 25 (Rev. Stats. § 2145), the plea was held bad. *United States v. Rogers*, 4 How. 567; *Hempst.* 450. But see *United States v. Bailey*, 1 McLean, 234. The circuit court has jurisdiction of an indictment for an assault with intent to kill committed in a government navy yard. *United States v. Dondan*, 5 Blatch. 284. Murder or robbery committed on the high seas may be an offence cognizable by the United States courts, although it was committed on board a vessel not belonging to citizens of the United States, if she had at the time no national character, but was possessed and held by pirates or persons not lawfully sailing under the flag of any foreign nation. *United States v. Holmes*, 5 Wheat. 412. Where the United States own lands situated within the limits of a State, but over which they have not acquired jurisdiction from the State, they cannot be said to have any local jurisdiction over the land whatever. 14 A. G. Op. 557. The United States courts have no jurisdiction of murder committed in a fort which was established as a military post on land of which the government has always held the fee, such fort having been erected subsequently to the admission into the Union of a State whose boundaries included the land on which the fort stood. *United States v. Stahl*, Woolw. 192; *McCahon* (Kans.), 206. As to crimes by Indians or in the Indian Territory, see notes, §§ 2145, 2153, 2154.

After the admission of a State to the Union the fact that within its boundaries land, the fee of which is in the United States, is set apart as an Indian reservation, is not enough of itself to give Federal courts jurisdiction of murder committed within the limits of such reservation. *Ex parte Sloan*, 4 Sawyer, 330. Indians belonging to a tribe which maintains a tribal organization, occupying a reservation within the limits of a State, are amenable to State laws for murder or other offences when committed off the reservation and within the limits of the State. *United States v. Yellow Sun*, 1 Dillon, 271. *United States v. Ward*, Woolw. 17; *McCahon* (Kans.), 199. Federal courts have no jurisdiction of a homicide committed on the Presidio military reservation in San Francisco (*United States v. Bateman*, 34 F. R. 86); nor of a homicide committed on board a ship of war lying in Boston harbor (*United States v. Bevans*, 3 Wheat. 336); nor, before St. March 3, 1835, ch. 65, § 4, of a homicide where the mortal stroke was given on the high seas and the death happened on the land (*United States v. McGill*, 4 Dall. 426); and that statute applies only to a malicious killing on shore by a stroke at sea (*United States v. Armstrong*, 2 Curtis, 446); nor of a homicide on the high seas, if the vessel in which the offender is or to which he belongs, is at the time, both in fact and in right, the property of a subject of a foreign State and subject at the time to his control. *United States v. Holmes*, 5 Wheat. 412. If the crime is committed on board a foreign vessel by a citizen of the United States, or on board a vessel of the United States by a foreigner, the offender is to be considered *pro hac vice* and in respect to this subject, as belonging to the nation under whose flag he sails. *Id.* For murder committed within the Territory of New Mexico, an indictment found in the name of the Territory is sufficient. *Territory v. Yarberry*, 2 N. Mex. 391. If two or more are jointly charged in the same indictment with a capital offence, they cannot demand a separate trial as of right. It is a matter in the dis-



cretion of the court. *United States v. Marchant*, 4 Mason, 158; 12 Wheat. 480. The offences named in this section and Rev. Stats. § 5341, manslaughter; § 5342, attempt to commit murder or manslaughter; § 5345, rape; § 5348, mayhem; § 5352, bigamy; § 5356, larceny; and § 5357, receiving stolen goods, — are not, when committed within the Indian country by one Indian against the person or property of another Indian, punishable, under the laws of the United States. *Ex parte Crow Dog*, 109 U. S. 556. As to the criminal jurisdiction of the Federal courts, see further 7 A. G. Op. 721; 13 Id. 131.

*High Seas.* — The words “high seas” mean any waters on the sea-coast which are without the boundaries of low-water mark, although such waters may be in a roadstead or bay within the jurisdictional limits of a foreign government (*United States v. Ross*, 1 Gall. 624); and the unenclosed waters of the ocean on the sea-coast outside of the *fauces terrae*. *United States v. Grush*, 5 Mason, 290.

SECT. 5341. — *United States v. Leonard*, 2 F. R. 669; *Kie v. United States*, 27 Id. 351; *United States v. King*, 34 Id. 302; *United States v. Terrel*, Hempst. 416; 1 West. L. J. 246; *State v. Kelly*, 76 Maine, 331; *People v. Tyler*, 7 Mich. 161. Manslaughter is not an offence against the laws of the United States unless it be committed on the high seas or in some place under the sole and exclusive jurisdiction of the United States, or on board a vessel belonging to a citizen or citizens thereof on some water within a foreign jurisdiction, by one or more of the ship’s company or a passenger upon some other passenger or member of the ship’s company. *United States v. Imbert*, 4 Wash. 702; *United States v. Wiltberger*, 5 Wheat. 76; *United States v. Holmes*, Id. 412; 14 A. G. Op. 559, see note, § 5339. For a definition of the crime of manslaughter prior to the enactment of this statute, see *United States v. Armstrong*, 2 Curtis, C. C. 446.

SECT. 5342. — There is no punishment provided for an assault with a dangerous weapon committed within the exclusive jurisdiction of the laws of the United States, if it is committed on land and involves an attempt to commit murder. And such a case cannot be brought within this section by the use of its language in the indictment. *United States v. Williams*, 6 Sawyer, 244; 2 F. R. 61; 9 Rep. 369; *Ex parte Crow Dog*, 109 U. S. 556, see note, § 5339.

SECT. 5343. — *Kie v. United States*, 27 F. R. 351, 356; *State v. Kelly*, 76 Maine, 331. St. March 3, 1875, ch. 138 (18 St. 473), provides, —

“SEC. 1. That whoever shall hereafter be convicted of the crime of manslaughter, in any court of the United States, in any State or Territory, including the District of Columbia, shall be imprisoned not exceeding ten years, and fined not exceeding \$1000: *Provided*, That this act shall not affect or apply to any prosecution now pending, or the prosecution of any offence already committed.

“SEC. 2. That all acts or parts of acts inconsistent with this act are hereby repealed: *Provided*, That said acts shall remain in force for the punishment of all persons who have heretofore committed the crime of manslaughter.”

SECT. 5344. — In an indictment framed under this section it is not necessary to aver, nor is it necessary to prove on the trial, a malicious intent. *United States v. Warner*, 4 McLean, 463. Nor is it necessary to show wilful misconduct, negligence, or inattention in the captain. *United States v. Farnham*, 2 Blatch. 528; *United States v. Keller*, 19 F. R. 633. Destruction of life is the essence of the offence. *Re Doig*, 4 F. R. 193. The wrongful act of the pilot of one vessel which contributes to an accident does not justify neglect of duty by the pilot of another vessel. *United States v. Keller*, *supra*. The power to regulate navigation conferred upon Congress includes the power to regulate steamboats whenever they are used on the navigable waters of the United States. *United States v. Beacham*, 29 F. R. 284. An indictment need not aver that the Chesapeake Bay is one of the navigable waters of the United States. The court must know this judicially. Id.; *United States v. Taylor*, 5 McLean, 242; *Holmes v. Oregon Co.*, 5 F. R. 523.



SECT. 5345. — United States *v.* Coppersmith, 4 F. R. 193; 10 Rep. 513; *Ex parte* Crow Dog, 109 U. S. 556, see note, § 5339. St. Feb. 9, 1882, ch. 120 (25 St. 428), provides —

“That every person who shall carnally and unlawfully know any female under the age of sixteen years, or who shall be accessory to such carnal and unlawful knowledge before the fact in the District of Columbia or other place, except the territories, over which the United States has exclusive jurisdiction; or on any vessel within the admiralty or maritime jurisdiction of the United States, and out of the jurisdiction of any State or Territory, shall be guilty of a felony, and when convicted thereof shall be punished by imprisonment at hard labor, for the first offence for not more than fifteen years, and for each subsequent offence not more than thirty years.”

SECT. 5346. — United States *v.* Hunt, 2 Story, 120; United States *v.* Anderson, 17 Blatch. 238. Federal courts have no jurisdiction of offences committed on an arm of the sea, a creek, haven, &c., within the ebb and flow of the tide, when such places are within the body of a county. When an arm of the sea or creek, &c., is so narrow that a person standing on one shore can, with the naked eye, see what is being done on the opposite shore, the waters are within the body of a county. United States *v.* Grush, 5 Mason, 290. Nor of a felonious assault committed on board an American vessel in the Detroit River, the Great Lakes, or their connecting waters. *Ex parte* Byers, 32 F. R. 404. For a case in which the accused was tried in a district other than the one into which he was first brought, see United States *v.* Aron, 19 Wall. 486. A stowaway is not one of the crew, but an officer who assaults him with a dangerous weapon is guilty of an offence under this section. United States *v.* Small, 2 Curtis, 241. It is of the substance of the offence that the assault be with a dangerous weapon; but whether a belying pin is a dangerous weapon is a question for the jury. *Id.* See United States *v.* Lewis, 36 F. R. 449. If the prisoner was able to inflict a blow with a knife which he held in his hand, by extending his arm its length and intended so to do, he was guilty of the assault; otherwise not. United States *v.* Salisbury, 2 N. Y. Leg. Obs. 53. But punishment for an attempt to commit murder or manslaughter, unless coincident with the assault, has not been provided for. United States *v.* Williams, 6 Sawyer, 244; 2 F. R. 61; 9 Rep. 369.

SECT. 5347. — *Officer.* — Any person who has authority to control the actions of the crew, or any part of it, by directing their work, is an officer, such as one of the “roustabouts” who is set over his fellows as a “captain of the watch.” He may be held to answer a charge of beating and wounding any one so placed under his command. United States *v.* Trice, 30 F. R. 490.

*Crew.* — Crew includes officers as well as seamen, and a master is liable for imprisoning the first mate. United States *v.* Winn, 3 Sumner, 209.

The master when on board has generally sole authority to inflict punishment. If he is present when it is inflicted by a subordinate, and can prevent it, but does not, he is responsible. No other officer can punish seamen for misconduct to him personally when the master is on board, except by authority of the latter, express or implied, unless the ship’s service requires instantaneous punishment to induce a seaman to do his duty. United States *v.* Taylor, 2 Sumner, 584.

Under this section malice means a wrongful act done intentionally without just cause or excuse. The word here covers all intentional wrongs not included in the words hatred or revenge. To authorize a conviction, malice, hatred, or revenge must concur with a want of justifiable cause to inflict the injury. *Id.*; United States *v.* Harriman, 1 Hughes, 525; United States *v.* Freeman, 4 Mason, 505.

When this statute was enacted, flogging was not a cruel or unusual punishment within its meaning. United States *v.* Collins, 2 Curtis, 194. If flogging was inflicted from malice, the master should have been indicted for beating and wounding, and not for



inflicting cruel and unusual punishment. *United States v. Collins*, 2 Curtis, 194. But since the act of 1850 (Rev. Stats. § 4611), such punishment would be held cruel and unusual. A whaling vessel is within this section. *United States v. Cutler*, 1 Curtis, 501. See charge of Judge Curtis, Id. 509. Whether the punishment was from malice, hatred, or revenge, is a question for the jury. *United States v. Alden*, 1 Sprague, 95. A prisoner having been extradited upon a charge of murder under Rev. Stats. § 5339, the circuit court had no jurisdiction to put him upon trial upon an indictment under this section. *United States v. Rauscher*, 119 U. S. 407.

This section follows an American vessel wherever she may be on navigable waters, so that an offence committed on board such vessel is an offence against the United States, though the vessel be in the harbor or river of a foreign country. *United States v. Bennett*, 3 Hughes, 466.

See also *Re Smith*, 13 F. R. 25.

SECT. 5348. — *United States v. Terrel*, Hempst. 416; 1 West. L. J. 246; *Ex parte Crow Dog*, 109 U. S. 561; and 14 A. G. Op. 559, see note, § 5339. The word "maliciously," as here used, means voluntarily, intentionally, unlawfully, and without excuse or justification. It is immaterial whether the act was done with premeditated design or not. If the indictment followed the words of the statute, it was sufficient without averring that by reason and means of the fact therein alleged the complainant was maimed and disfigured. *United States v. Gunther*, 38 N. W. Rep. (Dak.) 79. The particular mode of disabling, as by stabbing, cutting, shooting, or striking, or the particular weapon or instrument used, is not material. Nor is it confined to cutting by the use of some sharp instrument or edged tool. The real inquiry is whether a limb or member has been disabled or disfigured purposely and maliciously and with intent to maim or disfigure. If so, the offence is complete. *United States v. Scroggins*, Hempst. 478.

SECT. 5352. — *Wenner v. Smith*, 9 Pac. Rep. 293; *United States v. Crawford*, 6 Mackey, 319. Amended by St. March 22, 1882, ch. 47 (22 St. 30), so as to read —

"Every person who has a husband or wife living who, in a Territory or other place over which the United States have exclusive jurisdiction, hereafter marries another, whether married or single, and any man who hereafter simultaneously, or on the same day, marries more than one woman, in a Territory or other place over which the United States have exclusive jurisdiction, is guilty of polygamy, and shall be punished by a fine of not more than \$500, and by imprisonment for a term of not more than five years; but this section shall not extend to any person by reason of any former marriage whose husband or wife by such marriage shall have been absent for five successive years, and is not known to such person to be living, and is believed by such person to be dead, nor to any person by reason of any former marriage which shall have been dissolved by a valid decree of a competent court, nor to any person by reason of any former marriage which shall have been pronounced void by a valid decree of a competent court, on the ground of nullity of the marriage contract."

By § 5 of the above act (22 St. 30) it is enacted —

"SEC. 5. That in any prosecution for bigamy, polygamy, or unlawful cohabitation, under any statute of the United States, it shall be sufficient cause of challenge to any person drawn or summoned as a jurymen or talesman, first, that he is or has been living in the practice of bigamy, polygamy, or unlawful cohabitation with more than one woman, or that he is or has been guilty of an offence punishable by either of the foregoing sections, or by Rev. Stats. § 5352, or the act of July 1, 1862, entitled 'An act to punish and prevent the practice of polygamy in the Territories of the United States and other places, and disapproving and annulling certain acts of the legislative assembly of the Territory of Utah,' or, second, that he believes it right for a man to have more than one living and undivorced wife at the same time, or to live in the practice of cohabiting with more than one woman; and any person appearing or offered as a juror or talesman, and challenged on either of the foregoing grounds, may be questioned on his oath as to the existence of any such cause of challenge, and other evidence may be introduced bearing upon the question raised by such challenge; and this question shall be tried by the court. But as to the first ground of challenge before mentioned, the person challenged shall not be bound to answer if he shall say upon his oath that he declines on the ground that his answer may tend to criminate himself; and if he



shall answer as to said first ground, his answer shall not be given in evidence in any criminal prosecution against him for any offence named in sections one or three of this act; but if he declines to answer on any ground, he shall be rejected as incompetent."

By 22 St. 313 and 23 St. 178, appropriations are made for carrying out the provisions of the act entitled "An act to amend Rev. Stats. § 5352 in reference to bigamy and for other purposes," approved March 22, 1882.

The last named act is still further amended by 24 St. 635, ch. 377.

By 24 St. 252, ch. 902 (see also 25 St. 13, 584), provision is made for the establishment of an Industrial Home in Utah, to provide employment and means of self-support for the dependent women who renounce polygamy, and for their children; and the money appropriated is to be expended under the management of a board of control.

This statute is constitutional. *Reynolds v. United States*, 98 U. S. 145. An indictment may be found under this section in a district court of Utah by a grand jury of fifteen persons impanelled pursuant to the laws of that Territory. *Id.* An indictment under 22 St. 30 need not aver that the defendant was a male person. *United States v. Cannon*, 7 Pac. Rep. 369; affirmed 116 U. S. 55; vacated, 118 Id. 355. See further, as to requisites of an indictment, and as to what constitutes cohabitation, under 22 St. 30. *United States v. Tenney*, 11 Pac. Rep. 472; *United States v. Christofferson*, *Id.* 480. It is not necessary, in order to establish the fact of cohabitation with more than one woman, to give evidence of sexual intercourse. *United States v. Cannon*, *supra*; *United States v. Musser*, 7 Pac. Rep. 389. The above § 5 of 22 St. 30, relating to disqualifications of jurors, applies to cases of bigamy and polygamy only. *Territory v. Hopt*, 3 Utah, 376; 4 Pac. Rep. 250, *q. v.* as to the construction of §§ 5, 8 of the same act. A juror is competent who, though he has formerly lived in the practice of polygamy, has abandoned it, and been pardoned by the President. *United States v. Bassett*, 13 Pac. Rep. 237.

There is no provision of law under which the Supreme Court of the United States can review a judgment of the Supreme Court of a Territory on a conviction for cohabiting with more than one woman under 22 St. 30. *Snow v. United States*, 118 U. S. 346. See also, *Re Snow*, 120 U. S. 274; *Ex parte Crow Dog*, 109 U. S. 556, see note, § 5339. See also, *Miles v. United States*, 103 U. S. 304; *Murphy v. Ramsey*, 114 Id. 15; *Clawson v. United States*, *Id.* 477.

SECT. 5356. — *Ex parte Crow Dog*, 109 U. S. 556, see note, § 5339. See St. 1875, ch. 144, stated p. 409, *ante*. The indictment under this section must state that the place where the offence was committed is "under the sole and exclusive jurisdiction of the United States," and it must also use the words of the statute, "take and carry away with intent to steal or purloin." *United States v. Davis*, 5 Mason, 356. The courts of the United States have jurisdiction of the offence of larceny committed by a white man against an Indian on the Umatilla reservation in Oregon (*United States v. Bridleman*, 7 F. R. 894); but not of larceny committed in the port of Savannah, even though the stolen property is taken to the port of New York (*United States v. Davis*, 2 N. Y. Leg. Obs. 35); nor of larceny of goods in a foreign port or within the *fauces terre* of a foreign country, though the goods purloined are afterward carried on to the high seas (*United States v. Morel*, 13 Am. Jurist, 279; 1 Brun. Coll. Cas. 373; *United States v. Jackson*, 2 N. Y. Leg. Obs. 3); nor of larceny committed on board an American ship in an enclosed dock in a foreign port. *United States v. Hamilton*, 1 Mason, 152. It seems that a reservation, on a cession of concurrent jurisdiction for specified purposes, operates merely as a condition of the grant, and does not exclude exclusive jurisdiction. *United States v. Davis*, 5 Mason, 356. The words "personal goods" do not include *chattel in action*, they not being the subject of larceny at common law. *Id.* Larceny of personal goods of the United States is an offence within this section. *United States v. Maxon*, 5 Blatch. 360.



SECT. 5357. — *Ex parte* Crow Dog, 109 U. S. 556, see note, § 5339.

SECT. 5358. — This section is constitutional, and is intended to prohibit and punish such plunder, stealing or destroying of property therein named, whether the act be done on shore or in any of the enumerated places below high-water mark. *United States v. Coombs*, 12 Pet. 72; *United States v. Pitman*, 1 Sprague, 196; 5 L. R. N. s. 36; *United States v. Kessler*, Baldw. 15.

An indictment which alleged that the defendant "furnished and loaned" a skiff to be used by others in plundering a wrecked vessel was held good. *United States v. Sanche*, 7 F. R. 715. The indictment need not distinguish between acts supposed to be characterized as "plundering" and other acts supposed to be properly designated as "stealing" or "destroying," nor between acts of depredation committed on the wreck and such acts committed on property belonging to, but separated from it. *United States v. Stone*, 8 F. R. 232. It is not larceny alone which is punishable under this section, but any act of depredation, whether it be of the character that would be piracy if committed on the high seas, robbery or other forcible taking, theft, trespass or other malicious mischief, or any fraudulent and criminal breach of trust, if committed on land where the common or statute law prevails. No specific intent is necessary to constitute the offence. The value of the goods is immaterial. *Id.* Until goods are removed from the place where landed, or thrown ashore from the stranded or wrecked vessel, or cease to be under the charge of the officers or other parties interested, the act would apply if a larceny of them were committed, even though the vessel may in the mean time have gone entirely to pieces and disappeared from the sea. But the act was not intended to reach cases where the property abandoned by the officers or other parties interested is recovered by third persons. *United States v. Smiley*, 6 Sawyer, 640. Where property abandoned by the officers of the vessel lies under the water within one hundred and fifty feet of the Mexican shore, the Federal courts of the United States have no jurisdiction under this section. *United States v. Smiley*, *supra*.

SECT. 5359. — *Crew*. — The "crew" embraces all the officers as well as the common seamen. *United States v. Winn*, 3 Sumner, 209. Therefore the mate (*United States v. Savage*, 5 Mason, 460), even though he may have been discharged by the master (*United States v. Huff*, 13 F. R. 630), the pilot in charge of the vessel (*United States v. Lynch*, 2 N. Y. Leg. Obs. 51), the cooper of the ship (*United States v. Thompson*, 1 Sumner, 168), and seamen for whom homeward passages are provided by United States consuls, pursuant to Rev. Stats. § 4577, are amenable to the provisions of this section. *United States v. Sharp*, Pet. C. C. 118.

*American vessel*. — This fact may be proved orally, and documentary evidence is not necessary. *United States v. Seagrist*, 4 Blatch. 420. The provisions of this section are not limited to offences committed on such vessels as answer to the description of ships. *United States v. Kelly*, 4 Wash. 528. But a ship engaged in a whaling voyage without having surrendered her register or taken out an enrolment and license as required by St. 1793, ch. 52, is not an American vessel within the intent of the act of 1835 embodied in this section. *United States v. Rogers*, 3 Sumner, 342.

*Jurisdiction*. — Under this section the circuit court has jurisdiction over all places and waters where the tide ebbs and flows. *United States v. Lynch*, *supra*. Therefore it had jurisdiction of an endeavor to make a revolt on a vessel about sixty yards from the wharf in New York harbor (*Id.*); on a vessel lying in the river about a mile and a half below the town of St. Ubes within the bar (*United States v. Smith*, 3 Wash. 78); or if the vessel is in a navigable stream, and nothing is shown as to the jurisdiction of the State over the place where she was at anchor (*United States v. Staly*, 1 Wood. & M. 338); or if she is in a foreign port (*United States v. Keefe*, 3 Mason, 475) and within an enclosed dock, in a foreign port, into which the tide flows at the will of the owner of the



dock. *United States v. Roberts*, 2 N. Y. Leg. Obs. 99. A vessel is on the high seas if lying outside a harbor within three miles of the shore (*United States v. Smith*, 1 Mason, 147); or if she is lying in a harbor fastened to the shore by cables, communicating with the land by her boats, and not within any enclosed dock, or at any pier or wharf. *United States v. Seagrist*, 4 Blatch. 420.

*Endeavor to make a revolt.*—The statute does not define the offence of endeavoring to make a revolt, but it was, in *United States v. Kelly*, 11 Wheat. 417, held to be within the power of the courts to define it. The definition there given was an attempt by the crew, or any one or more of them, to overthrow the legitimate authority of the commander, with intent to remove him from his command, or against his will to take possession of the vessel by assuming the government and navigation of her, or by transferring their lawful obedience from the commander to some other person. *United States v. Sharp*, Pet. C. C. 118. It necessarily implies an attempt to stir up others of the crew to a resistance or rebellion against the lawful authority of the master and officers, and the offence is not committed if the accused does not attempt or endeavor to combine or excite others of the crew to aid in his unlawful purposes. *United States v. Smith*, 1 Mason, 147; *United States v. Savage*, 5 Id. 460. Resisting a single lawful order constitutes the offence as much as a general resistance or usurpation. Id. It is an endeavor to make a revolt to conspire to usurp the authority and command of the ship, and for such purpose to resist a lawful command of the master, or to incite others of the crew to such resistance (*United States v. Hemmer*, 4 Mason, 105); or to do anything with intent to accomplish such object (Id.); to combine to prevent the vessel from going to sea in accordance with the master's orders (*United States v. Nye*, 2 Curtis, 225); to refuse to do duty until the master complies with some improper request (*United States v. Gardner*, 5 Mason, 402), although no orders are issued after the combination has been entered into (*United States v. Barker*, 5 Id. 404); to interpose and prevent one of the crew from being punished for misbehavior, and compelling the master, by acts of intimidation and violence, to desist therefrom (*United States v. Morrison*, 1 Sumner, 448); to induce the crew to disobey one lawful order (*United States v. Thompson*, 1 Id. 168); to refuse to perform the voyage under any person lawfully substituted as master (*United States v. Haines*, 5 Mason, 272; *United States v. Roberts*, 2 N. Y. Leg. Obs. 99; *United States v. Nye*, 2 Curtis, 225; *United States v. Hamilton*, 1 Mason, 443); unless such person be grossly incompetent, or unskilful, of profligate habits or cruel behavior. *United States v. Cassidy*, 2 Sumner, 582. If any of the crew stand by, inciting and encouraging those who are engaged in the illegal interference, they are equally guilty. *United States v. Morrison*, 1 Sumner, 448. And it is not necessary that there should be any previous deliberate combination for mutual aid and encouragement or any preconcerted plan of operations. Id.

*What is not an endeavor to make a revolt.*—An assault and battery committed by a seaman upon the master (*United States v. Lawrence*, 1 Cranch, C. C. 94); a mere refusal by one or more seamen, without any attempt to encourage or aid or influence any others of the crew to the same act (*United States v. Barker*, 5 Mason, 404; *United States v. Cassidy*, 2 Sumner, 582; *United States v. Haines*, 5 Mason, 272; *United States v. Hoff*, 13 F. R. 630); mere insolent conduct towards the master, disobedience of his orders, violence upon his person unaccompanied by other acts showing a purpose to subvert his command or conspiracy of the crew to displace the master (*United States v. Kelly*, 4 Wash. 528; 11 Wheat. 417), is not an endeavor to make a revolt.

*Defences.*—A deviation from the voyage described in the shipping articles is a justification of a refusal to do further duty on board. *United States v. Matthews*, 2 Sumner, 470. The crew are justified in combining to compel the master to return to port because of the unseaworthiness of the vessel if they act *bona fide*, and she is actually unseaworthy, and also if they so act upon reasonable grounds and apparent unseaworthiness, and it is a



matter of doubt whether she was unseaworthy or not. But if the vessel was clearly seaworthy, it is no defence. *United States v. Ashton*, 2 Sumner, 13. If they believe a vessel to be unseaworthy before the voyage is begun, they may lawfully refuse to go to sea in her. But this fact must be proved. *United States v. Nye*, 2 Curtis, 225. And they are not bound to sail until the vessel has been surveyed if this is requested by them. This is so although the jury, in a doubtful case, should think her seaworthy. *United States v. Givings*, 1 Sprague, 75. If the masts are rotten, the crew are not bound to rely upon the master's verbal promise that he will keep in certain latitudes, and carry only such sail as the masts are sufficient for, and they may resist an attempt on the master's part to compel them to go to sea. If, in such resistance, one of their number does an unlawful act, he alone is responsible for it. *Id.*; *The Hibernia*, *Id.* 78. In *United States v. Staly*, 1 Wood. & M. 338, it was held that the crew cannot refuse obedience subsequent to the voyage if the vessel is believed to be unseaworthy. Combination and intimidation may be lawful if from the improper conduct of the master the crew have reason to believe and do believe that they would be subjected to unlawful and cruel or oppressive treatment, or that a great wrong was about to be inflicted on one of them. *United States v. Borden*, 1 Sprague, 374. But seamen who claim that by their articles they are not bound to go on a certain voyage and perform certain duties required of them, must assert such claim at the time the orders which they disobey are given. *United States v. Lynch*, 2 N. Y. Leg. Obs. 51.

*Indictment.* — Under the act of 1790 it was not necessary, in an indictment for an endeavor to make a revolt, to allege that it was committed on the high seas. *United States v. Hamilton*, 1 Mason, 443; *United States v. Keefe*, 3 *Id.* 475; *United States v. Smith*, 3 Wash. 78. Nor need the indictment allege that the master was, at the time, in the peace of the United States or that he was an American citizen (*United States v. Thompson*, 1 Sumner, 168); nor that the defendant had been tried and convicted or acquitted by a foreign tribunal. *United States v. Stevens*, 4 Wash. 547. To sustain an indictment under this section there should be some evidence that the attack on the master was made with intent to take possession of the vessel (*United States v. Smith*, 3 Wash. 78); and a confederacy or combination must be shown between two or more seamen to refuse to do further duty and to resist the officer's lawful commands. *United States v. Cassidy*, 2 Sumner, 582. Confinement of the captain, under § 12 of the act of 1790, was a misdemeanor, and a revolt under § 8 of said act was a capital offence, and an indictment charging both offences in the same count was held bad. *United States v. Sharp*, Pet. C. C. 131. It is sufficient if the crime of endeavoring to make a revolt is charged in the words of the statute. *United States v. Seagrist*, 4 Blatch. 420. An indictment for confining the master, and for an assault committed on the high seas in the outer road of the harbor, is sustained by proof that the offences were committed in the inner road and in port. *United States v. Stevens*, *supra*.

*Confinement of the master.* — If the conduct of the crew toward the master is such as would reasonably intimidate a firm man, this clause is violated. The case is not altered where the master went armed, if it was necessary for him to do so for his protection. Seizing his person for a moment is a confinement which is not excused by a previous battery on the seamen administered for the purpose of securing performance of their duty. *United States v. Bladen*, Pet. C. C. 213. Confinement is not limited to mere personal restraint by seizing the master and preventing the free movement of his body, nor to imprisonment in any specific place. It is equally a confinement to prevent him from free movement about the ship by force or intimidation, as by limiting him to walking on a particular part of the deck. *United States v. Hemmer*, 4 Mason, 105; *United States v. Huff*, 13 F. R. 630; 4 Crim. L. Mag. 36. The confinement may be accomplished by moral as well as by physical restraint, but it must be an illegal restraint without justi-



fiable cause. *United States v. Thompson*, 1 Sumner, 168. But in order to constitute the offence it must be feloniously done. *United States v. Henry*, 4 Wash. 428. If the seizure is unlawful, it is a confinement regardless of the intent, as for the purpose of inflicting chastisement. *United States v. Savage*, 5 Mason, 460. It may be committed in port as well as on the high seas. *United States v. Stevens*, 4 Wash. 347. One who joins in the general conspiracy, and countenances violence by his presence, is guilty of the offence of confining the master, though he does not use force or threats to compel him to resign. *United States v. Sharp*, Pet. C. C. 118. Though the master's acts may justify the crew in placing restraint upon him, yet they should proceed with great caution, and such restraint must end the moment the occasion for it has passed. *Id.*

*Conspiracy.* — One cannot be an accomplice without intent. If, at the time some of the crew were attacking the captain, others attack the mate, intending thereby to assist the former, they are guilty, but if they were distinct affrays, they are not. *United States v. Henry*, 4 Wash. 428.

See, also, *United States v. Stone*, 8 F. R. 232, 252, and generally the notes to the following section.

SECT. 5360. — *United States v. Givings*, 1 Sprague, 75, see note, § 5359. There is a revolt "where the crew or any part of them throw off all obedience to the commander, and forcibly take possession of the vessel by assuming and exercising command and navigation of her, or by transferring their obedience from the lawful commander to one who has usurped the command." *United States v. Haskell*, 4 Wash. 402. It is an overthrowing of the legitimate authority of the commander with intent to remove him from the command, or against his will to take possession of the vessel by assuming the command and navigation of her. *United States v. Forbes*, Crabbe, 558. It is immaterial that the command is afterward regained, or how long the vessel is under the control of the mutineers. *United States v. Haskell*, *supra*. The master is prevented in the free and lawful exercise of his authority if he be prevented from carrying into effect one lawful command. *United States v. Borden*, 1 Sprague, 374. It is no excuse for participating in a revolt that one was in fear of death, unless it was such a fear as a man of ordinary courage and fortitude might yield to. *United States v. Haskell* and *United States v. Borden*, *supra*. The crew have no right to disarm the captain, though he is using a deadly weapon, if they are in a mutinous and seditious state and resisting his lawful commands. Foreign seamen on board an American vessel are subject to the statutes of the United States. *United States v. Peterson*, 1 Wood. & M. 305. Mere disobedience of orders by one or two of the crew without combination or offensive language is not a revolt. *United States v. Forbes*, *supra*. The pilot's orders are entitled to the same obedience as the master's. *Id.* Proof that a vessel sailed from and to an American port, and was apparently owned and controlled by an American citizen, is sufficient to show the nationality of the vessel. *United States v. Peterson*, *supra*. If the indictment contains two counts for offences committed at the same time and place, and of the same class, as one for a revolt and one for an attempt to excite, judgment will not be arrested, though the defendant was found guilty on both. *Id.* The indictment must allege the acts charged to have been done unlawfully. *United States v. Borden*, *supra*.

SECT. 5361. — For a definition of "plunder," see *United States v. Stone*, 8 F. R. 232, 246. See also note, § 5358.

SECT. 5363. — It is sufficient to constitute this offence if any of the officers or mariners are either forced on shore or left behind, or are refused a return home. *United States v. Netcher*, 1 Story, 307. The offence is committed where the master causes a mariner to be imprisoned in a foreign jail, for the use of abusive language or misconduct, so that he is unable to return, unless a more moderate punishment on board ship would not be effectual and safe. *Id.*; *United States v. Ruggles*, 5 Mason, 192. It is not necessary that



actual physical force be used. It is sufficient if one leaves the ship upon a well-founded fear of danger to his life should he continue on board to perform the home voyage. *United States v. Riddle*, 4 Wash. 644. The words "officer or mariner" include all persons, other than the captain, employed under shipping articles in any capacity on the vessel. *Case of Chinese Laborers*, 13 F. R. 291. The home referred to is the home port of the vessel for the voyage, and not the home of the officer or mariner, if he happen to be a foreigner. *United States v. Coffin*, 1 Sumner, 394. The act must be done without justifiable cause, and must be done maliciously. "Maliciously" means with a wilful disregard of right and duty, or doing an act against one's conviction of duty. *United States v. Ruggles*, *supra*; *United States v. Coffin*, *supra*. The requirement that the officer or mariner should be in a condition and willing to return, applies only to the offence of refusing to bring home again. *United States v. Netcher*, *supra*.

The commission of some offence of a high and aggravated character, or long and habitual disregard of duty, or continued misconduct, unrepented of and unchanged, will authorize a discharge in a foreign port. *United States v. Coffin*, *supra*. And so will an attempt to commit a rape upon a female passenger. *Nieto v. Clark*, 1 Cliff. 145. But such a discharge as the maritime law might authorize is not justifiable. *United States v. Coffin*, *supra*. The *onus probandi* is on the master to show justifiable cause. *Id.*

SECT. 5364. — This section is constitutional. *United States v. Cole*, 5 McLean, 513. Its object is to protect commerce, and the protection to underwriters is incidental. It applies to internal as well as foreign commerce. Any combination of two or more persons to destroy a vessel or cargo consummates the offence, though no harm has been done to either. *Id.* But intent to injure underwriters is an essential ingredient of the crime, and must be alleged. *United States v. Hand*, 6 McLean, 274.

SECT. 5365. — The word "destroys" means to unfit a vessel for service beyond the hope of recovery by the use of ordinary means. Casting away is a species of destroying. *United States v. Johns*, 4 Dall. 412; 1 Wash. 363. The original act used the words "any person or persons," and was held to include corporations and bodies politic. *United States v. Amedy*, 11 Wheat. 392. The law punishes the act when done with an intent to prejudice, and does not require actual prejudice. It does not prescribe that the policy should be valid. *Id.* The master of a vessel may be indicted and convicted for wilfully destroying a vessel with intent to defraud her underwriters, though the owner be on board, and consent to or command the destruction of the vessel. *United States v. Jacobson*, 1 Brun. Coll. Cas. 410. The indictment must state that the act charged was done to the prejudice of the underwriters or of a merchant who had goods thereon. *United States v. Vanranst*, 3 Wash. 146. In order to give Federal courts jurisdiction of the offences specified in this section and in Rev. Stats. § 5366, they must have been committed upon the high seas, and not merely upon waters within the jurisdiction of the United States. *United States v. Wilson*, 3 Blatch. 435; *Beaston v. Farmer's Bank*, 12 Pet. 102, 135.

SECT. 5366. — *United States v. Vanranst*, 3 Wash. 146, and *United States v. Wilson*, 3 Blatch. 435. See note, § 5365.

SECT. 5367. — The offence of wilfully setting fire to a ship at sea with intent to burn her being charged in the indictment in the words of the statute creating the crime, the allegation was sufficient without the allegation of the word "feloniously." *United States v. McAvoy*, 4 Blatch. 418; 18 How. Pr. 380.

SECT. 5368. — This section is constitutional, and Congress has power to define and punish the crime of piracy. It is defined to be robbery or forcible depredation upon the sea *animo furandi*. *United States v. Smith*, 5 Wheat. 153; *United States v. Pirates*, *Id.* 184. It is competent for the jury to find that a vessel within a marine league of the shore, at anchor in an open roadstead, where vessels ride under shelter of the land, is upon the high seas. *United States v. Pirates*, *supra*. Prosecutions for piracy committed on



the high seas, or in any place out of the jurisdiction of any particular State, should take place in the district where the offender is apprehended, or into which he may be first brought. 1 A. G. Op. 185.

For a general discussion and construction of this and the four following sections, see *United States v. Kessler*, 1 Baldw. 15. See also *United States v. Furlong*, 5 Wheat. 184, note § 5372; *United States v. Terrel*, Hempst. 416, note; 1 West. L. J. 246; 9 A. G. Op. 455; *United States v. Chapels*, 2 Wheeler, Cr. Cas. 205.

SECT. 5369. — *United States v. Kessler*, 1 Baldw. 15.

SECT. 5370. — As originally enacted this section contained a proviso declaring that nothing therein should be construed to deprive any particular State of its jurisdiction over the offence when committed within the body of the county. *United States v. Jackalow*, 1 Black, 484. In order to give the Federal court jurisdiction of an offence not committed within its district, it must appear not only that the accused was first apprehended within that district, but also that the offence was committed out of the jurisdiction of any particular State, and not within any other district of the United States. *Id.* The question whether or not a particular place is within the boundaries of a State is for the jury. *Id.* *Ex parte Ballinger v. Nowland*, 5 Hughes, 387. This section includes foreigners as well as citizens of the United States. A commission from a nation to private armed vessels to carry on war against its enemy on the high seas will afford protection, even in the courts of the enemy, against a charge of robbery or piracy. *United States v. Baker*, 5 Blatch. 6. But courts will not recognize the existence of a new government, foreign or domestic, until such recognition has been extended by the executive and legislative departments of this government. *Id.*; *United States v. Palmer*, 3 Wheat. 610.

Robbery, as here used, signifies the felonious taking of the goods or property of another, of any value, from his person or in his presence, against his will, by violence or putting him in fear. *United States v. Baker*, *supra*. To be within this section the taking need not be such as would amount, if upon the high seas, to piracy as defined by the law of nations. *Id.* Robbery, if committed on the high seas, is piracy within this section, although if it had been committed on land, it would not have been punishable with death. *United States v. Palmer*, *supra*. It is not piracy within this section if committed by any one on board a vessel belonging exclusively to subjects of a foreign state on persons within a vessel also belonging exclusively to subjects of a foreign state. *Id.*

SECT. 5372. — *United States v. Holmes*, 5 Wheat. 412, see note § 5339; *United States v. Terrel*, Hempst. 416, note; 1 West. L. J. 246. "High seas" mean any waters on the sea-coast which are without the boundaries of low-water mark, although such waters may be in a roadstead or bay within the jurisdictional limits of a foreign government. *United States v. Ross*, 1 Gall. 624. "Out of the jurisdiction of any particular State" means any particular State of the United States, and does not apply to foreign states. *United States v. Pirates*, 5 Wheat. 184. Therefore the Federal courts have jurisdiction of the crime of piracy on board an American ship, although it was committed in an open roadstead adjacent to foreign territory within half a mile of the shore. *United States v. Ross*, *supra*. But before Rev. Stats. § 5368 was enacted such courts had no jurisdiction of piracy committed on a vessel belonging exclusively to French owners and sailing under the French flag, though it was committed within a marine league of the coast. *United States v. Kessler*, Baldw. 15. This statute in its original form began with the words "any person or persons," and it was held that the Federal courts had no jurisdiction thereunder of piracy committed by a person not a citizen of the United States on the high seas on a vessel owned exclusively by subjects of a foreign state. *United States v. Palmer*, 3 Wheat. 610. Otherwise of persons who throw off all national character, and commit piracy on all vessels. *United States v. Klintock*, 5 Wheat. 144; *United States v. Howard*, 3 Wash. 340. The words "which, if committed within the body of a county," relate to the words



"or any other offence," immediately preceding them, and not to murder and robbery. *United States v. Jones*, 3 Wash. 209.

*Indictment.* — The venue is sufficiently laid by alleging that the piracy was committed on the high seas within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State. *United States v. Gibert*, 2 Sumner, 19. The indictment need not allege that the prisoner was a citizen of the United States, or that the crime was committed on a vessel owned by citizens thereof. It was enough to charge that the crime was committed from on board an American vessel by a mariner sailing thereon. *United States v. Pirates*, 5 Wheat. 184. One indicted under this section for murder may be convicted of manslaughter under Rev. Stats. § 1035, as necessarily included in the offence charged. *United States v. Leonard*, 18 Blatch. 187; 2 F. R. 669.

Robbery at common law is meant by this section, and is the felonious taking of goods from the person of another, or in his presence, by violence or by putting him in fear and against his will. *United States v. Jones*, 3 Wash. 209; *United States v. Palmer*, *supra*. The general rule that robbery on the high seas is piracy has no exception or qualification in favor of commissioned privateers, in any act of Congress, in the common law, or in the law of nations. *United States v. Jones*, *supra*; *United States v. Pirates*, *supra*.

SECT. 5373. — See *United States v. Palmer*, 3 Wheat. 610; 1 A. G. Op. 85; *United States v. Terrel*, Hempst. 416, note; 1 West. L. J. 246; *United States v. Hutchings*, 1 Brun. Coll. Cas. 489; 2 Wh. Cr. Cas. 543. This section has no application to foreigners. It changes the rule as respects citizens of the United States who take service under a commission to a vessel from an enemy of their country, and declares that, as respects them, the commission shall not be admitted as a defence. *United States v. Baker*, 5 Blatch. 6.

SECT. 5375. — See note, § 2161; *United States v. Libby*, 1 Wood. & M. 221; *United States v. Gordon*, 5 Blatch. 18; *United States v. Corrie*, 23 L. R. 145.

SECT. 5376. — *United States v. Corrie*, *supra*.

SECT. 5377. — *United States v. Libby*, *supra*.

SECT. 5383. — "Piratically and feloniously runs away with a vessel" means a running away with a vessel with the wrongful and fraudulent intent thereby to convert it to the taker's use, and make it his own property against the will of the owner. The intent must be *animo furandi*, though the taking need not be with personal force and violence. *United States v. Tully*, 1 Gall. 247; *United States v. Kessler*, Baldw. 15. If one other than the captain is charged with the offence, it must be shown that the vessel was taken from the command of the captain by the accused, and without the former's consent, for some period of time, with felonious intent to convert her to the use of the person or persons who were concerned in the taking. *United States v. Haskell*, 4 Wash. 402; 2 Wh. Cr. Cas. 101.

SECT. 5384. — *United States v. Howard*, 3 Wash. 340.

SECT. 5385. — 14 A. G. Op. 559.

SECT. 5388. — Amended by St. June 4, 1888, ch. 340 (25 St. 166), to read as follows: —

"Every person who unlawfully cuts, or aids or is employed in unlawfully cutting, or wantonly destroys or procures to be wantonly destroyed, any timber standing upon the land of the United States which, in pursuance of law, may be reserved or purchased for military or other purposes, or upon any Indian reservation, or lands belonging to or occupied by any tribe of Indians under authority of the United States, shall pay a fine of not more than \$500, or be imprisoned not more than twelve months, or both, in the discretion of the court."

SECT. 5389. — *United States v. Williams*, 3 F. R. 484, 488.

SECT. 5391. — This section (St. March 3, 1825, § 3) is to be limited to the laws of the several States which were in force at the time of its enactment. *United States v. Paul*, 6



Pet. 141. In view of the foregoing decision, the act must be restricted to places which had been ceded to the government of the United States at the time of its enactment. *United States v. Barney*, 5 Blatch. 294. In those cases where the State laws have been adopted, as in this section, they stand as if the act of Congress had defined the offences in the words of the State law. *United States v. Coppersmith*, 4 F. R. 195, 10 Rep. 517. By this section an act not specifically made an offence by the statutes of the United States, but which is an offence under the laws of the State wherein performed, is, by this general provision, also an offence under the laws of the United States, and punishable by the same penalties as are inflicted under the laws of the State. *Sharon v. Hill*, 24 F. R. 726.

## CHAPTER IV.

### CRIMES AGAINST JUSTICE.

SECT. 5392. — The provisions of this section are extended by § 6 of 20 St. 113, ch. 190, to that act, which amends the act of 1873 (17 St. 605) now Rev. Stats. §§ 2417, 2464, 2468, "to encourage the growth of timber on the Western prairies." Sects. 5392, 5393, are new general provisions recommended by the Revisers to take the place of the numerous provisions, affixing the pains and penalties of perjury anew every time an oath is required in any statute to be taken before either a judicial or administrative officer. 2 Com. D. 2583.

Prosecutions for false swearing may be sustained in the Federal courts against persons who shall have made false affidavits or affirmations before judicial officers of the United States or State officers generally authorized to administer oaths for the purpose of supporting claims, although the particular law under which the claims are made are silent on the subject. 2 A. G. Op. 700. Perjury may be committed, either by swearing to a fact which the witness knows is not true, or by swearing to his knowledge of the fact when he knows that he has no such knowledge. *United States v. Atkins*, 1 Sprague, 558; *United States v. Jones*, 14 Blatch. 90. It is committed where the clerk of the circuit or district court makes false statements in his emolument returns and accounts for services rendered (*United States v. Ambrose*, 2 F. R. 556; 108 U. S. 336); where an oath is made before the county clerk, as provided in Rev. Stats. § 2294, which is wilfully and knowingly false in a material particular, or where it includes a statement which the affiant did not believe (*United States v. Hearing*, 11 Sawyer, 514; 26 F. R. 744); where a false oath is taken, as to a pension claim before a justice of the peace (*United States v. Boggs*, 31 Id. 337); where one intentionally swore falsely in making return of his income, although the statute imposing a tax upon incomes did not provide for a compulsory disclosure under oath (*United States v. Smith*, 1 Sawyer, 277); where one intentionally omits to place a part of his property on a schedule in an application under the bankrupt act (*United States v. Nichols*, 4 McLean, 23); where one testifies falsely to the credibility of a witness, such credibility being material, or where one testifies that he has never been in prison, the fact being otherwise (*United States v. Landsberg*, 21 Blatch. 169; 23 F. R. 585; 15 Rep. 42); where statements which the deponent does not believe to be true, are made on a justification as bail. *United States v. Volz*, 14 Blatch. 15. Perjury committed on an examination before a United States commissioner, under an act of Congress, is within this section. *Ex parte Bridges*, 2 Woods, 428. An indictment for perjury could not be sustained under the act of 1790 for a false oath made on a hearing on a criminal complaint before a district judge of the United States. *United States v. Clark*, 1 Gall 497. A prosecution for a



false oath before a commissioner in bankruptcy was barred by the repeal of the bankruptcy law. *United States v. Passmore*, 4 Dall. 372; 1 Wash. 84. To constitute perjury an oath must be taken under, or required by some law of the United States. A voluntary or extra-judicial oath is not perjury. *United States v. Babcock*, 4 McLean, 113. Nor is a false oath taken before a magistrate who had no authority to administer it. *United States v. Howard*, 37 F. R. 666. A false oath by a witness as to the distance he has travelled, not being required by law or by a rule of court, is not perjury. A mere ministerial officer cannot institute a usage which will have the effect of causing the violator thereof to be guilty of perjury. *Id.*

Before the act of Feb. 26, 1881, ch. 82 (see note, § 5211), a notary public had no authority under the laws of the United States to administer an oath to an officer of a national bank in verification of his report made under Rev. Stats. § 5211. *United States v. Curtis*, 107 U. S. 671. The words "competent tribunal, officer, or person," do not necessarily mean that the tribunal by which the oath is administered shall have been created by the government which required it to be taken; nor that the officer who administers it shall be an officer of that government. But the statute means that the oath must, at any rate, be permitted or required, by the laws of the United States, and be administered by some tribunal, officer, or person authorized by such laws to administer oaths in respect of the particular matters to which it relates. *Id.* By St. June 14, 1878, ch. 190, § 2 (see note at beginning of this section), it was provided that a person applying for the benefit thereof shall make an affidavit before designated officers, or the clerk of some court of record, or officer authorized to administer oaths in the district where the land is situated. This was construed to mean an officer authorized to administer oaths in such district, either by the law of the State or of the United States, and rendered any State officer competent to administer it if authorized by State law. *United States v. Madison*, 21 F. R. 628. A county clerk authorized to administer oaths to persons resident in his county has no authority to administer them to persons not resident therein. *United States v. Deming*, 4 McLean, 3. The court takes judicial notice of the qualifications of Federal officers to administer oaths. *Babcock v. United States*, 34 F. R. 873. A deputy clerk has authority to administer oaths in bankruptcy. *United States v. Nichols*, 4 McLean, 23. The oath is complete so far as the affiant can make it, when it is taken and subscribed; and, if the notary in making a certificate uses the word "county" instead of "city," and another seal instead of his notarial seal, the validity of the oath is not affected. *United States v. Neale*, 14 F. R. 767; *United States v. Baer*, 18 Blatch. 493; 6 F. R. 42; 11 Repr. 182. The authority of the officer who administers the oath upon which perjury is predicated, is sufficiently alleged by stating that said officer was then and there a person having authority to administer said oath. *United States v. Boggs*, 31 F. R. 337. A notary public is authorized to administer oaths in affidavits required by the Secretary of War under St. March 3, 1863, and false swearing in reference to facts so required is perjury. *United States v. Sonachall*, 4 Biss. 425.

The usual and ordinary meaning of the word "deposition" is written testimony in legal proceedings. *United States v. Clark*, 1 Gall. 497. The words "declaration" and "certificate" are used in the ordinary and popular sense, and signify any statement of material matters of fact sworn to, and signed by the party charged. *United States v. Ambrose*, 108 U. S. 336. The oath of the cashier of a national bank to a report made to the Comptroller of the Currency, as required by Rev. Stats. § 5211, is a declaration within this section. *United States v. Bartow*, 10 F. R. 873.

The indictment need not allege that the false oath was taken deliberately and corruptly, or otherwise than as indicated by the language of the statute. But the fact that the accused was sworn must be distinctly stated. It need not appear from the indictment that the magistrate made a jurat or memorandum on the affidavit, stating when and where the defendant swore to it. An allegation that the defendant "did depose and swear" to



the truth of a deposition set out, does not sufficiently show that he was sworn. *United States v. McConaughy*, 33 F. R. 168; *United States v. Hearing*, 11 Sawyer, 514, 26 F. R. 744. An averment in the indictment that the report was "made to the Comptroller of the Currency, and verified as aforesaid as by law required," is a sufficient averment after verdict to warrant judgment on a conviction. *United States v. Bartow*, 10 F. R. 573.

There can be no conviction for perjury, unless the false oath or affidavit was taken, or made with a corrupt intent, and this is a question for the jury. *United States v. Smith*, 1 Sawyer, 277. Where a bankrupt submitted the fact in regard to his property fairly to his counsel for advice, and, acting thereon, withheld certain items from his schedule, the fraudulent intent required to constitute the crime of perjury was wanting. *United States v. Conner*, 3 McLean, 573. But an intent to defraud the government is not a necessary element in perjury under the statutes relating to fishing bounties. *United States v. Atkins*, 1 Sprague, 558.

A false oath taken before a Federal court in a case there pending, is not indictable in a State court. *State v. Shelley*, 11 Lea (Tenn.), 594; *Brown v. United States*, 2 Am. L. T. N. S. 464.

For perjury committed under the acts of March 1, 1823, and March 3, 1825, see *United States v. Bailey*, 9 Pet. 238; *United States v. Moore*, 2 Lowell, 232; under St. 1813, ch. 34, §§ 7, 9, see *United States v. Kendrick*, 2 Mason, 69. See also *United States v. Shinn*, 14 F. R. 447; *Babcock v. United States*, 34 Id. 873; *United States v. Stanley*, 6 McLean, 409; *United States v. Dickey*, Morris (Iowa), \*412.

SECT. 5393. — See note at beginning of § 5392. To constitute a good indictment for subornation of perjury the false swearing must be set out with the same detail as on an indictment for perjury, and the indictment must charge that the defendant procured the witness to testify knowing that the testimony would be false, and knowing that the witness knew that the testimony he had given, or was about to give, was false, and knowing that he would corruptly and wilfully give false testimony. *United States v. Denness*, 3 Woods, 39; *United States v. Wilcox*, 4 Blatch. 393; *United States v. Evans*, 19 F. R. 912. The indictment should also show that the oath was required under some law of the United States. *United States v. Wilcox*, *supra*. In an indictment under this section for procuring the commission of perjury in support of an application for land under the timber culture law, alleging that the defendant knew that the person who made the application did not make it for his own use and benefit, but for that of the defendant, and that the former did not intend to cultivate the land, it was held after verdict that this was equivalent to alleging that the defendant knew or believed that such person took the oath, knowing it to be false. *United States v. Thompson*, 31 F. R. 331; see *Babcock v. United States*, 34 Id. 873.

SECT. 5394. — *United States v. Crecilius*, 34 F. R. 30; *Barber v. United States*, 35 Id. 886; 5 A. G. Op. 523.

SECT. 5395. — An indictment under this section need not set out the declaration of intention made by the defendant. Such declaration was made is the best and only evidence thereof. It cannot be contradicted by the clerk of the court. It is not material that the record does not show the facts which gave the court jurisdiction, that being derived from the statutes. *United States v. Walsh*, 22 F. R. 644. This section applies to oaths which the naturalization laws require or authorize a person to take. Rev. Stat. § 2165, concerning the naturalization of aliens, does not permit the oath of the applicant as proof of his residence; and an oath by him concerning it is extra-judicial, and will not support an indictment for perjury. *United States v. Grottkau*, 30 F. R. 672.

SECT. 5396. — *United States v. Nickerson*, 1 Sprague, 232; 7 L. R. S. S. 266, 17 How. 204. This section was founded upon or copied from 23 Geo. II., ch. 11, § 1, and the material



parts of it are in the words of that act. The word "and" in this section should be read "or." *United States v. Walsh*, 22 F. R. 644. It is not required that when the false swearing is to a written instrument, it should be so stated, nor that when the court before whom the perjury was committed was properly and distinctly and correctly set forth, the judge holding the court should be named. *Id.* Nor need the commission or authority of a notary public be set out in full on an indictment against one for making a false pension claim. *United States v. Rhoades*, 30 F. R. 431. Where such words of description are used as can apply only to the proper officer, the indictment is good, although the words of the statute are not used. Thus, where it was alleged that the perjury was committed in verifying a petition made to a judge sitting as a bankrupt court, inasmuch as none but a district judge could sit in bankruptcy, the indictment was held good. *United States v. Deming*, 4 McLean, 3. In such a case it is not requisite that the petition should be set out in the indictment, but it must appear that the oath was administered by some one thereto authorized. *Id.* An allegation that perjury was committed on an examination before "a commissioner of the United States, duly appointed," without stating how, by whom, or under what law, or for what purpose, is bad on demurrer. The indictment should set out the name and official title of the officer by whom the oath was administered; and if it is alleged to have been administered on an examination of the accused for crime against the United States, the particular charge should be stated. *United States v. Wilcox*, 4 Blatch. 391. Where the averment as to the materiality of what is alleged to have been falsely sworn to is defective, the indictment is nevertheless good if, on its face, it shows the materiality of the statement. *United States v. McHenry*, 6 Blatch. 503. Where an indictment alleging perjury in a declaration of intention to become a citizen stated that the application was made before "the district court of the said United States, then and there holden at said Boston, within and for the said district of Massachusetts, and that the defendant 'did then and there, in the said matter and proceeding, knowingly swear falsely and make oath before said court,'" this was held a sufficient designation of the court, and a distinct averment that the oath was made before it. *United States v. Walsh*, *supra*. This section "does not require the indictment to show what oath was taken, but 'the substance of the offence charged with proper averments to falsify the matter wherein the perjury is assigned.'" *Id.* An allegation that the defendant did depose and state contrary to his said oath does not allege that he was sworn, and is insufficient. *United States v. Hearing*, 26 F. R. 744. An indictment for perjury did not state the day upon which the trial took place, and the day on which the defendant was sworn in the case in which the perjury was alleged to have been committed, for which cause judgment thereon was arrested. *United States v. Bowman*, 2 Wash. 328. And it is a fatal variance to allege that the perjury was committed in court on a day on which, as is shown by the record, the court was not in session. *United States v. McNeal*, 1 Gall. 387. An allegation that the defendant in taking the oath of bankruptcy committed perjury in falsely swearing to his schedule, is too general. The particulars should be set out. *United States v. Morgan, Morris (Iowa)*, \*412. But the items omitted from the schedule need not be stated. It is enough to allege that property was omitted with intent to defraud creditors. *United States v. Chapman*, 3 McLean, 390.

SECT. 5398. — *United States v. Bachelder*, 2 Gall. 15; *United States v. Huff*, 13 F. R. 630, 639. "Wilfully" means something more than intentionally. It implies an evil intent without justifiable excuse. *United States v. McDonald*, 8 Biss. 439. It is a violation of this section for any one to obstruct or resist the order of a circuit court commissioner engaged in the examination of an Indian charged before him with the murder of a white man upon the Umatilla reservation. *United States v. Martin*, 14 F. R. 817; 8 Sawyer, 473. So if one, being served with a warrant, and required thereby to accompany the officer who makes the service, says he will not go and does not go. *United*



States *v. Lukins*, 3 Wash. 335. So, although a mere threat to resist the execution of a writ does not constitute the offence, yet if when the officer proceeds to the execution of his process against property, a threat is used by the person in possession, accompanied by the exercise of force, or there are evidences of his capacity to employ force, and the officer does not perform his duty, the offence is complete. *United States v. Lowry*, 2 Wash. 169. Resisting an officer in an attempt to execute process is as much an offence as resisting or obstructing him in an attempt to serve process. The offence is committed by resisting or obstructing an officer holding attached property after seizure. So also where resistance is made to a special custodian of such property who is employed by a United States marshal, although such custodian is not a sworn deputy. So also if an officer, who holding a writ of attachment in good faith attaches the property of B., having reasonable grounds to believe that it belongs to A., is resisted or obstructed by B. *Aliter* if the officer acts in bad faith. *United States v. McDonald*, 8 Biss. 439. If a client and his attorney enter into a conspiracy to resist an officer in the performance of his duties, both are guilty. Threats and acts intended to terrify, or calculated to have that effect on a prudent and reasonable officer, are enough, though they do not hinder him from executing his process. *United States v. Smith*, 1 Dillon, 212. It is no offence to obstruct or resist an officer who is acting without, or in excess of, his authority (*United States v. Fears*, 3 Woods, 510); as if he attempts to execute a writ of *habere facias possessionem* after the return day. *United States v. Slaymaker*, 4 Wash. 169. It is no defence to an indictment for forcibly obstructing or impeding an officer of customs in the discharge of his duties that the object of the defendant was personal chastisement, if he knew the officer to be engaged in the discharge of his duties. *United States v. Keen*, 5 Mason, 453.

A deputy marshal of the United States is an officer of the United States within this section to serve process. *United States v. Tinklepaugh*, 3 Blatch. 425; *United States v. Martin*, *supra*. And so is the keeper of a State jail to whose custody a person is committed by legal process issued by a Federal court or judicial officer. *United States v. Martin*, *supra*. The production of the commission of a deputy marshal, and proof that he was in the performance of the duties of his office, raises a presumption that he had been sworn as required, and authorizes a finding to that effect in the absence of other proof. *United States v. Hudson*, 1 Haskell, 527.

This section includes every species of legal process, whether issued by the court in session or by a judge or magistrate acting in that capacity out of court in the execution of the laws of the United States. *United States v. Lukins*, 3 Wash. 335. If a warrant is legal so far as the marshal and those who act under him are concerned, it is to be obeyed by everybody, and no one has a right to resist it. *United States v. Tinklepaugh*, *supra*. See further, as to legal process, *United States v. Martin*, *supra*.

An indictment must distinctly state and charge the following facts: (1) That a legal process, warrant, writ, rule, or order was issued by a court of the United States; (2) that such legal process, &c., after the same was issued, was in the hands of some officer of the United States for service who had authority by the laws thereof to serve the same; (3) that after such legal process, &c., was in the hands of such officer for service, some one knowingly and wilfully obstructed, resisted, or opposed him in serving or attempting to serve or execute the same. *United States v. Tinklepaugh*, *supra*. It must be averred that the process which the defendant resisted was legal. A commissioner empowered to issue process, under 9 St. 462, must be such an one as is particularly described therein, and an averment that the warrant resisted was issued by a commissioner is not good. The facts constituting the due issue must be recited. The absence of an averment showing that the commissioner who issued the warrant was thereto authorized cannot be aided by referring to the court records. *United States v. Stowell*, 2 Curtis, 153. As to the manner of resistance, it is enough to aver that the defendant did knowingly, wilfully, and unlawfully



obstruct, resist, and oppose the officer. When the description of the execution which the officer was attempting to serve shows that it was in force, an averment to that effect is unnecessary. The process need not be set out. *United States v. Hudson, supra.*

SECT. 5399. — *United States v. Memphis R. Co.*, 6 F. R. 237, 240. Before any one can be said to have endeavored to corruptly influence a witness, he must have known that the witness had been designated by the United States district attorney, or the commissioner as one to be used as a witness. The designation may be by the issuing of a subpoena or by the indorsement of his name on a complaint designating the witness by name as such. In order to be found guilty of obstructing the due administration of justice in any court of the United States, the accused must have done some act or acts in addition to those specified in the first division of this section. *United States v. Bittinger*, 15 Am. L. Reg. n. s. 49. Drawing a pistol and threatening the life of counsel during the examination of witnesses before an examiner in chancery appointed by a circuit court, in a suit pending therein, is an offence under this section. *Sharon v. Hill*, 24 F. R. 726.

As to the requisites of an indictment or information hereunder, see *United States v. Polite*, 35 F. R. 58.

SECT. 5401. — It is an offence within this section to rescue and set at liberty an Indian woman arrested by the Indian police on the Umatilla reservation on a charge of adultery, and committed to jail for trial before the "court of Indian offences." *United States v. Clapox*, 35 F. R. 575.

SECT. 5403. — It is an essential element of the offence that there be a specific intent to destroy or steal the papers *as records* of a public office. The statute is not broad enough to cover the mere larceny of such papers or documents. The offence may be committed by taking the records from any place whatever, no matter how private or unusual the place where they are found. *United States v. DeGroat*, 30 F. R. 764; *Mackin v. United States*, 23 Id. 334; *Ex parte Perkins*, 29 Id. 900, 912; *United States v. Goldberg*, 7 Biss. 175, 178.

SECTS. 5404, 5405. — *United States v. Kilpatrick*, 16 F. R. 765.

SECT. 5411. — *United States v. Crecilius*, 34 F. R. 30, 32.

## CHAPTER V.

### CRIMES AGAINST THE OPERATIONS OF THE GOVERNMENT.

SECT. 5413. — This section is amended by 18 St. 320, ch. 80, by inserting the word "bank" after the word "national" in the third line; and by 19 St. 253, ch. 69, by inserting the word "be" after the word "may" in the seventh line.

St. May 16, 1884, ch. 52 (23 St. 22) makes the following criminal offences: By § 1, the making, altering, forging, or counterfeiting, within the United States, with intent to defraud, of any bond, certificate, obligation, or other security of any foreign government; by § 2, the passing of the same; by § 3, the making, altering, forging, or counterfeiting of any bank note or bill issued by a bank or other corporation of any foreign country, or causing or procuring the same to be done, or knowingly aiding or assisting therein; by § 4, the uttering, passing, or tendering in payment such bank note or bill with intent to defraud; by § 5, the having in possession of such bond, bill, &c.; by § 6, the having in possession of any plate or part thereof for producing the above, without lawful authority, or using the same, or knowingly permitting or suffering the same to be used.

Sects. 3, 6, of the act of 1884 are constitutional. An indictment thereunder need not allege or show that the notes of a foreign bank or corporation are notes of money or issue of a foreign government, sovereign, or power; nor is it necessary to allege that the offence



is an offence against the law of nations. *United States v. Arjona*, 120 U. S. 479. An indictment for the felonious possession of a national bank note need not aver that the forged instrument purported to be a note of any designated national bank, if the instrument be copied into the indictment, and if by the terms of such copy it purports to be such a note. *United States v. Williams*, 4 Biss. 302. See 14 A. G. Op. 328, as to internal revenue stamps bearing upon them the portraits of living persons. See also *Ex parte Houghton*, 7 F. R. 657; 8 Id. 897; 24 Alb. L. J. 145; 2 Crim. L. Mag. 759; *United States v. Owens*, 37 F. R. 112; *United States v. Trout*, 4 Biss. 105. As to *United States v. Bennett*, 17 Blatch. 357; see note, § 5434.

SECT. 5414. — *United States v. Crecilius*, 34 F. R. 30; 14 A. G. Op. 328; *Hoke v. People*, 13 N. E. Rep. 823; *United States v. Owens*, 37 F. R. 112. The offences described in this section are no longer felonies, and the defendant seems therefore to be entitled to but three peremptory challenges. *United States v. Coppersmith*, 4 F. R. 138; 10 Rep. 517. See *United States v. Field*, 16 F. R. 778, note. It is unnecessary to aver any specific intent to defraud the United States or any person who may be defrauded by the act complained of by the indictment. A general averment in the language of the statute is sufficient. The forgery of an indorsement of the payee upon a post-office warrant upon the Treasury of the United States, such indorsement, being legally a part of the said warrant, is an offence within this section. *United States v. Jolly*, 37 F. R. 108.

SECT. 5415. — *Ex parte Houghton*, *supra*; *United States v. Crecilius*, 34 F. R. 30; *Hoke v. People*, 13 N. E. Rep. 823; *United States v. Owens*, 37 F. R. 112; *United States v. Bennett*, 17 Blatch. 357.

SECT. 5416. — *United States v. Crecilius*, 34 F. R. 30. This act abrogates and supercedes St. 1790, § 14. *United States v. Irwin*, 5 McLean, 178.

SECT. 5418. — See note, § 3259; *United States v. Crecilius*, 34 F. R. 30; *State v. White*, 71 S. E. Rep. 715; *United States v. Cameron*, 13 N. W. Rep. 561, see note, § 5472. This section was enacted in consequence of the decision in *United States v. Barney*, 5 Blatch. 294, where it was held that the crime of forgery denounced in the first and second clauses of St. 1823, § 1 (3 St. 771), was confined to instruments designed for the purpose of obtaining money from the United States. *United States v. Lawrence*, 13 Blatch. 211. This statute is aimed at forgery, and not at perjury. *United States v. Wentworth*, 11 F. R. 52. In order to find one guilty hereunder of making a false pay-roll, the jury must be satisfied, (1) that the time and pay-roll was false, forged, and counterfeit; (2) that the defendant sent it to the proper officer of the government; (3) that he knew its false character at the time he sent it, and that his intent was to defraud the government. *United States v. Houghton*, 14 F. R. 544; 4 Crim. L. Mag. 243. If one intends what he knows the law forbids, the law infers the intent to defraud from the act. *Id.* Offences named in this section can be prosecuted only by indictment. *United States v. Tod*, 25 F. R. 815. An indictment for the forgery of goods entered at the custom-house need not allege the existence of the goods mentioned in the writings. *United States v. Lawrence*, *supra*. Where intent is made a part of the offence, the indictment should allege it. The particular manner in which the act is to be done need not be generally alleged. *United States v. Wentworth*, *supra*. The words "other writing" include an owner's oath required to be taken before making an entry of goods at the custom-house, and an import entry and an importer's bond, notwithstanding Rev. Stats. § 5445 punishes as a misdemeanor all fraudulent acts done in effecting an entry of goods. *United States v. Lawrence*, *supra*. This section includes a forged affidavit when it appears therefrom, or in connection with extraneous circumstances alleged in the indictment, that it may be used to defraud the government as alleged. *United States v. Barnhart*, 33 F. R. 459. Under the facts of this case the affidavit alleged in the indictment to have been forged by the defendant could not be used for the purpose of defrauding the United States. *Id.*



SECT. 5420. — *United States v. Spaulding*, 13 N. W. Repr. 357; see note, § 5421.

SECT. 5421. — See note, § 5479. The ingredients of this offence should be set forth with such particularity that the court and defendant may know from the indictment whether the defendant is to be tried for transmitting an affidavit not genuine in its execution, or one genuine in its execution but false in statement, and if the latter, whether in a material or immaterial part. *United States v. Corbin*, 11 F. R. 238. The third clause of this section includes an affidavit sworn to by an actual person, but false in the facts it professes to narrate, as well as an affidavit forged or counterfeited, if the defendant knew that it was false. *United States v. Staats*, 8 How. 41; *United States v. Spaulding*, 13 N. W. Rep. 357. This section applies only to instruments altered or forged for the purpose of obtaining moneys from the United States or their officers or agents. *United States v. Reese*, 4 Sawyer, 629. Hence it does not apply to a false and fraudulent bond relating to the exportation of distilled spirits. *United States v. Barney*, 5 Blatch. 294. The word "claim" is not limited to a demand for money, and an indictment will be supported for the transmission to the Pension Office of forged papers in support of a claim for bounty land under an act of Congress (*United States v. Wilcox*, 4 Blatch. 385); or for the transmission of false affidavits or declarations in support of an application for bounty land-warrants. *United States v. Bickford*, 12 L. Repr. n. s. 273. A pre-emption claim is also such an act or claim as is within the meaning of this section. *United States v. Spaulding*, *supra*. See dissenting opinion, 13 N. W. Rep. 538. It is sufficient to aver that the act was done with intent to defraud the government without alleging that it was done feloniously or with a felonious intent. *United States v. Staats*, *supra*. It need not be alleged that the forged papers which were transmitted stated all the facts required to be established to entitle the party to the claim, if it shows that they were transmitted for the purpose of obtaining its allowance. *United States v. Wilcox*, *supra*. It is unnecessary to show that the prisoner actually transmitted the papers. Any party participating or co-operating in the crime by aiding or assisting is liable. *United States v. Bickford*, *supra*. It is unnecessary that the claim should be one in favor of the person who presents the false writing in support of it. *United States v. Kohnstamm*, 5 Blatch. 222. The repealing clause of St. March 2, 1863 (12 St. 699), saves prosecutions for offences committed hereunder prior to the passage of the act of 1863. *Id.*

SECT. 5423. — *United States v. Schoyer*, 2 Blatch. 59.

SECTS. 5424, 5425. — The act embodied in these sections repeals the act of March 3, 1813, entitled "An act for the regulation of seamen on board the public and private vessels of the United States." *United States v. Tynen*, 11 Wall. 88.

SECT. 5426. — The mere fact that the defendant knew that a naturalization certificate had been issued by a State court without his presence in court, and without any oath being taken by him, is not sufficient to warrant a conviction. *United States v. Burley*, 14 Blatch. 91. It was alleged in an affidavit for a complaint of a violation of this section that one, for the purpose of registering himself as a voter, unlawfully used a certificate of citizenship, knowing that it had been unlawfully issued or made. No statement was made as to how such use was unlawful, or how the certificate had been unlawfully issued or made, and it was held that sufficient cause for issuing a warrant was not shown. *Re Coleman*, 15 Blatch. 406.

SECT. 5430. — See note, § 5171. It seems to have been held in *Re Wilson*, 18 F. R. 33, that a prosecution under this section may be begun by information. But in the Supreme Court in the same case it was held (114 U. S. 417) that a person sentenced to imprisonment for an infamous crime, without having been indicted or presented by a grand jury, may be discharged on *habeas corpus*. It is a crime to photograph or execute likenesses of United States treasury notes, although the similarity of the photograph to the original is not calculated to deceive the public. *Ex parte Holcomb*, 2 Dillon, 392. "A



bond resembling a United States bond, but unexecuted, is not an "obligation or security" within this section, and an indictment cannot be sustained against one having it in possession." *United States v. Sprague*, 11 Biss. 376; *s. c. sub nom. United States v. Williams*, 14 F. R. 550. But it is not necessary that the fraudulent bond should purport to be an obligation of the United States, or that the similitude should be such as to deceive experts or cautious men. It is sufficient if it is calculated to deceive an honest, sensible, and unsuspecting man of ordinary observation and care, dealing presumably with an honest man. *Id.* Whether an instrument is an obligation or not and within the statute is a question for the court. *Id.* Under the act of May 16, 1834, it is a crime to print, sell, &c., the bond, note, or obligation of any foreign government. An indictment drawn under this act, which alleged that the defendant caused three certain impressions to be printed, each in the likeness of a certain part, &c., except the signatures of a genuine treasury note of Brazil, was held sufficient. *United States v. White*, 25 F. R. 716.

SECT. 5431. — *United States v. Williams*, 4 Biss. 302, see note, § 5413. The failure of an indictment under this section and § 5434, in setting out counterfeit notes, to exhibit an imprint of the seal of the Treasury which was shown on the notes put in evidence, is not such a variance as to make it improper to admit the notes in evidence. Neither was it a variance for the indictment to refer to the circulating notes of a national banking association, which it set out at length as "national bank currency notes." *United States v. Bennett*, 17 Blatch. 357; 9 Rep. 136. Different offences under this section and § 5434 may be properly charged in different counts, notwithstanding different punishments are provided. *Id.* An indictment setting forth the offence in the words of the statute, without alleging that the defendant knew the instrument which he uttered to be false, forged, counterfeited, and altered, is insufficient after verdict and fails to charge any crime. *United States v. Carl*, 105 U. S. 611. An indictment describing the notes as "false, forged, and counterfeit treasury notes" is sufficient without adding that they were obligations or other securities of the United States. Nor need it aver that the counterfeit Treasury notes were made in the resemblance of a genuine one. *United States v. Trout*, 4 Biss. 105; *United States v. Owens*, 37 F. R. 112. The use of the statutory words "false, forged, and counterfeited obligation of the United States" in an indictment sufficiently implies that the alleged counterfeit set out *in hæc verba* in the indictment purports to be a genuine obligation of the United States, and it is also intended to aver that there is or was a legally authorized and existing genuine obligation of which the alleged imitation pretended to be a forgery or counterfeit. *United States v. Owens, supra.* This section does not, in terms, require that the notes should be uttered as true or genuine, and one may be convicted of uttering or passing upon proof that he sold and delivered the notes as spurious to a third person, intending that they should be passed upon the public as genuine. The words "uttering" and "passing" do not necessarily import that the notes are transferred as genuine, but include any delivery of a note to another for value, intending that it shall be put into circulation as money. *United States v. Nelson*, 1 Abb. U. S. 135. The fact that other existing provisions punish the selling of spurious notes does not prevent the conviction of one upon an indictment for passing, uttering and publishing such notes, upon proof that he sold them as spurious with intent that they should be put into circulation as money. *Id.* If one is convicted of several offences charged in different counts, it amounts to a conviction on separate indictments, and each offence may be separately punished. *United States v. Bennett, supra.* A conviction under this section does not deprive the defendant of the right of suffrage in the State of New York. *United States v. Barnabo*, 14 Blatch. 74.

SECT. 5432. — 14 A. G. Op. 528.

SECT. 5434. — There was no intention of creating a distinction between national bank currency and the circulating notes issued by a banking association, by the language em-



played in this section, and Rev. Stats. § 5413 is not modified hereby. *United States v. Bennett*, 17 Blatch. 357.

SECT. 5438. — The object of this statute is to protect the government against fraudulent claims presented to its officers for settlement, and it was never designed to apply to the prosecution of claims before a tribunal like the Court of Claims. *United States v. Moore*, 3 MacArthur, 226. The offences herein named are not felonies, and one indicted therefor is not entitled to challenge more than three jurors. *United States v. Daubner*, 17 F. R. 793. The opening words of this section are, "Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval." In the original act (12 St. 696, 698), from which this was taken, a semicolon followed the word "made" in the clause quoted, instead of the comma as at present, and there was no comma after the word "presented." The changes in punctuation have altered the meaning of the section, and the words "for payment or approval" are a part of both the first and second clauses of it. *United States v. Ambrose*, 2 F. R. 764. By making a claim, as defined in this section, is meant the asking or demanding on the part of the claimant payment for services. "False" means unfounded or unjust; "fictitious" means not real; "fraudulent" means having a certain and clear perception of the falsity of the claim made. *United States v. Bitteringer*, 21 Int. Rev. Rec. 342. In order to sustain a conviction for making or using a false affidavit, it must be made to appear not only that it was false, but also that the claim, the payment of which was sought thereby, was false, fictitious, or fraudulent. *United States v. Miskell*, 15 F. R. 369. The indictment should allege that the officer to whom the claim was presented was authorized to approve and allow it. *United States v. Reichert*, 12 Sawyer, 643; 32 F. R. 142. A United States marshal is an officer as to whom it is an offence for a deputy marshal to present for approval a false claim for fees. *United States v. Strobach*, 4 Woods, 592. And so is the United States district judge. *Id.* It is sufficient to aver that the claim was presented to a designated officer without naming the person who filled the office. The different items of the account may be embraced in one count of the indictment. It must be alleged that the claim was made for payment or approval, and it is not enough to say that the defendant did merely make an unlawful claim knowing it to be false. *United States v. Ambrose, supra.* An allegation that the claim was presented to T., then late marshal, he being then and there an officer in the civil service, is accurate and sufficient. An averment that the claim so presented was for services purporting to have been performed by a deputy marshal, in a case in which the government was plaintiff, and that it was a claim in favor of the late marshal against the United States, shows that such marshal was the proper officer to whom the claim should be presented for approval. *United States v. Strobach, supra.* If it is averred with requisite certainty that the defendant presented for approval to an officer in the civil service of the United States, with intent to defraud, a false, fictitious, and fraudulent claim against the government, knowing the same to be such, every element of the offence created by this section is covered and the averment is sufficient. *Id.* An indictment charging the defendant with making a false deposition, to enable another person to procure payment of a fraudulent pension claim, need not aver that such deposition was ever used, or that an attempt was made to use it, or that the claim had been presented and was pending when the deposition was made. *United States v. Rhodes*, 30 F. R. 431. It is an offence within this section to present a false claim as a pensioner and to demand money as such. *United States v. Goggin*, 9 Biss. 416; 3 F. R. 492. And the presentation to the pension agent of a genuine certificate of pension, which has been obtained by the fraud of the pensioner, is in itself the presentation of a false and fraudulent claim against the government within this section. *Id.* The fact that punishment for the fraud in obtaining the certificate is barred by the statute of limitations will not operate as a defence for the presentation of



such a certificate. *Id.* But see 9 Crim. L. Mag. 707, where it is said that it seems that the government cannot prosecute for the offence of making or presenting false affidavits in pension claims under this section, but must do so under Rev. Stats. § 4746. This section is intended to apply to a case where a person makes or causes to be made a false statement of this character, or where he obtains or is guilty of aiding to obtain the payment or approval of any such false claim. It is clearly implied that the statute is intended to cover a case where an attorney, agent, officer, or other person undertakes to get a claim which is false and fraudulent allowed in his own behalf or in behalf of any other party. *United States v. Hull*, 14 F. R. 324. An allegation that the defendant made and caused to be made a false voucher, certificate, or claim, and that he presented and caused to be presented, &c., is not bad for duplicity because the statute uses "or" instead of "and." *Id.* The statute distinguishes between making and presenting a fraudulent bill or account, and makes each a distinct offence. Where a United States marshal for a designated district makes a false and fraudulent bill for services or expenses, and, after securing its approval by the court, forwards it to the proper department at Washington for payment, or otherwise causes it to be presented there for such purpose, he makes, in such district, a false and fraudulent bill. *Ex parte Shaffenburg*, 4 Dillon, 271. It is an offence under this section to substantiate a claim, which the defendant believes to be just, by affidavits and depositions which he knows are false. *United States v. Jones*, 32 F. R. 482. But it is not an offence to make a claim upon the government for the payment of a demand that is groundless or without merit, unless the person who makes it understands at the time it is made that it is false, fictitious, or fraudulent, and therefore intends to defraud the government. One who makes a claim on the government for pay and bounty as the widow of a soldier, knowing that she is not his widow, is within this section. *United States v. Route*, 33 F. R. 246. Inmates of the national military homes are not in the military service, and clothing issued to them is not used in such service. *United States v. Murphy*, 9 F. R. 26; *United States v. Griswold*, 12 Sawyer, 398; 30 F. R. 604, see note, § 3469; *United States v. Griswold*, 12 Sawyer, 352; 30 F. R. 762, see note, § 3491; *United States v. Griswold*, 11 Sawyer, 65; 24 F. R. 361, see note, § 3490; *United States v. Griswold*, 11 F. R. 807; *United States v. Wright*, 2 Cranch C. C. 296. See also note, § 819.

SECT. 5439. — See 18 St. 479, ch. 144, § 1, stated in note, § 1342 art. 60. As to embezzlement by a paymaster's clerk in the navy, see *United States v. Bogart*, 3 Ben 257; *United States v. Murphy*, 9 F. R. 26, note, § 5438.

SECT. 5440. — *United States v. Chouteau*, 102 U. S. 603, note, § 3281; *United States v. McKee*, 4 Dillon, 128, note, § 3296; *Re Coy*, 31 F. R. 794; 127 U. S. 731, 749, note, § 5511; *United States v. Johannesen*, 35 Id. 411; *United States v. Hammond*, 2 Woods, 197; *Re Calicott*, 8 Int. Rev. Rec. 169; 1 Am. L. Times (U. S. Cts.), 129; *United States v. De Grieff*, 16 Blatch. 20. Amended by St. May 17, 1879, ch. 8 (21 St. 4), so as, after the word "penalty" in the fifth line, to read —

"of not more than \$10,000, or to imprisonment for not more than two years, or to both fine and imprisonment, in the discretion of the court."

This section covers every conspiracy to commit an act made an offence or crime by any law of the United States, as well as an act that may defraud the United States in any manner, and is not limited in its application to conspiracies to defraud the revenue. *United States v. Owen*, 32 F. R. 534. It applies to the prosecution of a false, forged, and fraudulent claim by false and perjured testimony before the Court of Claims (*United States v. Dennee*, 3 Woods, 47); to the offence described in Rev. Stats. § 3725 (*United States v. Stevens*, 2 Haskell, 164), and in Rev. Stats. § 5132 (*United States v. Swett*, Id. 310); and to conspiracies that affect private rights, or interests which are protected by the criminal laws of the United States, as, e. g., a conspiracy to plunder a vessel within



the admiralty and maritime jurisdiction of the United States. *United States v. Sanche*, 7 F. R. 715. It applies also to Rev. Stats. § 5438; and inasmuch as under this section the conspiracy to defraud must be followed by some act to effect that object, to constitute a public offence, it would seem that, to the extent in which the offence differs in that particular from the offence of defrauding the United States mentioned in Rev. Stats. § 5438, this section must be held to qualify and amend it. *United States v. Reichert*, 12 Sawyer, 643; 32 F. R. 142. See also, *United States v. Hirsch*, 100 U. S. 33; *United States v. Thompson*, 12 Sawyer, 151; 29 F. R. 86.

There is a conspiracy when two or more persons mutually agree to do an unlawful act, or to do a lawful act in an unlawful manner, and the offence is complete when such agreement has been made and an act done in furtherance of it. *United States v. Wooten*, 29 F. R. 702; *United States v. Nunnemacher*, 7 Biss. 111; *United States v. Goldberg*, Id. 175. A mere agreement or combination to effect an unlawful object, not followed by an act on the part of the conspirators to carry it into execution, does not constitute the offence. *United States v. Nunnemacher*, 7 Biss. 111; *United States v. Sacia*, 2 F. R. 754. It is not an offence within this section to conspire to make a settlement on Indian lands and to return thereto after having been removed, such offence being punishable by a penalty provided for by Rev. Stats. § 2124 (*United States v. Payne*, 22 F. R. 426); nor, where the conspiracy to defraud is legally impossible of execution, as where it depends upon the future passage of an act of Congress (*United States v. Crafton*, 4 Dillon, 145); nor where the president of a national bank and one of the directors thereof agree to purchase shares of said bank with its money and for its benefit (*United States v. Britton*, 108 U. S. 192), or to misapply its money by procuring the declaration of a dividend greater than the net profits of the banking association (Id.); nor is a conspiracy to enter land under the timber culture law with the money of one, for the purpose of selling it for the advantage of him who furnishes the money. *United States v. Thompson*, *supra*. The doing of some act in pursuance of the conspiracy is an ingredient of the crime, but it is not necessary to show that such is itself of a criminal nature. *United States v. Thompson*, 12 Sawyer, 151; 29 F. R. 86; *United States v. Smith*, 2 Bond, 323. And until such act, done by some one of the conspirators in pursuance of such unlawful object, all parties to it may withdraw, and thus escape the effect of the statute. *United States v. Donau*, 11 Blatch. 168.

Two persons, one of whom is a bank officer, may be indicted for a conspiracy to commit an offence which under an act of Congress could be committed by the bank officer only. *United States v. Martin*, 4 Cliff. 156. Where the act to effect the object of the conspiracy is done by only one of the parties thereto, it constitutes a complete offence as to all the others, for in that case the act of one becomes the act of all, although they never met together to devise the means or give effect to their designs. *United States v. Nunnemacher*, 7 Biss. 111; *United States v. Kane*, 23 F. R. 748; *United States v. Sacia*, 2 Id. 754. The identity of the conspiracy is not destroyed by the subsequent connection of new parties therewith (*United States v. Nunnemacher*, *supra*); nor is it necessary to conviction that the conspiracy should have originated with the persons charged. *United States v. Sacia*, *supra*.

Upon a charge of conspiracy an overt act which is itself criminal may be proved to show the existence of the conspiracy charged. And the fact that the overt acts set out and proved were severally criminal, rendering the persons committing them liable to specific punishment therefor, does not exonerate the persons from the crime of conspiracy or bar a prosecution therefor. *United States v. Rindskopf*, 6 Biss. 259. It is unnecessary to prove intent. That is inferred from the unlawful act of combining to defraud. *United States v. Donau*, 11 Blatch. 168. A co-conspirator is a competent witness against another co-conspirator upon the trial on a charge of conspiracy. *United States v. Sacia*, *supra*.



An indictment under this section must charge that the conspiracy was to do some act made a crime by the laws of the United States, and it must state with such reasonable certainty the acts intended to be effected or carried out by the agreement of the parties that it can be seen that the object of the conspiracy was a crime against the United States. *Re Wolf*, 27 F. R. 606. An act done to effect the object of the conspiracy is material matter, and it must be alleged and proved with the usual certainty required in criminal pleading. *United States v. Milner*, 36 F. R. 890; *United States v. Thompson*, *supra*; *United States v. Watson*, 17 F. R. 145. And such omission is fatal. *United States v. Reichert*, 12 Sawyer, 643; 32 F. R. 142. The indictment need not set out the manner in which the alleged conspiracy was to be carried into effect, nor state the means agreed on to accomplish its purpose. *United States v. Dennee*, 3 Woods, 47; *United States v. Milner*, *supra*. See, however, *United States v. Crafton*, 4 Dillon, 145. It should charge the object of the conspiracy. *United States v. Milner*, *supra*. It is not necessary to set forth the county in which the conspiracy was formed, and if incorrectly set forth, it may be rejected as surplusage. *United States v. Smith*, 2 Bond, 222. When a document is relied on to sustain the prosecution, it must be set out *in substance* or in substance. A statement of the pleader's opinion as to the effect it was intended to or might produce is not enough. *United States v. Watson*, 17 F. R. 145. But an indictment for conspiring to defraud the United States by entering public lands need not set out the affidavit made in pursuance thereof. If it is referred to or described as the affidavit required by law, its words being prescribed by statute, the court will take notice of them, and so must the defendants. *United States v. Thompson*, *supra*. An indictment of one of several persons charged with conspiracy is good on demurrer without a joinder of the others. *United States v. Miller*, 3 Hughes, 553. And if two are shown to have conspired, the acquittal of others jointly indicted does not prevent the conviction of those two. *United States v. Rindskopf*, 6 Biss. 259. An officer of internal revenue, named as such in the indictment, cannot be jointly indicted with a private person for a conspiracy to defraud the revenue. *United States v. McDonald*, 3 Dillon, 543. But if a bankrupt and another person conspire together to commit an act made criminal by subd. 7, 10 of Rev. Stat. § 5132, and either one does any act in pursuance of such conspiracy, both are punishable. *United States v. Bayer*, 4 Dillon, 407. It need not appear from the indictment in what manner the act described would tend to effect the object of the conspiracy. *United States v. Donau*, 11 Blatch. 168. An averment in any form that some act has been done to carry out the agreement is enough, as, e. g., "furnished and loaned" a skill to aid in the crime of robbery. *United States v. Sanche*, 7 F. R. 715. If the indictment describes the subject-matter of the conspiracy as "the taxes arising from and imposed by law upon certain divers proof gallons and quantities of distilled spirits distilled in the United States, then and there situated in certain bonded warehouses," describing them, it is good, though the precise kinds, quantities, and qualities are not stated. The overt acts need not be laid as having been done "to effect the object." It is enough to say that they were done in pursuance thereof. A revenue officer may be joined with others in such an indictment without charging him as an officer, although under another statute he is subject to a severer punishment than private individuals. Under such an indictment he can be punished under this section only. *United States v. Boyden*, 1 Lowell, 206. Every element of the offence must be alleged, and an averment that the defendant conspired to defraud the United States in "certifying that certain false and fraudulent accounts and vouchers for material furnished for use in the construction of, &c., and for labor performed on said building, were true and correct," is too uncertain. *United States v. Walsh*, 3 Dillon, 58. And so is the allegation of the unlawful tender of money to "certain Federal officials, to wit, the officers of the court of the United States acting under authority of the government of the United States for the southern division of the northern district of



Alabama," and does not sufficiently inform the defendant of the nature of the charge against him. *United States v. Milner*, 36 F. R. 890. And an indictment in which the conspiracy is insufficiently charged cannot be aided by averring acts done by one or more of the conspirators in furtherance of the object of the conspiracy. *United States v. Britton*, *supra*.

The punishment prescribed by this section being infamous, the prosecution therefor must be by indictment. *United States v. Brady*, 3 Crim. L. Mag. 69; *Mackin v. United States*, 117 U. S. 348. But as to a conspiracy to make counterfeit coin, see *United States v. Burgess*, 9 F. R. 896. See further, as to the requisites of an indictment, *United States v. Gordon*, 22 F. R. 250.

This section applies to a conspiracy against the United States when committed in the District of Columbia (*Re Wolf*, 27 F. R. 606), though the defendant is an Indian. *Id.* The trial may be had in any district where the overt acts were committed. *United States v. Rindskopf*, *supra*. Conspiracy at common law not being defined by any act of Congress as an offence against the government, the Federal courts have no cognizance thereof. *United States v. Martin*, 4 Cliff. 156.

Where an assessor of internal revenue was indicted hereunder, and also under Rev. Stats. §§ 3168, 3169, for having entered into a corrupt arrangement with certain distillers to defraud the government, and before trial proposed terms of compromise to the commissioner of internal revenue under Rev. Stats. §§ 3229, 3231, it was held that the case did not come within the purview of those statutes. 14 A. G. Op. 43.

As to the limitation of prosecutions hereunder, see the cases of *United States v. Fehrenback*, *United States v. Hirsch*, *United States v. Owen*, in note, § 1044.

In *Ex parte Carstendick*, 93 U. S. 396, decided in 1876, the Supreme Court held that effect must be given to this section as if it read: "All the parties to such a conspiracy shall be liable to a penalty of not less than \$1000, and not more than \$10,000, and to imprisonment not more than two years."

SECT. 5443. — *United States v. De Grief*, 16 Blatch. 20.

SECT. 5445. — The offences defined by this section are crimes arising under the revenue laws of the United States. *United States v. Hirsch*, 100 U. S. 33. They may be charged conjunctively in the same count. Unless the fraudulent means used are specified the indictment will be insufficient. *United States v. Bettilini*, 1 Woods, 654. The forgery of writings used in entering goods at the custom-house is punishable under Rev. Stats. § 5418, notwithstanding the penalty prescribed by this section. *United States v. Lawrence*, 13 Blatch. 211.

SECT. 5447. — This section applies to a case of active, forcible interference by a person with a customs or revenue officer, or with one assisting such officer in the performance of his duty as such, and the interference must be with the intent to impede or prevent the performance of the duty. *Ex parte Murray*, 35 F. R. 496. It does not exempt a customs officer from arrest under civil process from a State court. *Id.*

SECT. 5450. — Money paid to a public officer with the corrupt motive and purpose of procuring the official action of another public officer is paid as bribery. *Clark v. United States*, 12 Ct. Cl. 597.

SECT. 5451. — *United States v. Worrall*, 2 Dall. 384. Where a territorial statute provides that when two or more defendants are jointly indicted for a felony, any defendant requiring it must be tried separately, it was held that a defendant indicted under this section was entitled to a separate trial. *United States v. Jones*, 18 Pac. Rep. (Utah) 233.

SECT. 5452. — Amended by 18 St. 316, ch. 80, by placing a comma after the word "principal" in the second line.

SECT. 5453. — See note, § 1342, art. 60.



SECT. 5455. — Amended by 19 St. 240, ch. 69, by inserting after the word "seaman" in the twelfth, fourteenth, and fifteenth lines, and after the word "sailor" in the seventeenth line, the words "or other person," and by adding to the section the words "to be enforced in any court of the United States having jurisdiction."

This section re-enacts St. March 3, 1863, ch. 75, § 24, embracing the provisions of earlier statutes. *Kurtz v. Moffitt*, 115 U. S. 487, 502. See 15 A. G. Op. 222.

SECT. 5457. — See note, § 3551. Amended by St. Jan. 16, 1877, ch. 24 (19 St. 223), so as to read: —

"Every person who falsely makes, forges, or counterfeits, or causes or procures to be falsely made, forged, or counterfeited, or willingly aids or assists in falsely making, forging, or counterfeiting any coin or bars in resemblance or similitude of the gold or silver coins or bars which have been or hereafter may be, coined or stamped at the mints and assay offices of the United States or in resemblance or similitude of any foreign gold or silver coin which by law is, or hereafter may be, current in the United States, or are in actual use and circulation as money within the United States, or who passes, utters, publishes, or sells or attempts to pass, utter, publish, or sell, or bring into the United States from any foreign place, knowing the same to be false, forged, or counterfeit, with intent to defraud any body politic or corporate, or any other person or persons whatsoever, or has in his possession any such false, forged, or counterfeited coin or bars, knowing the same to be false, forged, or counterfeited, with intent to defraud any body politic or corporate or any other person or persons whatsoever, shall be punished by a fine of not more than \$5000, and by imprisonment at hard labor not more than ten years."

The provision prohibiting the bringing into the United States of counterfeit coin or bars with intent to pass, utter, or publish them, is constitutional. It is sustainable under the power to regulate commerce, and also under the power to coin money and regulate its value. *United States v. Marigold*, 9 How. 560. The *head pistareen* is no part of the Spanish milled dollar, and is not a silver coin of Spain made current by law in the United States. *United States v. Gardner*, 10 Pet. 618. The jury, in order to convict, should be satisfied that the resemblance of the counterfeit to the genuine is such as might deceive a person exercising ordinary caution. *United States v. Morrow*, 4 Wash. 733. One who has made false coins with intent to circulate them, and has carried the manufacture so far as to produce coin capable of being uttered as genuine, may be convicted, though there was evidence that he intended to coat the coins with silver before putting them in circulation. *United States v. Abrams*, 21 Blatch. 553; 18 F. R. 823. Under this statute, as amended, it is an offence to change by any kind of manipulation any foreign coin into the resemblance of some coin of the United States, or foreign coin made current by law thereof, by gilding, electro-plating, or any other process or coloring. *United States v. Russell*, 22 F. R. 390. The words "in resemblance or similitude" are a variation or exposition of the words "falsely make, forge, or counterfeit." If the former were dropped out, the legal significance of the statute would be unchanged. *United States v. Otey*, 12 Sawyer, 416; 31 F. R. 68. The knowledge and intent to defraud, mentioned in this section, refer only to the crime of passing counterfeit money, or having the same in possession, and therefore an indictment for counterfeiting need contain no averment as to intent. *Id.*; *United States v. Russell*, *supra*. But see *United States v. King*, 5 McLean, 208. Proof that counterfeit coin was passed by an agent of the defendant employed for that purpose will sustain a conviction of the principal. *United States v. Morrow*, *supra*. The offence named in this section is not infamous, and therefore may be prosecuted by information. *United States v. Yates*, 6 F. R. 861; 23 Alb. L. J. 407; 2 Crim. L. Mag. 520. But the Supreme Court has held, in *United States v. Petit*, 114 U. S. 429, that prosecutions under this section must be by indictment. And prosecutions for the offence of counterfeiting United States coin are maintainable in the State courts. *Martin v. State*, 18 Tex. App. 224. See also *Ex parte Geisler*, 4 Woods, 381, note, § 5328. Uttering and passing counterfeit coin is not a felony within Rev. Stats. § 819. *United States v. Coppersmith*, 4 F. R. 198; 10 Repr. 517. If it is alleged that the defendant did falsely make,



forge, and counterfeit four pieces of silver coin of the coinage of the United States called a dollar, the indictment is good after verdict. *United States v. Otey, supra*. If the counterfeit is in resemblance of the genuine, it is not essential that it should be exact in in all respects. If they are so much alike that the counterfeit is calculated to deceive one of ordinary caution and observation, although it would not deceive an expert, or a person who has had particular experience in such matters, it is within the statute. The counterfeit must be passed with intent to deceive; and the circumstances and manner in which the act was done are to be considered. *United States v. Hopkins*, 26 F. R. 443. As to the requisites of indictment and proof, see *United States v. Burns*, 5 McLean, 23; *United States v. Owens*, 37 F. R. 112. See also *United States v. Bicksler*, 1 Mackey, 341, note, § 5457.

SECT. 5458. — The offence of having counterfeit gold or silver coins in possession is not complete unless the accused had them in his possession "knowing the same to be false, forged, or counterfeited," whereas there is no necessity for the averment or proof of such *scienter* under the section punishing the possession of counterfeit *minor coinage*. The accused, for the former offence, may be imprisoned ten years, while the limit of imprisonment under this section is three years. *United States v. Bicksler*, 1 Mackey, 341.

SECT. 5461. — Passing pieces of metal apparently gold and octagonal in form, bearing on one side the device of an Indian, and on the other the inscription " $\frac{1}{4}$  dollar," is not a crime under this section. It does not extend to the uttering of a token which does not purport to be an imitation, or in substitution of any coin known to the law. *United States v. Bogart*, 9 Ben. 314.

SECT. 5463. — *United States v. Crecilius*, 34 F. R. 30; *United States v. Pelletreau*, 14 Blatch. 126. Amended by St. Jan. 3, 1887, ch. 13, § 2 (24 St. 355), so as to read: —

"Any person who shall, with intent to defraud, falsely make, forge, counterfeit, engrave, or print, or cause or procure to be falsely made, forged, counterfeited, engraved, or printed, or willingly aid or assist in falsely making, forging, counterfeiting, engraving, or printing, any order in imitation of, or purporting to be, a money-order or postal note issued by or under the direction of the Post-Office Department of the United States, or of any foreign country, and payable in the United States, or any material signature or indorsement thereon; or any material signature upon any receipt or certificate of identification thereon; any person who shall falsely alter, or cause or procure to be falsely altered, or willingly aid or assist in falsely altering any such money-order or postal note; any person who shall, with intent to defraud, pass, utter, or publish, or attempt to pass, utter, or publish, as true, any such false, forged, counterfeited, or altered money-order or postal note, knowing the same, or any signature or indorsement thereon, to be false, forged, counterfeited or altered, shall be punishable by a fine of not more than five thousand dollars, or by imprisonment at hard labor for not less than two years and not more than five years."

Where a postmaster issued a postal money-order on the application of a fictitious person, without consideration, payable to a bank, to which he at the same time wrote in the name of the fictitious person, directing that the amount of the order be collected and remitted to him at a certain place in a registered package, and he intercepted this as it passed through an intermediate office, and converted to his own use the contents thereof, he was held to have committed forgery both at common law and under the statute. *Ex parte Hibbs*, 11 Sawyer, 452; 26 F. R. 421. If the forgery of a postal order would defraud any person, there may be a conviction, although the evidence does not show an intent on the part of the accused to defraud that particular person. The crime of forgery may be committed if one fraudulently signs his own name, it being the same as the name of him who should have signed. *United States v. Long*, 30 F. R. 678. And an indictment under this section, which charges one with having forged a material indorsement on a post-office money-order, with intent to defraud another person, charges an offence against the United States. *United States v. Morris*, 16 Blatch. 133.



SECT. 5464. — The offences herein described are no longer declared felonies. *United States v. Coppersmith*, 4 F. R. 198; 10 Repr. 517; *United States v. Pelletreau*, 14 Blatch. 126.

SECT. 5467. — This section is a revival of § 21 of St. March 3, 1825 (*United States v. Taylor*, 1 Hughes, 514); and also a verbatim transcript of § 279 of St. June 8, 1872, up to its concluding part, where the words "every such person shall on conviction thereof for every such offence" have been omitted, and no penalty is prescribed for any offence hereunder except that of stealing the valuable contents of a letter by an employee in the postal service. The offence of embezzling a letter with valuable contents is not covered. *United States v. Long*, 4 Woods, 454; 10 F. R. 879. This decision has been disapproved in *United States v. Falkenhainer*, 21 F. R. 624, and in *United States v. Atkinson*, 34 Id. 316. It creates two distinct offences, viz.: (1) The embezzlement of a letter carried in the United States mail; and (2) the stealing of its contents. Therefore an indictment charging embezzlement only is sufficient. *United States v. Taylor, supra*. One may be punished separately for each offence. *United States v. Harmon*, 3 Sawyer, 556. It applies to a local mail agent who received the mail bags from and delivered them to the trains, who received letters from individuals for the purpose of delivering them to the route agents, and who had taken the oath of office though he received no compensation from the government (*United States v. Hamilton*, 11 Biss. 85; 9 F. R. 442); to a person employed in the Post-Office Department as a carrier, postmaster, or assistant postmaster (*United States v. Nott*, 1 McLean, 499; *United States v. Belew*, 2 Brock, 280; *United States v. Brent*, 17 Int. Rev. Rec. 54; *United States v. Pelletreau*, 14 Blatch. 126); but not to one disconnected with the Post-Office Department. *United States v. Nott, supra*.

This section applies to letters *in transitu*; letters deposited in a post-office to be forwarded or handed to a mail carrier on his route between post-offices. *United States v. Pearce*, 2 McLean, 14; *United States v. Martin*, Id. 256. United States treasury notes issued by authority of Congress are promissory notes within the meaning of this section. *United States v. Hardyman*, 13 Pet. 176. Gold dust in packages of not more than four pounds' weight paying letter postage is mailable matter, and, whether it is or not, any one stealing it from the mail is guilty hereunder. *United States v. Randall*, Dundy, 524.

In order to come within the provisions of this section a letter or packet must get into the mail in some of the ways provided by the postal authorities, and become part of the mail matter under the control thereof. And it must be such as is "intended to be conveyed by mail," in order to warrant a conviction. *United States v. Rapp*, 30 F. R. 818. It is not material how a letter, which is intended to be conveyed by mail, comes into the possession of a person employed in the postal service (*United States v. Hamilton, supra*); or for what purpose it was mailed. *United States v. Cottingham*, 2 Blatch. 479. A letter with money enclosed deposited in the mail for the purpose of determining whether its contents were stolen on a particular route, and actually sent on a post route, is a letter intended to be sent by mail within the meaning hereof (*United States v. Foye*, 1 Curtis, 364), and it seems, when regularly mailed, may be the subject of embezzlement. *United States v. Rapp, supra*. But a decoy letter, which is fictitiously addressed, and which it is impossible to deliver, is not intended to be conveyed by mail within the meaning of this section. *United States v. Denicke*, 35 F. R. 407.

*The offence.* — A postmaster who takes money from a registered letter and borrows it, hoping and expecting to return it, and who does in fact return it, is within the prohibition of this section. *United States v. Thompson*, 29 F. R. 706. There is embezzlement only when the letter is in postal custody, is not yet delivered to the person to whom it is addressed, contains some of the valuable articles named in this section, and this valuable thing has been taken or stolen. *United States v. Baugh*, 4 Hughes, 501; 1 F. R. 784; 9 Repr. 574. It is not an offence within this section for one who is in the postal service



to secrete, embezzle, or destroy a letter intrusted to him or coming into his possession, unless such letter was intended to be conveyed by mail or carried or delivered by some one employed in the postal service, or forwarded through or delivered from the post-office or branch post-office established by authority of the Postmaster-General. *United States v. Matthews*, 35 F. R. 890. So long as anything remains to be done to make the envelope mailable matter, and the postmaster, acting as agent for the sender, exchanges silver for paper money and places the latter in the envelope, the letter is not within the meaning of this section. *United States v. Taylor*, 37 F. R. 200. The offences herein described may be committed without taking the letter from the post-office building. *United States v. Nott, supra*. But as to a postmaster acting as agent, see *United States v. Bramham*, 3 Hughes, 557.

*How prosecuted.* — The offences herein described not being infamous may be prosecuted by information. *United States v. Baugh*, 4 Hughes, 501; 1 F. R. 784.

*Indictment.* — An indictment against a post-office employee for stealing money from a letter should aver that the letter was one intended to be conveyed by mail, that it had been deposited in the post-office in the charge of the defendant, that it came into his possession in the regular course of his official duty, and that he was employed in the post-office department; and if it does not, it is defective. *United States v. Winter*, 13 Blatch. 333; *United States v. Patterson*, 6 McLean, 466; *United States v. Nott, supra*; *United States v. Laws*, 2 Lowell, 115, *contra*. But under § 21, act of March 3, 1825, for embezzlement of a letter containing a bank note, it was held unnecessary to allege the particular office held by the accused, or that the note was of an incorporated bank or of any value. *United States v. Clark, Crabbe*, 584. It seems that the proviso "and provided the same shall not have been delivered to the party to whom it is directed," appertaining to the contents of letters, does not apply to the first class of offences named in the section, and therefore an indictment against a letter-carrier for embezzling a letter need not aver that the letter had not been delivered to the party to whom it was directed. *United States v. Jenther*, 13 Blatch. 335. An indictment will lie which charges a person employed as a letter-carrier with having embezzled a letter which was intended to be conveyed by mail and contained an article of value, and had been entrusted to him, and had come into his possession as such letter-carrier. *United States v. Pelletreau, supra*. Although if a letter contains an article of value it must be so averred in the indictment, yet as it is an offence to steal a letter which contains no article of value, the defendant may be convicted and punished accordingly, though the indictment contains no averment of valuable contents in the letter. *United States v. Fisher*, 5 McLean, 23. An indictment charging the embezzlement of letters need not, under § 18, act of April 30, 1810, allege that the articles were intended to be conveyed by post, nor describe them nor the bank notes they contained particularly, it being averred that the particular description of the letters and notes was to the grand jurors unknown. It is no objection to the indictment that the embezzlement of the letters and the stealing of the notes therefrom were charged in the same count. *United States v. Golding*, 2 Cranch C. C. 212. If several indictments for similar offences are found, the court may order them to be consolidated, and if the defendant is thereby prejudiced a new trial will be granted. *United States v. Brent, supra*. An indictment for embezzling and secreting valuable letters need not allege that the act was done with a fraudulent intent, since the offence is a mere misdemeanor. *United States v. Atkinson*, 34 F. R. 316. But an indictment for stealing a letter under this section must allege a wrongful intent, and it is not good and sufficient unless it lays the thing alleged to have been stolen, as the property of some one other than the accused. *United States v. Foye*; 1 Curtis, 364; *Jones v. United States*, 27 F. R. 447. This last allegation was held to be unnecessary under 13 St. 337, § 12, in *United States v. Laws*, 2 Lowell, 115, in *United States v. Okie*, 5 Blatch. 516, and, it seems, in *United States v. Baugh*, 4 Hughes, 501;



1 F. R. 784; 9 Rep. 574. If the article alleged to have been stolen is named in the statute, the indictment need not allege that it is of any value, and if it was a check or bank note it need not be set forth or particularly described. A substantive description is sufficient. *Jones v. United States*, *supra*; *United States v. Patterson*, 6 McLean, 466. But if described they must be proved as laid. *United States v. Lancaster*, 2 McLean, 431. It is unnecessary to state to what particular place the letter was to be sent (*United States v. Okie*, *supra*; *United States v. Laws*, *supra*); but if alleged it cannot be rejected as surplusage, but must be proved as laid. *United States v. Foye*, *supra*. All the facts which aggravate the crime must be alleged. *United States v. Nott*, *supra*. It is not necessary to allege that the grand jury which found the indictment was duly organized, and that twelve of its members concurred in finding it. If the letter was enclosed in an envelope and the envelope was directed to A. B., the letter is well described as directed to A. B. *United States v. Laws*, *supra*. See also, as to requisites of an indictment, *United States v. Martin*, 2 McLean, 256; *United States v. Jones*, 31 F. R. 718; *United States v. McKenzie*, 35 Id. 826. See also note, §§ 3891, 5469.

SECT. 5468. — "A letter intended to be conveyed by mail is one which is intrusted to, or comes to the possession of, some postal employee, to be transmitted, by means of the mail or mail agencies of the United States, to the person to whom, under whatever name, it is addressed; or, which is the same thing, to some person authorized to receive it from the mail before or after it reaches the particular place to which it is directed. It cannot be that a letter is intended to be conveyed by mail, within the meaning of the statute, when the postal authorities, acting in co-operation with the sender, intend, after the letter is put in the mail, to resume possession of it themselves, or to permit the sender to do so, before it reaches the hands of any carrier, messenger, or other postal employee, for delivery to the proper person." *United States v. Matthews*, 35 F. R. 890. See also *United States v. Rapp*, 30 F. R. 818.

SECT. 5469. — The provisions of this section are not in the nature of an exception to the offences created by Rev. Stats. § 3892, so as to make it essential for an indictment under that section to allege that the letter taken from the mails did not contain an article of value. *United States v. Davis*, 33 F. R. 865. Nor is it necessary under this section to aver in an indictment for stealing a letter out of the mail that it contained anything of value (*United States v. Burns*, 5 McLean, 23); or if the offence charged is the theft of a Treasury note, to aver the ownership of the note in some one other than the accused. *United States v. Falkenhainer*, 21 F. R. 624. It is sufficient to lay the charge in the words of the statute which describes the offence, unless those words include cases not intended by the legislature to be embraced in the act, in which case the indictment must show the case to be one not thus excluded. It was not necessary under 4 St. 109, § 72, to allege a venue of the unlawful intent, nor that the opening of the letter was unlawful, nor that the person to whom it was addressed was a real person, it being alleged that the letter was opened with intent to obstruct the correspondence of such person, for in such case it will be assumed that he was a real person. *United States v. Pond*, 2 Curtis, 263. If the statute makes one or more distinct acts connected with the same transaction indictable they may be averred as one act. Therefore, a count charging that the defendant did secrete and embezzle a letter is not bad for duplicity. *United States v. Sander*, 6 McLean, 598. The offences described in this section are not infamous, and may therefore be prosecuted by information. *United States v. Wynn*, 9 F. R. 886; *United States v. Falkenhainer*, *supra*. This section punishes any person, whether in the employ of the postal department or not, who opens, embezzles, or destroys mail matter containing things of value, or the representatives of value, notwithstanding the special provisions made for the punishment of postal employees in Rev. Stats. § 5467. *United States v. Gruver*, 35 F. R. 59; *United States v. Marselis*, 2 Blatch. 108, note, p. 111. To constitute an offence within



the meaning of the clause "take the mail or any letter or packet therefrom from any post-office . . . with or without the consent of the person having custody thereof," the taking of the mail or of a letter from the post-office must be with criminal intent; not a taking by the authority of the person to whom the letter is addressed, although there is a subsequent embezzlement, nor a taking by mistake or with an innocent intent. *Re Burkhardt*, 33 F. R. 25; *United States v. Pearce*, 2 McLean, 14. If a letter has been delivered to an authorized agent, there can be no embezzlement of it. *United States v. Sander*, *supra*. Nor can there be a conviction of such agent for opening a letter not containing an article of value if he took the letter in the discharge of his duty. *United States v. Driscoll*, 1 Lowell, 303. It is an offence to open a letter with wrongful intent though the letter was not sealed, though it was written by the defendant himself, and though the name to which the letter was addressed was not the name of the person for whom it was intended. *United States v. Pond*, *supra*. But after the post-office has voluntarily terminated its custody of a letter by delivery to the person supposed to be entitled to it, the rights of the person actually entitled thereto are governed by the laws of the State, and not by those of the United States. *United States v. Parsons*, 2 Blatch. 104.

See notes to §§ 3892 and 5467. See also *United States v. Rapp*, 30 F. R. 818; *United States v. Jolly*, 37 Id. 108.

SECT. 5470. — 19 St. 253, ch. 69, inserts a semicolon after "thereon" in the sixteenth line. Upon the trial of an indictment hereunder which, in several counts, charges the defendant with receiving, concealing, and aiding in the concealment of property stolen from the mails of the United States, proof of receiving, concealing, or aiding in concealing, is sufficient to establish the guilt of the defendant. *United States v. Montgomery*, 3 Sawyer, 544. And one jointly indicted with another for this offence may be convicted, though the other has been discharged upon a plea of *autrefois convict*. *Id.* The conviction of the person who stole the property which the defendant is accused of receiving is sufficient, on the trial of the latter, to show that it was stolen, if the article has been identified. *United States v. Keene*, 5 McLean, 509; *United States v. Hardyman*, 13 Pet. 176, see note, § 5467; *United States v. Jolly*, 37 F. R. 108.

SECT. 5472. — The word "rob" is to be taken in its common-law signification, viz.: the stealing or taking from the person of another, or in the presence of another, property of any amount, with such a degree of force or terror as to induce the person to part with it unwillingly. *United States v. Wilson*, Baldw. 78, 93. Stopping the carrier on the highway, demanding the surrender of the mail, and showing weapons calculated to take his life, such as pistols or dirks, putting him in fear of his life, is placing him in jeopardy. *Id.* Pistols are dangerous weapons. If an offer or threat is made to shoot with them, the presumption is that they were loaded. *Id.*; *United States v. Hare*, 2 Wh. Cr. Cas. 283. It is not necessary to a conviction that the carrier of the mail should have taken the prescribed oath, or that the whole mail should be taken. *Id.* It is sufficient to charge the crime in the words of the statute. The county in which it was committed need not be named. It is sufficient to show that the crime was committed within the jurisdiction of the court where the indictment is pending. *Id.* One may be convicted under this section of robbing a postmaster. *United States v. Bowman*, 5 Pac. Repr. (New Mex.) 333.

SECT. 5474. — A mail contractor has no right to employ an express company not under his control to carry the mail, and if he does so it is a violation of this section. 15 A. G. Op. 70.

SECT. 5475. — See note, § 1342, art. 60. If the court has imposed as punishment both fine and imprisonment when its only power was to impose fine or imprisonment, and the fine has been paid, it cannot, during the same term, modify its judgment. A second judgment on the same verdict is void. *Ex parte Lange*, 18 Wall. 163.

SECT. 5477. — See note, § 1342, art. 60.



SECT. 5478. — *Re* Byron, 18 F. R. 722. The fact that the defendant was found in the post-office after the building had been closed for the night, and after all persons had apparently been removed therefrom, is sufficient *prima facie* evidence of a forcible breaking. In such case there is no presumption that he hid himself within it merely because he had been seen with other persons lawfully there, before the building was closed. *United States v. Lantry*, 30 F. R. 232. An indictment must aver an intent to commit larceny in that part of the building used as a post-office. Of a breaking with intent to commit larceny in a part of the building not so used, the United States courts have no jurisdiction. *United States v. Campbell*, 9 Sawyer, 20; 16 F. R. 233.

SECT. 5479. — Amended by 19 St. 253, ch. 69, by striking out the word "to," before the word "procure" in the eleventh line, and inserting in place thereof the word "or." *United States v. Gowdy*, 37 F. R. 332.

The offence described in this section is infamous, and can be prosecuted only by indictment. *United States v. Tod*, 25 F. R. 815. This section is to be considered as relating to forgery only, and not to the making or assisting to make an affidavit which is genuine in itself, but containing statements which are false and untrue, for the purpose of defrauding the United States. Therefore an indictment which charges a person with aiding and assisting another in making certain affidavits which contain matter false and untrue with intent to defraud the United States, and with transmitting to an officer of the United States an affidavit in writing which contained statements known by him to be false and fraudulent, cannot be sustained as an indictment hereunder. And it is too indefinite if it intended to charge that the affidavit was transmitted or presented to any officer of the United States in support of or in relation to any account or claim to be sustained under Rev. Stats. § 5471. *United States v. Cameron*, 13 N. W. Rep. (Dak.) 561.

SECT. 5480. — The word "or" in the phrase "or be effected," in the second line, should be "to," so as to read "to be effected." *Brand v. United States*, 18 Blatch 384; 4 F. R. 394. The latter clause of this section seems to be a transcript of and based upon 14 & 15 Vict. ch. 100, §§ 15, 16, 17. *United States v. Nye*, 4 F. R. 888. This section was amended by St. March 2, 1889, ch. 393 (25 St. 873), to read as follows: —

"SEC. 5480. If any person having devised or intending to devise any scheme or artifice to defraud, or to sell, dispose of, loan, exchange, alter, give away, or distribute, supply, or furnish, or procure the unlawful use any counterfeit or spurious coin, bank notes, paper money, or any obligation or security of the United States or of any State, Territory, municipality, company, corporation, or person, or anything represented to be or intimated or held out to be such counterfeit or spurious articles, or any scheme or artifice to obtain money by or through correspondence, by what is commonly called the 'sawdust article,' or 'counterfeit money fraud,' or by dealing or pretending to deal in what is commonly called 'green articles,' 'green coin,' 'bills,' 'paper goods,' 'spurious Treasury notes,' 'United States goods,' 'green cigars,' or any other names or terms intended to be understood as relating to such counterfeit or spurious articles, to be effected by either opening or intending to open correspondence or communication with any person, whether resident within or outside the United States, by means of the Post-Office Establishment of the United States, or by inciting such other person or any person to open communication with the person so devising or intending, shall, in and for executing such scheme or artifice or attempting so to do, place or cause to be placed, any letter, packet, writing, circular, pamphlet, or advertisement in any post-office, branch post-office, or street or hotel letter-box of the United States, to be sent or delivered by the said post-office establishment, or shall take or receive any such therefrom, such person so violating the post-office establishment shall, upon conviction, be punishable by a fine of not more than \$500 and by imprisonment for not more than eighteen months, or by both such punishments, at the discretion of the court. The indictment, information, or complaint may severally charge offenses to the number of three when committed within the same six calendar months; but the court thereupon shall give a single sentence, and shall proportion the punishment especially to the degree in which the abuse of the post-office establishment enters as an instrument into such fraudulent scheme and device.

"SEC. 2. That any person who, in and for conducting, promoting, or carrying on, in any manner by means of the Post-Office Establishment of the United States, any scheme or device mentioned in the preceding section, or any other unlawful business whatsoever, shall use or assume or request to be ad-



addressed by any fictitious, false, or assumed title, name, or address, or name other than his own proper name, or shall take or receive from any post-office of the United States any letter, postal-card, or packet addressed to any such fictitious, false, or assumed title, name, or address, or name other than his own lawful and proper name, shall, upon conviction, be punishable as provided in the first section of this act.

"SEC. 3. That the Postmaster-General may, upon evidence satisfactory to him, that any person is using any fictitious, false, or assumed name, title, or address in conducting, promoting, or carrying on, or assisting therein, by means of the Post-Office Establishment of the United States, any business scheme or device in violation of the provisions of this act, instruct any postmaster at any post-office at which such letters, cards, or packets, addressed to such fictitious, false, or assumed name or address arrive to notify the party claiming or receiving such letters, cards, or packets to appear at the post-office and be identified; and if the party so notified fail to appear and be identified, or if it shall satisfactorily appear that such letters, cards, or packets are addressed to a fictitious, false, or assumed name or address, such letters, postal-cards, or packages shall be forwarded to the dead-letter office as fictitious matter.

"SEC. 4. That all matter the deposit of which in the mails is by this act made punishable is hereby declared non-mailable; but nothing in this act shall be so construed as to authorize any person other than an employee of the dead-letter office, duly authorized thereto, to open any letter not addressed to himself.

"SEC. 5. That whenever the Postmaster-General is satisfied that letters or packets sent in the mails are addressed to places not the residence or business address of the persons for whom they are intended, to enable such persons to escape identification, he may direct postmasters to deliver such letters only from the post-office upon identification of persons addressed."

The effect of the statute is not limited to lotteries, but is general. *United States v. Watson*, 35 F. R. 358.

To make out an offence under this section, three matters of fact must be charged in the indictment and established by the proof: (1) That a scheme or artifice to defraud has been devised by the defendant; (2) that such scheme or artifice to defraud was to be effected by correspondence with another person by means of the post-office establishment of the United States, or by inciting such other person to open communication with the defendant; (3) that for the purpose of executing such a scheme or artifice or attempting so to do, the defendant placed a letter or packet in a post-office of the United States or has taken or received a letter or packet therefrom. *United States v. Flemming*, 18 F. R. 907; *United States v. Wootten*, 29 Id. 702; *United States v. Hoeflinger*, 33 Id. 469; 38 Alb. L. J. 18. One may be convicted hereunder though the fraudulent scheme in which he participates may have originated with another. A person is guilty though the letter was placed in the post-office by another with fraudulent intent, if it was placed there by his direction. A clerk who knowingly aids his employer in his fraudulent practices is equally a party. *United States v. Flemming, supra*. Sending a letter calculated to induce the purchase of counterfeit money at a low price for the purpose of putting it off as genuine, is an offence though no intention was shown to defraud any particular person. *United States v. Jones*, 20 Blatch. 235; 10 F. R. 469; 13 Repr. 165. The gist of the offence is the abuse of the mail. The *corpus delicti* was the mailing of the letter in execution of the unlawful scheme, and this being shown it was competent to prove that the defendant was the sender of the letter by his admission to that effect. *Id.* Advertising under various titles for agents to sell goods and distribute circulars, without intending to employ such agents, but with the intention of inducing persons who saw such advertisements to remit postage stamps and money for outfits, and to appropriate them to the defendant's use, without giving an equivalent therefor, and in pursuance of this purpose taking a letter and packet from the post-office and depositing a packet in it, is an offence under this section. *United States v. Stickle*, 15 F. R. 798. A plan to cheat by ordering goods through the mail with the intention of not paying for them, under the false assertion that the persons mailing the orders are wholesale merchants, is also a fraudulent scheme within the statute. *United States v. Watson, supra*, and note. It was held not to be within this section where the defendant, a post-office employee, changed the date of the mailing stamp in the post-office so as to give a false post-



mark to a letter enclosing an insurance assessment (*United States v. Mitchell*, 36 F. R. 472); for a debtor to enclose in a letter to his creditor worthless slips of paper, and write that such slips were sent in payment of an obligation or account, and send them through the mail (*United States v. Owens*, 5 McCrary, 307; 17 F. R. 72); for one not solvent to seek credit or order goods, though he be without the means of paying for them at the time. The intent not to pay for the goods ordered through the mail must exist before the order was mailed. And the statute does not take cognizance of an act devised for the purpose of escaping payment for goods, such act occurring after they were ordered. *United States v. Wootten*, *supra*.

The offence here described is a misdemeanor only. *United States v. Stickie*, *supra*.

The offence may be charged in the general language of the statute, but the description must be accompanied by a statement of all the particulars essential to constitute the offence or crime, and to acquaint the accused with the nature of the charge. *United States v. Hess*, 124 U. S. 483; 8 Sup. Ct. Repr. 571. The latter clause of this section is not a part of the description of the offence; it relates only to the procedure. This section imposes no stricter rule than the common law, and where an indictment charges, in different counts, the commission of five separate and distinct offences, the court may permit the district attorney to *nolle prosequi* two of them and proceed upon the others. *United States v. Nye*, 4 F. R. 888. The provision that the government may "severally charge offences to the number of three when committed within the same six calendar months" does not restrict it to the prosecution of three several acts alone. *United States v. Martin*, 28 F. R. 812. There being a conviction under two indictments, one of which charged two and the other three offences all laid within six months, a sentence of six months' imprisonment was pronounced under each conviction, the terms to run concurrently, — held that though there could be a conviction for only three offences in each six months, one of the indictments and the conviction thereunder were valid. *Re Haynes*, 30 F. R. 767. Under this section three separate offences committed in the same six months may be joined, but not more; and when joined there is to be a single sentence for all. But this does not mean that there can be but one punishment for all the offences committed by a person within any one period of six calendar months. *Re Henry*, 123 U. S. 372; 8 Sup. Ct. Rep. 142. An indictment under this section should allege the formation of a scheme to defraud that is to be effected by using the United States mail, all the essential features of the fraudulent scheme or artifice should be described, and the existence of the same as alleged must be proven on the trial. In addition the indictment must of course show that a letter has been placed in the mail by the defendant or taken therefrom by him in execution of the scheme or artifice. It is not essential that the letter written in aid of the scheme shall contain false statements. *United States v. Hoeflinger*, 33 F. R. 469; 38 Alb. L. J. 18.

See note, § 3894. Also *United States v. Thomas*, 27 F. R. 682; *United States v. McMillan*, 29 Id. 247; *United States v. Haynes*, Id. 691.

## CHAPTER VI.

### OFFICIAL MISCONDUCT, ETC.

Sr. Aug. 15, 1876, ch. 287, § 6, prohibiting under certain penalties United States officials from requesting, giving to, or receiving from any other official money, property, or other thing of value for political purposes, is constitutional. *Ex parte Curtis*, 166 U. S. 371; *sub nom.* *United States v. Curtis*, 12 F. R. 824; 3 Cr. L. Mag. 810; 14 Rep. 187.

SECT. 5481. — This section, having been enacted after the cession of Alaska, has been in force there ever since, and 4 St. 118, § 12, was in force before that from the cession of



Alaska to the United States. *United States v. Carr*, 3 Sawyer, 302. Extortion is the unlawful taking by any officer, by color of his office, of any money or thing of value that is not due to him, or the taking of any money or thing of value by color of his office in excess of what is due him or before it is due to him. If a register of a land office undertakes to act as attorney for an applicant in procuring a patent and receives from him a gross sum, which is taken as well for the execution of his official duties as for the doing of non-official work relating to the patent, and no designated portion of it is taken in payment for either class of services, and the gross sum is in excess of his legal fees, he is guilty of extortion. *United States v. Waitz*, 3 Sawyer, 473; 2 L. & Eq. Repr. 42. See *Ogden v. Maxwell*, 3 Blatch. 319.

SECT. 5483. — See note, § 1342, art. 60.

SECT. 5484. — An indictment hereunder alleged that the defendant received money "under a threat of informing, and as a consideration for not informing." A motion in arrest of judgment was made on the ground that the information was bad for duplicity, and it was held that the two offences should be regarded as successive acts in the same transaction, and that there was really but one offence, and that it was properly alleged. *United States v. Fero*, 18 F. R. 901. It is not necessary to state what particular offence the defendant claimed that the violator of the internal revenue law had committed. *Id.* The offence is a misdemeanor only, and though the intent is a material ingredient of the offence, it seems not necessary to charge it, inasmuch as the very act condemned by the statute involves an unlawful act. *Id.*

SECT. 5485. — St. Jan. 25, 1879, ch. 23, § 4 (20 St. 265), provides —

"SEC. 4. No claim agent or other person shall be entitled to receive any compensation for services in making application for arrears of pension."

The provisions of this section are by 21 St. 385, ch. 130, and by 22 St. 248, made applicable to any person who shall violate the provisions of St. June 20, 1878 (see note, § 4785). Sects. 12, 13 of the pension act of 1864 (13 St. 389), limiting the fees of agents and attorneys for making out and causing the papers to be executed under the act, and providing that the receiving of any greater compensation than that prescribed shall be punished as a misdemeanor, are constitutional. *United States v. Fairchilds*, 1 Abb. U. S. 74; *United States v. Marks*, 2 *Id.* 531.

To obtain a conviction under this statute it must be shown: (1) That the person from whom it is alleged that the whole or any part of a pension is wrongfully withheld, is a pensioner of the United States. (2) That the amount alleged to be wrongfully withheld is the whole or part of a pension or claim allowed and due such pensioner or claimant. (3) That the person charged with the wrongful withholding was an agent or attorney of the pensioner, instrumental in prosecuting the pensioner's claim for pension, or if not an agent or attorney was a person through whose instrumentality the claim was prosecuted. (4) That the whole or part of the pension or claim allowed and due such pensioner or claimant was wrongfully withheld from the pensioner or claimant by such agent or attorney, or other person instrumental in prosecuting the claim for pension. *United States v. Howard*, 7 Biss. 56.

This section embraces the withholding of money by any agent, attorney, or any other person, though he be not the regular pension attorney (*United States v. Schindler*, 18 Blatch. 227; 10 F. R. 547); the withholding against the pensioner's will of a check or warrant, which comes into the hands of the agent as well as money. *United States v. Ryckman*, 12 F. R. 46. But an agreement by a banker or other person to collect a check which a pensioner has received from a pension agent, does not make the banker or other person an agent within this section, but only an agent for the collection of the check; and if the pensioner accepts a certificate of deposit for the check, the ordinary relation of



debtor and creditor is established as between the parties. *United States v. Howard, supra.* Fraud and extortion are not ingredients of the offence. If the illegal fee is demanded or received, the statute is violated. But money which has been disbursed or advanced in prosecuting the claim is not within the prohibition. *United States v. Moore, 18 F. R. 686.* It is a good defence to an indictment for charging in excess of the established fee for obtaining a widow's pension, that her former husband was represented in the records of the war department as a deserter, and that the services for which the alleged excessive payment was made were rendered in causing such charge to be removed. *United States v. Snow, 2 Flippin, 1.* The rights of the pension claimant are established by the findings of the Commissioner of Pensions, and such findings are conclusive. *United States v. Schindler, supra.* It was the intention of Congress by this section, and by Rev. Stats. §§ 4768, 4769, 4785, 4786, to prohibit the receiving from any person whatever of any compensation for services in procuring a pension, other or greater than that provided by statute. *Wolcott v. Frissel, 134 Mass. 1.* There was no statute in force from June 20, 1878, when Rev. Stats. § 4785 was repealed, to March 3, 1881, on which the penalty prescribed by this section could operate, and therefore an indictment for the offence of receiving an unlawful pension fee during such period could not be sustained. *United States v. Mason, 8 F. R. 412; United States v. Hewitt, 11 Id. 243; United States v. Starn, 17 Id. 425; United States v. Goodwin, 20 Id. 237; United States v. Jenson, 15 Id. 138. Contra, United States v. Dowdell, 8 Id. 881; United States v. Jessup, 15 Id. 790.* Rev. Stats. § 4766, which provides that "hereafter no pension shall be paid to any person other than the pensioner entitled thereto," does not conflict with that clause of this section which makes it a misdemeanor for any person to wrongfully withhold from the pensioner any part of his claim. *United States v. Connally, 1 F. R. 779.* Neither this section nor the acts of June 20, 1878, or March 3, 1881, apply to a claim under Rev. Stats. § 4718, for reimbursement out of an accrued pension by one who paid the expense of the last sickness and burial of a deceased pensioner, nor to the agent or attorney of such claimant. *United States v. Nicewonger, 20 F. R. 438.* The act of 1872 (17 St. 137), prohibiting the retention of soldiers' discharges by agents and attorneys, is still in force as to such discharges, and while not embraced in the Revision, is not repealed or affected by it. The original of this section repealed by implication that part of the act of 1872, *supra*, relating to the withholding of land warrants, but did not affect it otherwise. *United States v. Webster, 21 F. R. 187.* In the appropriation act of 1884, the act of June 20, 1878, was repealed, but without saving the right to prosecute criminally the violations thereof, and it was held that without Rev. Stats. § 4785, or the substituted act of 1878, there could be no conviction for the violation of this section. *United States v. Van Vliet, 22 F. R. 641; United States v. Hague, Id. 706.* But later, it was held that the right to prosecute for a violation of this section, under the circumstances stated, is saved by Rev. Stats. § 13. *United States v. Van Vliet, 23 F. R. 35; United States v. Mathews, Id. 74.* But Rev. Stats. § 13 does not meet the case of an act not forbidden by statute at the time of its commission. Where money was received and withheld in September, 1872, and continued to be withheld until after the passage of the act of March 3, 1873, an indictment alleging the withholding to have occurred on March 31, 1873, could not be sustained. *United States v. Bennett, 12 Blatch. 345.* This section was not intended to apply to a case where the money was withheld before its enactment. *United States v. Bencke, 18 U. S. 447.*

The indictment need not allege how the defendant was instrumental in procuring the pension, or what he did in procuring it. Neither is it necessary to state that he knowingly and wilfully or unlawfully did the act charged. *United States v. Koch, 21 F. R. 873.* An indictment following the language of this section, and charging the accused with receiving an excessive fee "in prosecuting a pension claim," is equivalent to charg-



ing him with receiving it "in a pension case," and is good. *United States v. Wilson*, 29 F. R. 286. It is not necessary for an indictment to set out the statute which creates the offence prosecuted. But if it does, and the statute has been repealed, the allegations cannot be rejected as surplusage, and judgment rendered under a statute substituted for the one repealed. *United States v. Goodwin*, 20 F. R. 237.

Parol evidence that the person from whom the defendant withheld the money is a pensioner of the United States, is inadmissible. *United States v. Scott*, 25 F. R. 470; *United States v. Irvine*, 98 U. S. 450; *Ex parte Alexander*, 14 F. R. 680; *United States v. Moyers*, 15 Id. 411; *United States v. Chaffee*, 4 Ben. 330. See note, § 4785.

SECT. 5486. — *United States v. Starn*, 17 F. R. 435. This section is constitutional. *United States v. Hall*, 98 U. S. 343.

SECTS. 5488, 5489. — 15 A. G. Op. 288. See note, § 1342, art. 60.

SECT. 5490. — *United States v. Forsythe*, 6 McLean, 584; *United States v. Cook*, 17 Wall. 168; 7 A. G. Op. 82, 257.

SECT. 5491. — This section applies to all officers and other persons charged by it or any other act with the safe-keeping, transfer, and disbursement of public moneys. *United States v. Hutchinson*, 4 Pa. L. J. Rep. 211. It applies therefore to a post-office clerk acting as cashier. 5 A. G. Op. 685.

SECT. 5492. — 15 A. G. Op. 280.

SECT. 5496. — See note, § 5439.

SECT. 5497. — 15 A. G. Op. 288. Amended by St. Feb. 3, 1879, ch. 42 (20 St. 280), by adding at the end of this section —

"And any officer connected with, or employed in the internal revenue service of the United States, and any assistant of such officer, who shall embezzle or wrongfully convert to his own use any money or other property of the United States, and any officer of the United States, or any assistant of such officer, who shall embezzle or wrongfully convert to his own use any money or property which may have come into his possession or under his control in the execution of such office or employment, or under color or claim of authority as such officer or assistant, whether the same shall be the money or property of the United States or of some other person or party, shall, where the offence is not otherwise punishable by some statute of the United States, be punished by a fine equal to the value of the money and property thus embezzled or converted, or by imprisonment not less than three months nor more than ten years, or by both such fine and imprisonment."

SEC. 5498. — *Ex parte Curtis*, 106 U. S. 371. An officer of the bureau of Military Justice cannot lawfully act as counsel for a claimant in the Court of Claims in prosecution of the claim of another army officer against the United States. 16 A. G. Op. 478. Nor can a retired army officer. *Tyler's Motion*, 18 Ct. Cl. 25.

SECT. 5503. — See note, § 3663.

SECT. 5504. — See note, § 1342, art. 60. 18 St. 316, ch. 80, strikes out the word "and," and the first "of" in the fourth line. *Henry v. Sowles*, 28 F. R. 481. An assignee in bankruptcy cannot be convicted of embezzlement under this section, which applies only to such moneys as are required to be deposited with the Treasurer, Assistant-Treasurer, or a designated depository of the United States, in the name and to the credit of the court. *United States v. Bixby*, 10 Biss. 238; 6 F. R. 375.

## CHAPTER VII.

### CRIMES AGAINST THE ELECTIVE FRANCHISE AND CIVIL RIGHTS OF CITIZENS.

SECT. 5506. — *United States v. Reese*, 92 U. S. 214; *United States v. Cruikshank*, 1 Woods, 308; 92 U. S. 542; *Seeley v. Koox*, 2 Woods, 368; *Baldwin v. Franks*, 120 U. S. 692; *Le Grand v. United States*, 12 F. R. 577. See *United States v. Souders*, 2 Abb.



U. S. 456, note, § 5511; 19 Pac. Rep. 135. This section is constitutional. *United States v. Munford*, 16 F. R. 223. The right guaranteed by the Fifteenth Amendment to the Constitution is protected by this and the following section. *United States v. Harris*, 106 U. S. 629.

SECT. 5507. — This section is unauthorized by the Fifteenth Amendment to the Constitution, and is unconstitutional and void. *United States v. Amaden*, 10 Mass. 283; 6 F. R. 819.

SECT. 5508. — This section is constitutional. *Ex parte Yarbrough*, 110 U. S. 651; *United States v. Waddell*, 5 McCrary, 155; 16 F. R. 221; 112 U. S. 76. The exercise by a citizen of the United States of the right to make a homestead entry upon unoccupied public lands, which is conferred by Rev. Stats. § 2289, is the exercise of a right secured by the Constitution and laws of the United States within the meaning of this section. *United States v. Waddell*, *supra*. As to whether the offences defined in this section should be prosecuted by information or indictment, *quære*. *Id.* That they should be prosecuted by indictment, see *United States v. Butler*, 4 Hughes, 512. In order to convict under this section and Rev. Stats. § 5520, it is not necessary to find that the conspiracy charged was formed alone against the voter named in the indictment. It is sufficient if it is made to appear that he was included among persons actually conspired against. *United States v. Butler*, 1 Hughes, 457. The word "citizen" is here used in its political sense, with the same meaning which it has in the Fourteenth Amendment to the Constitution, and not as being synonymous with "resident," "inhabitant," or "person." *Baldwin v. Frank*, 120 U. S. 678. To constitute the offence, the wrong must be done to one who is a citizen in that sense. Though the word "citizen" does not occur in the second clause of the section, there is nothing to indicate that any other than a citizen was meant. *Id.* See further *United States v. Mitchell*, 1 Hughes, 439; *United States v. Cruikshank*, 1 Woods, 308; 92 U. S. 542; *Le Grand v. United States*, 12 F. R. 577; 3 Cr. L. Mag. 713; *Re Baldwin*, 27 *Id.* 187, 193; *United States v. De Grieff*, 16 Blatch. 20, 27.

SECT. 5510. — *Re Parrott*, 1 F. R. 481, 520. In a prosecution under this section for depriving a colored child of the right to attend public schools, in order to warrant a conviction, it must be made to appear that the defendant excluded such child under some color of law, statute, ordinance, regulation, or custom of the State, and because of the color of the child. And the fact that he so acted under the advice of counsel, is no defence. The recovery of damages in a civil action for depriving the child of such rights is not a bar to a prosecution therefor under this section. *United States v. Buntin*, 10 F. R. 730. It must appear that the conspiracy was against the persons named as a class, and because they were colored. It is no defence to allege that the persons named in the indictment were accused of illegal conduct. Conduct which tends to deprive colored people of their rights to attend public schools, or of their right to have public schools of their own under the law, is prohibited by this section. *United States v. Blackburn*, 1 N. Y. Week. Dig. 276.

SECT. 5511. — If the exercise of the right to vote is limited by the Constitution and laws of a State to males it is not in violation of the Fourteenth Amendment to the Federal Constitution. It is no defence to an indictment for voting without right that the accused who thus voted believed she had such right and voted relying on such belief. *United States v. Anthony*, 11 Blatch. 200. The mere fact that a representative in Congress is voted for at an election at which State officers are voted for does not give Congress power to regulate such election except in matters which concern the United States. *Ex parte Perkins*, 29 F. R. 900, reversing the judgment of the district court reported *Id.* 910. Therefore the alteration by the officers of the election, of the statement upon the tally sheets of the vote for certain local officers, in pursuance of a conspiracy, is not an offence within this section and Rev. Stats. § 5514. *Id.* The defendant and others attacked a



number of voters, waiting in line for their turn to vote, and expelled them from the room. The voters afterward returned and cast their ballots. This was held to be an offence within this section. The words "exercising the right of suffrage" in this section may be construed to mean "voting," without bringing it in conflict with the provisions of Rev. Stats. § 5506, if the penalties prescribed in this section be limited to apply to offences committed at elections for members of Congress, and those in Rev. Stats. § 5506 to State, county, and municipal elections. *United States v. Souders*, 2 Abb. U. S. 456. To make out an offence under this section it must appear directly or by fair inference from the proof that the accused acted with evil motive or intent. It should appear that he threatened or intimidated a person whom he knew or had reason to suppose was a duly qualified voter. If a citizen at the polls challenges the right of another citizen to vote, and does so in good faith, believing that the party challenged is not a qualified voter, no offence is committed under the statute, although the challenge is accompanied with a threat to have the party arrested and prosecuted if he persists in voting. *United States v. Guion*, 37 F. R. 263.

An allegation that the accused offered a person who was a minor a sum of money to vote is equivalent to an allegation that he counselled and advised him to vote. *United States v. Hendric*, 2 Sawyer, 476. But an allegation that one claimed the right to vote is not equivalent to an allegation that he was qualified to vote. *Id.* 479. An allegation that the accused offered to give O. a bribe to vote, the said O. being a minor, was construed to mean that the accused knew that O. was not of age when he offered him the bribe. *United States v. O'Neill*, 2 Sawyer, 481. An allegation that an election was held at a precinct named, was construed under the facts to be an allegation that the election was held in such precinct. And an averment that an election was held in a designated precinct on the day fixed for holding such election is good, the presumption being that the election so held was legal. *United States v. Johnson*, 2 Sawyer, 482. An indictment for voting without right should aver that the defendant knowingly so voted, although the question as to his knowledge is one of law. *United States v. Watkinds*, 6 F. R. 152. An indictment for unlawfully preventing a qualified voter from exercising the suffrage should charge the defendant with interfering at a Congressional election with a voter qualified to vote and offering to vote for a representative in Congress. But the detailed facts on which the qualification depends need not be averred. *United States v. Cahill*, 3 McCrary, 200; 9 F. R. 80. An indictment charging the defendant with fraudulently attempting to vote in the name of another person at an election for a representative in Congress had and conducted under the laws of the State of New York, by which State officers and such representative are voted for on separate ballots cast in different boxes, which fails to allege that the accused attempted to vote for a representative in Congress, is not sufficient. *United States v. Seaman*, 23 Blatch. 216; 23 F. R. 882. An indictment for aiding and assisting in illegal voting at an election for a representative in Congress need not recite the particular acts constituting the aid or assistance. It was alleged that the offence was committed at B. in said district of M. at an election for representative in Congress for the fourth Congressional district of the Commonwealth of M., in accordance with the laws thereof and with the laws of the United States. This was held to be a sufficient allegation that the election was held in the fourth Congressional district, which is a part of B. *United States v. Doherty*, 25 F. R. 28. An averment that the defendant, as inspector of elections, knowingly and wilfully received the vote of H. knowing that he was not a resident of, nor registered in, the precinct, alleges a violation of official duty. *Id.* It need not be alleged, in an indictment for illegal voting or for bribery at an election for representative in Congress voted for at the same time and place and upon the same ballot with State officers, that the ballot cast had upon it the name of a person voted for for such representative, nor that the bribe was given with intent to influence the election as to that office. *United*



*States v. McBosley*, 29 F. R. 897. Other cases on this section are *United States v. Fisher*, 8 F. R. 414; *United States v. Tiernay*, 16 Id. 513; *United States v. Watson*, 17 Id. 145, 149; *Mackin v. United States*, 23 Id. 334; *Re Coy*, 31 Id. 794; *Ex parte Morrill*, 35 Id. 261, 266.

SECT. 5512. — *Re Coy*, 31 F. R. 794; 127 U. S. 731; 9 Crim. L. Mag. 674; *Mackin v. United States*, 23 F. R. 334; *Ex parte Perkins*, 29 Id. 900. This and the following section are constitutional. *United States v. Quinn*, 8 Blatch. 48; *United States v. Gale*, 109 U. S. 65. They do not establish a test of the qualification of an elector or affect such qualification. They are sustainable under article 1, section 4, subdivision 1, and the last subdivision of article 1, section 8, of the Constitution. *United States v. Quinn*, *supra*. The offence herein described is a felony. *United States v. Carroll*, 32 F. R. 775. To counsel, procure, and advise a registration officer to do an act unauthorized by law is in itself, a distinct offence, different from that which such an officer commits when he does an act unauthorized by law. Id. If with knowledge that a voter has given a false residence the recorder accepts him, or suffers him to be borne in the registration books as a voter residing at a place where he does not reside, he is guilty of an offence under this section. *United States v. Eagan*, 30 F. R. 495. The words "or does any unlawful act" are not confined in their application merely to acts which are unlawful under the laws of the United States. An act prohibited by State law is included, although no penalty is prescribed for its commission. If the act has been, in effect, prohibited though not in express terms, it is unlawful. *United States v. O'Connor*, 31 F. R. 449. An indictment for counselling, procuring, and advising a registration officer to do an unlawful act is bad if it does not show that the officer did specific acts, at the instigation of the defendant, which amount to an offence. *United States v. Carroll*, 32 F. R. 775. The indictment besides using the language of the statute should show the ground of the voter's disqualification to be registered, as that he is a minor, a non-resident of the precinct, an alien, or some other ground of disqualification. *United States v. Eagan*, *supra*. Placing a number of fictitious names on the registration list at the same time and place constitutes but one offence, and is properly charged as such. Id. 498. The statutes of the State in which the offence was committed, being referred to in the indictment, will be noticed judicially. *United States v. Quinn*, 8 Blatch. 48. It was alleged in one count that the defendant "having no lawful right to register, fraudulently and wilfully did register," and in another "that he had no lawful right to register, as he well knew, by reason of the fact that he was then and there an alien, and had not been admitted to become a citizen of the United States." It was held that the indictment was bad in not pointing out the fraud, and in omitting to state facts showing that he was not entitled to register. The averment that the accused was an alien, &c., did not show that he was not so entitled, nor that he was not a citizen, nor that he had no right to vote. *United States v. Hirschfeld*, 13 Blatch. 330. An indictment for fraudulently securing registration of another person need not aver that the person for whom registration was obtained was an actual person. *United States v. O'Connor*, *supra*.

Where a circuit court commissioner issues a warrant under this and the following section upon affidavits which do not show an offence, the issuing of the warrant does not make a "case" within the meaning of Rev. Stats. § 1986, which provides that a commissioner "shall be entitled to a fee of ten dollars for his services in each case," &c. *Southworth v. United States*, 19 Ct. Cl. 278.

SECT. 5513. — See notes, §§ 5511, 5512.

SECT. 5514. — *United States v. Foster*, 4 Hughes. 514; *United States v. Seaman*, 23 Blatch. 217; 23 F. R. 882; *United States v. McBosley*, 29 Id. 897; *Ex parte Perkins*, 14 Id. 900. The last clause of this section should read as if the word "so" were omitted. So read, it gives force and validity to the clause which otherwise it would not have, and



gives meaning to the whole section, carrying out the obvious intent of Congress that where there is a single ballot at any election, at which under the law of the State all names must appear on the same ballot, the production of the ballot is *prima facie* evidence sufficient to convict. *United States v. Morrissey*, 32 F. R. 147. An indictment under this section is insufficient unless it alleges an act which either does or may affect the election of a representative to Congress. *Id.*

SECT. 5515. — *Mackin v. United States*, 23 F. R. 334; *United States v. Coy*, 32 Id. 538. Amended by 18 St. 320, ch. 80, by striking out the word "ten" in the last line and inserting the word "eleven."

Congress had constitutional power to enact this section by virtue of the provision in the Constitution, which declares that "the times, places, and manner of holding elections for senators and representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time, by law, make or alter such regulations except as to the place of choosing senators." *Ex parte Siebold*, 100 U. S. 371; *Ex parte Clark*, Id. 399; *United States v. Gale*, 109 Id. 65; *United States v. Bader*, 4 Woods, 189. But see dissenting opinion, 100 Id. 404. This section has no reference to any act of election officers which exclusively relates to or affects other officers than representatives in Congress. Congress has no more right to regulate the election of State and county officers at elections where representatives in Congress are chosen in conjunction with State and county officers, than it would have if no representative in Congress were voted for, and it has not attempted to do so. *Ex parte Perkins*, 29 F. R. 900; *United States v. Nicholson*, 3 Woods, 215. This section adopts the laws of the State in relation to elections. *United States v. Watson*, 17 F. R. 145. This statute is applicable only to officers of elections, and to no other persons. *United States v. Fisher*, 8 F. R. 414; *United States v. Baldridge*, 11 Id. 552; 3 *Crim. L. Mag.* 844. A supervisor of elections appointed under the laws of the United States is an officer of an election within the meaning of this section. *United States v. Fisher*, *supra*. But the governor of a State is not such an election officer as may be made criminally liable for any false certificate of the result of a Congressional election. *United States v. Clayton*, 2 *Dillon*, 219; 19 *Am. L. Reg.* 737. A clerk of an election who is not authorized by the State law to receive, count, or handle the ballots, but is simply required to make certain entries at the dictation of the judges of election, and to cast up the total number of votes polled in favor of each candidate as the same are read by the judges, does not, by attesting the poll-book, certify as to the correctness of the count of the votes so as to render himself criminally liable by making a false certificate as to the result of the election, such attestation being merely an authentication of the signatures of the judges. *United States v. Green*, 33 F. R. 619.

It is an offence within this section for an election officer to use argument to induce a voter to cast his ballot for a particular candidate, with intent to affect the election for a representative in Congress or the result thereof (*United States v. Bader*, 4 Woods, 189); not to convey the ballot box, after it has been sealed and delivered to him for that purpose, to the county clerk in accordance with the laws of the State (*Ex parte Clark*, 100 U. S. 399); to intentionally delay executing a warrant for the arrest of one charged with illegally registering until election day, in order to prevent his voting. And it is equally so to threaten to arrest for the purpose of deterring him from voting (*Matter of Spooner*, 9 *Abb. N. Cas.* 481); to refuse and neglect to appoint a suitable person to act as inspector of the election, and appointing an illiterate and wholly incompetent person. *United States v. Caruthers*, 15 F. R. 309. Under the laws of Indiana, imposing upon an inspector who receives the certificate, tally-sheet, and poll-list of a general election, the duty of safely keeping them in his own custody until they are delivered or returned to the board of canvassers, it is an offence under this section to part with such certificate to a person not entitled thereto. *Re Coy*, 31 F. R. 794; 127 U. S. 731; 9 *Crim. L. Mag.* 674.



The fraudulent addition by officers who act at a Congressional election of the names of persons who have not voted, to an incomplete list of the voters required by law to be kept, with intent to affect such election, is an offence under this section. *United States v. Bader, supra*. If election officers undertake to count the ballots in an unlawful manner, against the laws of the State, as by removing the ballot-box from the place designated for holding the election, and refusing to allow electors to attend the count, they are guilty under this section. *United States v. Badincelli*, 37 F. R. 138. In a prosecution under this section and Rev. Stats. § 5522, for adding the names of persons not voting to the list of names of persons who voted at the election, it must be shown, in order to convict, that the defendants were such officers as the indictment alleged; that the election at which they acted was for a representative in Congress; that fraudulent additions of names of persons who did not vote for such representative were made by them to a list which the law required them to keep; that one at least of the names of the persons so added was among the names charged to have been added; that in making additions of the names of persons who had not voted, and who the defendants knew had not voted, they acted fraudulently; that the additions were made with intent to affect the election of representatives in Congress, and were made by the defendants, or by one of them, in the presence and with the assent of the others, or by some other person in their presence and with their assent. *United States v. Wright*, 16 F. R. 112. The measure of duty devolving upon election officers is to be determined by State laws, but it is not necessary that they impose a penalty or punishment for their violation. This section does that *proprio vigore*.

Neglect or refusal to perform a duty required by law in regard to an election at which a representative in Congress is voted for, is made by this section an offence against the United States, although such non-performance of duty is without an evil intent, while the doing of an act simply unauthorized by law is not punishable unless done with an intent to affect the election or the result thereof. *Re Coy*, 31 F. R. 794; *United States v. Baldrige*, 11 Id. 552; *United States v. Foster*, 6 Id. 247; *United States v. Jackson*, 25 Id. 548; 7 Crim. L. Mag. 230; *United States v. Caruthers*, 15 Id. 309.

An indictment is good if it concludes *contra formam* the statute of the United States, and not also *contra formam* the statute of the State in which it is found. *United States v. Bader, supra*. An indictment against the judges and clerks of election, who have several and not joint duties to perform under the laws of the State, charging them with neglecting to sign and attest the poll-book, &c., is bad if it charges them jointly in the same count. *United States v. Davis*, 33 F. R. 621.

The difference in punctuation between the original act where the words "or who violates any duty so imposed" are followed by a comma, and in this section where they are followed by a semicolon, does not affect the construction of the statute, the meaning of which is the same in either case. *United States v. Jackson, supra*.

SECT. 5518. — *United States v. Johnson*, 26 F. R. 682.

SECT. 5519. — *Re Parrott*, 1 F. R. 481, 520; *Re Empanelling and Instructing the Grand Jury*, 26 Id. 749. This section, as a provision for the punishment of the conspiracies therein mentioned, is unconstitutional. *United States v. Harris*, 106 U. S. 629; 1 Sup. Ct. Rep. 601; *Le Grand v. United States*, 12 F. R. 577; 3 Crim. L. Mag. 713. So far as it embraces a conspiracy to deprive Chinese residents of a State of the privileges and immunities secured to them by existing treaties, it is unconstitutional. *Re Baldwin*, 11 Sawyer, 533; 27 F. R. 187; *Baldwin v. Franks*, 120 U. S. 678; 7 Sup. Ct. Rep. 656.

SECT. 5520. — See note, § 5508. This section is constitutional. *United States v. Goldman*, 3 Woods, 187. An indictment which charges in the first count that the defendants conspired to intimidate a citizen of African descent in the exercise of his right to vote for a member of Congress, and that in the execution of that conspiracy they beat, bruised,



wounded, and otherwise maltreated him; and in the second count that they did this on account of his race, color, and previous condition of servitude, by going in disguise and assaulting him on the public highway and on his own premises, contains a sufficient description of an offence within the provisions of this section and Rev. Stats. § 5508. *Ex parte* Yarbrough, 110 U. S. 651.

SECT. 5521. — *Berry v. United States*, 35 F. R. 269. It is made the duty of supervisors of elections by Rev. Stats. § 2017 "to challenge any vote offered by any person whose legal qualifications the supervisors, or either of them, may doubt." To warrant a conviction under this section for neglecting to perform that duty, it must appear that the supervisor intentionally omitted to challenge a vote which was offered by a person who was not qualified. *United States v. Chamberlain*, 32 F. R. 777.

SECT. 5522. — See note, § 5515. This section is constitutional. *Ex parte* Siebold, 100 U. S. 371; *United States v. Bader*, 4 Woods, 189. A deputy marshal arrested a person who had offered to vote under circumstances which justified his belief that he was not entitled to vote. Subsequently, through the intervention of others, the prisoner escaped. The marshal thereupon drew a pistol, and was immediately arrested by the defendant, who was a policeman. It was held that the marshal was obstructed in the performance of his duties, and the defendant rightly convicted. *United States v. Conway*, 18 Blatch. 566; 6 F. R. 49. Under Rev. Stats. § 2018, a supervisor has the right to have each ballot in his hands for such reasonable time as may be necessary for him to scrutinize it with care, and a refusal to allow him to do so will be an offence under this section. *United States v. Clark*, 22 F. R. 387.

SECT. 5523. — An indictment for refusing to answer a lawful inquiry of the supervisor of elections in the verification of a registry list is insufficient unless it aver that the inquiry was made of the defendant at the place assigned by him in the list as his residence. *United States v. Davis*, 6 F. R. 682. The omission of this averment is matter of substance, and cannot be aided by amendment. *Id.* This section should be construed together with Rev. Stats. §§ 2016, 2021, 2026, all of which were originally parts of the same act. *Id.*

SECT. 5525. — See note, § 2161; *United States v. Ancarola*, 1 F. R. 676.

## CHAPTER VIII.

### PUNISHMENT OF ACCESSORIES.

SECT. 5533. — See opinion of Judge Wells, Hempst. 413, note; 1 West. L. J. 246.

SECT. 5534. — Where one is charged as an accessory, he may, under the statute, be tried and convicted if the principal cannot be found. *United States v. Crane*, 4 McLean, 317. When the principal has been tried and acquitted on the charges on which the accessory is indicted, the latter will be discharged on motion. *Id.*

## CHAPTER IX.

### PRISONERS AND THEIR TREATMENT.

By 24 St. 346, the Commissioner of Labor is authorized to make an investigation as to convict labor in the penal institutions of the various States and Territories, and by 24 St. 411, ch. 213, it is enacted —

"That it shall not be lawful for any officer, agent, or servant of the Government of the United States to contract with any person or corporation, or permit any warden, agent, or official of any State



prison, penitentiary, jail, or house of correction where criminals of the United States may be incarcerated to hire or contract out the labor of said criminals, or any part of them, who may hereafter be confined in any prison, jail, or other place of incarceration for violation of any laws of the Government of the United States of America. That any person who shall offend against the provisions of this act shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be imprisoned for a term not less than one year nor more than three years, at the discretion of the court, or shall be fined not less than \$500 nor more than \$1000 for each offense. That all acts or parts of acts inconsistent with the provisions of this act are hereby repealed; and this act shall take effect and be in force from and after its passage."

SECT. 5537. — Under the resolution passed by Congress in 1789 relating to the use of State jails, and the act of Mississippi of 1822, a sheriff was not authorized to discharge a prisoner in his custody by virtue of process from the United States circuit court, unless the discharge was sanctioned by an act of Congress, or the manner in which it was made adopted by a rule of such court. *McNutt v. Bland*, 2 How. 9. The marshal is not liable for the escape of a debtor committed to a State jail under process of the Federal courts. *Randolph v. Donaldson*, 9 Cranch, 76.

SECT. 5539. — *Mackin v. United States*, 117 U. S. 348, 352; *United States v. Johannesen*, 35 F. R. 411, 413. It is not the intention of Congress to limit confinement in the penitentiary to those offences where hard labor is imposed. *United States v. Coppernath*, 4 F. R. 198, 204. The word "jail" is here substituted for "prison" in the original act. *Ex parte Karstendick*, 93 U. S. 396.

SECT. 5541. — *Mackin v. United States*, 117 U. S. 348, 352; *United States v. Johannesen*, 35 F. R. 411, 413; *Ex parte Brooks*, 29 Id. 83; *Ex parte Geary*, 2 Biss. 485; *United States v. Barnabo*, 14 Blatch. 74. If sentence to imprisonment is imposed for a term not exceeding one year, it is within the discretion of the court to direct confinement in a State penitentiary. *Ex parte Karstendick*, 93 U. S. 396. "State jail" is substituted for "State prison" in the original act. *Id.* A sentence of confinement in a penitentiary outside the State in which it was imposed is not invalid because the record of conviction does not show that there was no penitentiary within the State suitable for the purpose, nor that the Attorney-General had designated the one to which the prisoner was sentenced for such purpose. *Re Wilson*, 18 F. R. 33. The designation of the place of imprisonment, being no part of the judgment, may be made in the absence of the prisoner. *Ex parte Waterman*, 33 F. R. 29. The Attorney-General has no power to order that a prisoner sentenced to jail shall be confined in the penitentiary, although he may remove a prisoner from one jail to another, and from one prison to another. *United States v. Marshall*, 6 Mackey, 34.

SECT. 5542. — *Mackin v. United States*, 117 U. S. 348, 352; *United States v. Johannesen*, 35 F. R. 411, 413; *Ex parte Wilson*, 114 U. S. 416, 427; *Ex parte Brooks*, 29 F. R. 81. Where fine and imprisonment, or imprisonment alone, is imposed, the court has discretion to order the execution of the sentence at a place where labor is exacted from convicts as a part of the discipline of the institution. *Ex parte Karstendick*, 93 U. S. 396.

SECTS. 5543, 5544. — *United States v. Schroeder*, 14 Blatch. 344. St. March 3, 1875. ch. 145 (18 St. 479), provides —

"SEC. 1. That all prisoners who have been, or shall hereafter be, convicted of any offence against the laws of the United States, and confined, in execution of the judgment or sentence upon such conviction, in any prison or penitentiary of any State or Territory, which has no system of commutation for its own prisoners, shall have a deduction from their several terms of sentence of five days in each and every calendar month during which no charge of misconduct shall have been sustained against each severally, who shall be discharged at the expiration of his term of sentence less the time so deducted, and a certificate of the warden or keeper of such prison penitentiary of such deduction shall be entered on the warrant of commitment: *Provided*, That, if during the term of imprisonment the prisoner shall commit any offence for which he shall be convicted by a jury, all remissions theretofore made shall be annulled.



"SEC. 2. That on the discharge from any prison of any person convicted under the laws of the United States on indictment, he or she shall be provided by the warden or keeper of said prison with one plain suit of clothes and \$5 in money, for which charge shall be made and allowed in the accounts of said prison with the United States: *Provided*, That this section shall not apply to persons sentenced for a term of imprisonment of less than six months."

SECT. 5546. — See note, § 5541. Amended by act July 12, 1876, ch. 183 (19 St. 88), to read: —

"All persons who have been, or who may hereafter be, convicted of crime by any court of the United States whose punishment is imprisonment in a District or Territory where, at the time of conviction, or at any time during the term of imprisonment, there may be no penitentiary or jail suitable for the confinement of convicts or available therefor, shall be confined during the term for which they have been or may be sentenced, or during the residue of said term, in some suitable jail or penitentiary in a convenient State or Territory, to be designated by the Attorney-General, and shall be transported and delivered to the warden or keeper of such jail or penitentiary by the marshal of the District or Territory where the conviction has occurred; and if the conviction be had in the District of Columbia, the transportation and delivery shall be by the warden of the jail of that District; the reasonable actual expense of transportation, necessary subsistence, and hire and transportation of guards and the marshal, or the warden of the jail in the District of Columbia, only, to be paid by the Attorney-General, out of the judiciary fund. But if, in the opinion of the Attorney-General, the expense of transportation from any State, Territory or the District of Columbia, in which there is no penitentiary, will exceed the cost of maintaining them in jail in the State, Territory, or the District of Columbia during the period of their sentence, then it shall be lawful so to confine them therein for the period designated in their respective sentences. And the place of imprisonment may be changed in any case, when, in the opinion of the Attorney-General, it is necessary for the preservation of the health of the prisoner, or when, in his opinion, the place of confinement is not sufficient to secure the custody of the prisoner, or because of cruel or improper treatment. *Provided, however*, That no change shall be made in the case of any prisoner on the ground of the unhealthiness of the prisoner, or because of his treatment, after his conviction and during his term of imprisonment, unless such change shall be applied for by such prisoner, or some one in his behalf."

If the court, in imposing sentence in the penitentiary, finds that in the district or territory where it sits there is no penitentiary suitable for the confinement of convicts, or available for that purpose, such finding is conclusive, and cannot be reviewed upon a *habeas corpus*. Where the Attorney-General has designated a penitentiary in another State or Territory for the confinement of prisoners sentenced by such court, the sentence may be executed at the penitentiary so designated. The order of the Attorney-General is not invalid because the State has not given its consent that the penitentiary shall be so used. So long as it permits a prisoner to be detained there he is rightfully in custody. *Ex parte Karstendick*, 93 U. S. 396. Such order is not invalid as to sentences pronounced after it was made merely because it used the words "all persons convicted and sentenced." *Id.* This section is to be construed in connection with Rev. Stats. §§ 5541, 5542, and may be treated as a proviso to them. *Id.*

SECT. 5548. — See note, § 5541.



## TITLE LXXI.

### THE SLAVE TRADE

SECT. 5551. — The Emily, 9 Wheat. 381; United States v. Gooding, 12 Id. 460; The Slavers, 2 Wall. 350; United States v. Brune, 2 Wall. Jr. 264. See Rev. Stats. §§ 5375-5382, and notes.

SECTS. 5552, 5553. — See Rev. Stats. §§ 5378, 5379, notes, p. 81.

## TITLE LXXII.

### GUANO ISLANDS.

THE right recognized in this chapter is merely a commercial privilege; and the widow of a discoverer is not entitled to dower as against a purchaser from him, although she never executed a release. *Grafflin v. Nevassa Co.*, 35 F. R. 474. See *American Guano Co. v. United States Co.*, 44 Barb. 23; *Benson v. Ketchum*, 14 Md. 331; *Whiton v. Albany Ins. Co.*, 109 Mass. 24; *Gould on Waters*, § 1, note 4.

SECT. 5574. — By act of March 15, 1878, ch. 34 (20 St. 30), the provisions of this section were suspended for five years; and by act of April 18, 1884, ch. 24 (23 St. 11), for another five years.

SECT. 5575. — *Petrel Guano Co. v. Jarnette*, 25 F. R. 676.

SECT. 5576. — See note § 5339.

## TITLE LXXIII.

### THE SMITHSONIAN INSTITUTION.

By the act of March 3, 1879, ch. 182, cl. 12 (20 St. 397), the archives, &c., relating to Indians collected by Rocky Mountain Geographical and Geological Surveys were to be turned over to the Smithsonian Institution, to be completed and published by it, subject to the approval of the Secretaries of the Interior and of said institution. The *American Historical Association* is, by 25 St. 640, ch. 20, to report annually to the Smithsonian Institution, and the Regents are to permit it to deposit its collections, manuscripts, &c., in the Institution or in the National Museum. See also 25 St. 522.

SECT. 5579. — By 19 St. 253, this section is amended by striking out, in the fourth line, the words "the Patent Office," and inserting the word "Patents."

SECTS. 5582, 5583. — The appointment and duties of the acting secretary are set forth in 20 St. 264, ch. 21, and 23 St. 21, ch. 44.



## TITLE LXXIV.

## REPEAL PROVISIONS.

By 18 St. 316 and 19 St. 240, the different portions of which have been already cited, errors were corrected and omissions supplied. See *United States v. Auffmordt*, 122 U. S. 197, 209, 210; 19 F. R. 893; *Burke v. United States*, 19 Ct. Cl. 420; *Ludington v. United States*, 15 Id. 453. 19 St. 240 takes effect from its date, and is not retrospective. 15 A. G. Op. 222; Id. 259. By 18 St. 113, provision was made for publication, and by 18 St. 293, for the authentication and preservation of the originals. See *Wright v. United States*, 15 Ct. Cl. 80. See notes pp. 1, 2, *ante*.

SECT. 5595. — See notes § 5596. The printed first edition is *prima facie* evidence, and the original, conclusive evidence. *Wright v. United States*, 15 Ct. Cl. 80. The Rev. Stats. is the enactment of a more convenient expression of the law, on Dec. 1, 1873. It re-enacts nothing which was not the law on that date. *United States v. Moore*, 7 Repr. 198. See *Re Oregon Co.*, 3 Sawyer, 614.

SECT. 5596. — See notes §§ 5595, 5597–5601. “The Revised Statutes must be treated as the legislative declaration of the statute law on the subjects which they embrace, on the first day of December, 1873. When the meaning is plain, the courts cannot look to the statutes which have been revised to see if Congress erred in that revision, but may do so when necessary to construe doubtful language used in expressing the meaning of Congress.” *United States v. Bowen*, 100 U. S. 508, 513; 14 Ct. Cl. 162; *Wade v. United States*, 21 Id. 141; *Thomas v. United States*, 16 Id. 522; *Wright v. United States*, 15 Id. 80, 87; *Bradshaw v. United States*, 14 Id. 78; *Hahn v. United States*, Id. 305; *Arthur v. Dodge*, 101 U. S. 34; 15 A. G. Op. 260, 450; *Cambria Co. v. Ashburn*, 118 U. S. 54; *Illinois v. United States*, 20 Ct. Cl. 342, 351; *United States v. 65 Vases*, 21 Blatch. 511; 18 F. R. 508; *Magaw v. United States*, 16 Ct. Cl. 3; *Murdock v. Memphis*, 20 Wall. 590, 617; *Smythe v. Fiske*, 23 Id. 374; *The L. W. Eaton*, 9 Ben. 289; *The Bark Brothers*, 10 Id. 400; *United States v. Tilden*, Id. 170; *Deffebach v. Hawke*, 115 U. S. 392; *Kurtz v. Moffitt*, Id. 487; *Rosenbach v. Dreyfuss*, 1 F. R. 391. See *Re Attachment*, *MacArthur & M.* 433; *United States v. Butterworth*, 3 Mackey, 229; *Campbell v. James*, 3 F. R. 513; *Myer v. Car Co.*, 102 U. S. 1, 11; *May v. County*, 30 F. R. 250, 256; *The Montana*, 22 Id. 715, 729; *The Marine City*, 6 Id. 413, 414; *Gillets v. Pierce*, *Brown’s Adm.* 553. “It must be admitted that in construing any part of the Revised Statutes it is admissible, and often necessary, to recur to its connection in the act of which it was originally a part.” *United States v. Hirsch*, 100 U. S. 33, 35. See *United States v. One Raft*, 5 Hughes, 404. It was held in *United States v. Le Bris*, 121 U. S. 278, that a section of an old act repealed by this section may be referred to to determine the meaning of “Indian Country” when found in sections of the Revised Statutes which are re-enactments of other sections of that act. See *Ex parte Crow Dog*, 109 U. S. 556; *United States v. Martin*, 8 Sawyer, 473; 14 F. R. 817, 822, 823; *United States v. Bridleman*, 7 Sawyer, 243, 252; 7 F. R. 894, 903. See also *Pelcher v. United States*, 3 McCrary, 510. For a case where a clause was not contained in the revisal, but inserted after the work had left the commissioners’ hands, see 15 A. G. Op. 491. See *Hahn v. United States*, 14 Ct. Cl. 305, 312.

“All parts of such acts not contained in such revision having been repealed,” &c. — This declaration, though entitled to great respect, ought not to be considered as more than an expression of an opinion or a recital of belief. It is not in the form of an enactment;



and whether a statute was repealed by a later one is a judicial, not a legislative, question. It is therefore still a question of judicial construction whether a certain act prior to the revision, and not contained therein, was in fact repealed by a subsequent act. *United States v. Clafin*, 97 U. S. 546; 14 Blatch. 55. Where a statute covers the whole subject-matter of a prior one, it operates by way of substitution, and not cumulatively, and the former statute is by implication repealed. But in the absence of a repealing clause the objects of the two statutes must be the same in order to warrant a repeal by implication. *Id.* See *Re Stupp*, 12 Blatch. 501, 523; *United States v. Webster*, 21 F. R. 187. And see also *United States v. Jordan*, 2 Lowell, 537, 542, dissenting from *United States v. Clafin*, 14 Blatch. 55.

The Rev. Stats. have made no change in pre-existing laws as to costs; and *United States v. Treadwell*, 15 F. R. 532, and *Cooper v. New Haven Steamboat Co.*, 18 Id. 548, so far as to the contrary, are disapproved. *Pentlarge v. Kirby*, 22 Blatch. 251; 20 F. R. 898; 19 Id. 501. See note, § 823.

SECT. 5597. — See notes §§ 5596, 5599; *Magaw v. United States*, 16 Ct. Cl. 3; *Kewsett v. Stivers*, 18 Blatch. 397, 410; 10 F. R. 517, 528; *Vaughan v. East Tennessee R. Co.*, 1 Flippin, 621; *Bechtel v. United States*, 101 U. S. 597.

SECT. 5598. — See notes, § 13, pp. 993, 994. *United States v. Reisdinger*, 9 Sup. Ct. Rep. 99; *Crowell v. United States*, 22 Ct. Cl. 69.

SECT. 5599. — *May v. County of Logan*, 30 F. R. 250, 256, 258; *May v. County of Buchanan*, 29 Id. 469; *Sayles v. Louisville R. Co.*, 9 Id. 512; *Vaughan v. East Tennessee R. Co.*, 1 Flippin, 621, 626; *Sayles v. Oregon R. Co.*, 6 Sawyer, 31.

SECT. 5600. — *United States v. Claypool*, 14 F. R. 127; *Ex parte Houghton*, 8 Id. 897, 901; 7 Id. 657, 662; *United States v. Sanche*, 7 Id. 715, 718; *Re Long Island Co.*, 3 Id. 599, 626; *Campbell v. James*, 3 Id. 513; *Branagan v. Dulaney*, 8 Col. 408, 412; *Hold v. United States*, 18 Ct. Cl. 625.

SECT. 5601. — See note p. 824, *ante*. By 18 St. 329, ch. 84, and 18 St. 401, ch. 139, § 9, provision was made for the distribution and sale of the Revised Statutes and the Statutes at Large. The Revised Statutes are made to take effect from Dec. 1, 1873, and as if passed on that day; "and all other acts passed after that date, although in fact passed before the Revised Statutes, are to be treated and enforced as subsequent statutes, repealing the Revised Statutes so far as they are inconsistent therewith." *Re Oregon Co.*, 2 Sawyer, 614, 617; *United States v. Mason*, 34 F. R. 129; *United States v. Aaffinck*, 122 U. S. 197, 208; 19 F. R. 893; *Brown v. Jefferson Bank*, 9 Id. 238, 260; *Thomas v. United States*, 16 Ct. Cl. 522, 525; *Ludington v. United States*, 15 Id. 453, 460; *McLean v. St. Paul R. Co.*, 17 Blatch. 363. In *Wright v. United States*, 15 Ct. Cl. 80, there is a discussion of the Revision and of what was intended thereby.

The act for the revision and consolidation of the statutes was the act of June 27, 1874, ch. 140 (14 St. 74). See *United States v. Clafin*, 14 Blatch. 55, 62. The act for publication of the Revised Statutes, 18 St. 113, is referred to at the beginning of this title. By act of March 2, 1877, ch. 82 (19 St. 268), provision is made for the preparation and publication of a new edition. A commissioner was to be appointed who was to incorporate amendments, with marginal references, &c., add Articles of Confederation, &c., with foot-notes. See *McLean v. St. Paul R. Co.*, *supra*; *Norris v. Mineral Tunnel*, 19 Blatch. 201; 3 F. R. 272. It was also provided that when printed it was to "be legal evidence of the laws therein contained, in all the courts of the United States, and of the several States and Territories, . . . but shall not preclude reference to, nor control, in case of any discrepancy, the effect of any original act as passed by Congress since the first day of December, eighteen hundred and seventy-three." 20 St. 27, ch. 26. See *Wright v. United States*, *supra*, 80, 88. For other points see statutes just referred to.







## APPENDIX.

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SECT. 6. — To the list of words add : " Conviction," " officer," " soldier." § 1342.

SECT. 64. — St. Oct. 19, 1888, ch. 1210 (25 St. 587), provides —

" That hereafter the statement of all appropriations made during each session of Congress, including new offices created and the salaries of each and salaries of the offices which are increased and the amounts of such increase authorized by the act of July 4, 1836, shall be prepared under the direction of the Committees on Appropriations of the Senate and House of Representatives, and said statement shall hereafter show also the offices the salaries of which are reduced or omitted, and the amount of each reduction, and shall also contain a chronological history of the regular appropriation bills passed during the session for which it is prepared; and to complete this work for the present session the sum of \$1,700 is hereby appropriated, to be paid to the persons designated by the chairmen of said committees to do said work."

SECT. 88. — See 25 St. 523.

SECT. 158. — Amended by 25 St. 659 to include the Department of Agriculture, which is thereby made an Executive Department.

SECT. 197. — Provision is made by 25 St. 672 for the disposition of useless papers in the Executive Departments.

SECT. 222. — 25 St. 44, 90, provides for a site and building at Washington for the use of the Chief Signal Officer of the Army.

SECT. 497. — See 25 St. 610, ch. 1213.

SECT. 520. — St. Feb. 9, 1889, ch. 122 (25 St. 659), enlarges the powers and duties of the Department of Agriculture, which it makes an Executive Department. See also 25 St. 837-840.

SECT. 533. — St. Feb. 6, 1889, ch. 113, § 5 (25 St. 655), provides —

" SECT. 5. That the provisions of the act entitled ' An act to amend §§ 533, 536, 571, 572 of the Revised Statutes of the United States relating to courts in Arkansas and other States,' approved January 31, 1877, conferring upon the district courts named therein circuit court powers; and § 571 of the Revised Statutes of the United States, as amended by said last-mentioned act, and all provisions of law inconsistent with any of the provisions of this act be, and the same are hereby, repealed."

SECT. 535. — The northeastern division of the Southern Federal judicial district of Georgia was created by 25 St. 671, which transferred certain counties from the northern to the southern district.

SECT. 556. — See note, § 533, above.

SECTS. 571, 572. — See note, § 533 above. Circuit courts are established by 25 St. 658 in Arkansas, Mississippi, and South Carolina. St. Feb. 23, 1889, ch. 205 (25 St. 690), provides —

" That hereafter the regular terms of the district court for the northern district of Georgia, now held on the first Monday in March, shall commence on the second Monday in March of each year."



SECT. 619. — St. Feb. 6, 1889, ch. 113, § 3 (25 St. 655), in part provides —

“Hereafter all appointments of clerks of circuit courts of the United States shall be made by the circuit judges of the respective circuits in which such circuit courts are or may be hereafter established; and all provisions of law inconsistent herewith are hereby repealed.”

SECT. 683. — Amended by St. Feb. 12, 1889, ch. 135 (25 St. 661).

SECT. 691. — St. Feb. 6, 1889, ch. 113, § 6 (25 St. 656), which took effect May 1, 1889, provides —

“SECT. 6. That hereafter in all cases of conviction of crime the punishment of which provided by law is death, tried before any court of the United States, the final judgment of such court against the respondent shall, upon the application of the respondent, be re-examined, reversed, or affirmed by the Supreme Court of the United States upon a writ of error, under such rules and regulations as said court may prescribe. Every such writ of error shall be allowed as of right and without the requirement of any security for the prosecution of the same or for costs. Upon the allowance of every such writ of error, it shall be the duty of the clerk of the court to which the writ of error shall be directed to forthwith transmit to the Clerk of the Supreme Court of the United States a certified transcript of the record in such case, and it shall be the duty of the Clerk of the Supreme Court of the United States to receive, file, and docket the same. Every such writ of error shall during its pendency operate as a stay of proceedings upon the judgment in respect of which it is sued out. Any such writ of error may be filed and docketed in said Supreme Court at any time in a term held prior to the term named in the citation as well as at the term so named; and all such writs of error shall be advanced to a speedy hearing on motion of either party. When any such judgment shall be either reversed or affirmed the cause shall be remanded to the court from whence it came for further proceedings in accordance with the decision of the Supreme Court, and the court to which such cause is so remanded shall have power to cause such judgment of the Supreme Court to be carried into execution. No such writ of error shall be sued out or granted unless a petition therefor shall be filed with the clerk of the court in which the trial shall have been had during the same term or within such time, not exceeding sixty days next after the expiration of the term of the court at which the trial shall have been had, as the court may for cause allow by order entered of record.”

SECT. 699. — St. Feb. 25, 1889, ch. 236 (25 St. 693), provides —

“That in all cases where a final judgment or decree shall be rendered in a circuit court of the United States in which there shall have been a question involving the jurisdiction of the court, the party against whom the judgment or decree is rendered shall be entitled to an appeal or writ of error to the Supreme Court of the United States to review such judgment or decree without reference to the amount of the same; but in cases where the decree or judgment does not exceed the sum of \$5,000 the Supreme Court shall not review any question raised upon the record except such question of jurisdiction; such writ of error or appeal shall be taken and allowed under the same provisions of law as apply to other writs of error or appeals except as provided in the next following section.

“SECT. 2. That in cases of judgments or decrees mentioned in the first section of this act, and heretofore rendered, where the period of limitation for taking writs of error or appeals in other cases has not expired, appeals or writs of error may be sued out at any time within one year after the passage of this act.”

SECT. 846. — See 25 St. 503, 978; *United States v. Knox*, 9 Sup. Ct. Repr. 63.

SECT. 1057. — *Irwin v. United States*, 23 Ct. Cl. 149.

Page 352. — Under Bowman Act, add *Furlong v. United States*, *infra*; *Nance v. United States*, *infra*.

Page 354, par. 1. — See *Stanton v. United States*, 37 F. R. 252; *Hayne v. United States*, 38 Id. 542. Also on p. 354, at the end of line 21, add *Bliss v. United States*, 37 F. R. 191.

SECT. 1059, p. 358, *et seq.* *Furlong v. United States*, 23 Ct. Cl. 32.

SECT. 1063. — *Savage v. United States*, 23 Ct. Cl. 255.

SECT. 1066. — *Weld v. United States*, 23 Ct. Cl. 126.

SECT. 1069. — *Savage v. United States*, 23 Ct. Cl. 255.

SECT. 1087. — *Nance v. United States*, 23 Ct. Cl. 463.



SECT. 1088. — *Murdock v. District*, 23 Ct. Cl. 41.

SECT. 1136. — See 25 St. 915.

SECT. 1270. — See 25 St. 828, 969.

SECT. 1273. — See 25 St. 827.

SECT. 1309. — As to land and buildings at West Point, see also 25 St. 646, 647, 824.

SECT. 1347, p. 412, ch. 6. — See 25 St. 170, ch. 362.

SECT. 1418. — St. March 1, 1889, ch. 331 (25 St. 781), provides —

"That in order to encourage the enlistment of boys as apprentices in the United States Navy, the Secretary of the Navy is hereby authorized to furnish as a bounty to each of said apprentices after his enlistment, and when first received on board of a training-ship, an outfit of clothing not to exceed in value the sum of \$45."

SECT. 1429. — St. Feb. 8, 1889, ch. 115 (25 St. 657), provides a temporary home for certain persons discharged from the United States Navy.

SECT. 1511. — By 25 St. 821, provision is made for the purchase or condemnation of land and buildings adjacent to the Naval Academy at Annapolis. The course at the Naval Academy is regulated by 25 St. 878, ch. 396.

SECT. 1517. — By 25 St. 879, the minimum age of admission of cadets to the Academy is fifteen years and the maximum age twenty years, after March 4, 1889.

SECT. 1625. — St. March 1, 1889, ch. 328 (25 St. 772), provides for the organization of the militia of the District of Columbia.

SECT. 1667. — As to military stores, arms, &c., for Montana and Oregon, see 25 St. 646.

SECT. 1752. — *The T. F. Oakes*, 36 F. R. 442, 445.

SECT. 1753. — St. Aug. 8, 1888, ch. 787 (25 St. 387), provides —

"That hereafter, whenever any deficiency shall be discovered in the accounts of any official of the United States, or of any officer disbursing or chargeable with public money, it shall be the duty of the accounting officers making such discovery to at once notify the head of the Department having control over the affairs of said officer of the nature and amount of said deficiency, and it shall be the immediate duty of said head of Department to at once notify all obligors upon the bond or bonds of such official of the nature of such deficiency and the amount thereof. Said notification shall be deemed sufficient if mailed at the post-office in the city of Washington, District of Columbia, addressed to said sureties respectively, and directed to the respective post-offices where said obligors may reside, if known; but a failure to give or mail such notice shall not discharge the surety or sureties upon such bond.

"SEC. 2. That if, upon the statement of the account of any official of the United States, or of any officer disbursing or chargeable with public money, by the accounting officers of the Treasury, it shall thereby appear that he is indebted to the United States, and suit therefor shall not be instituted within five years after such statement of said account, the sureties on his bond shall not be liable for such indebtedness."

SECT. 1832. — As to inspection of public buildings, see 23 St. 196, 494.

Page 460, Title XXIII. — St. Feb. 22, 1889, ch. 180 (25 St. 676), provides for the division of Dakota into two States and to enable the people of North Dakota, South Dakota, Montana, and Washington to form constitutions and State governments, and to be admitted into the Union on an equal footing with the original States, and to make donations of public lands to such States.

SECTS. 1956, 1958. — S. T. D. 8150.

SECT. 2115. — With 24 St. 388, see 25 St. 612.

SECT. 2126. — The statute of limitations runs against an Indian if educated and familiar with the laws. *Felix v. Patrick*, 36 F. R. 457.

SECT. 2154. — As to various crimes in the Indian Territory, see 25 St. 787.

Page 506. — Nurses and body-servants who accompany travellers here, or American residents in China returning home on a visit, are not excluded as Chinese laborers. S. T. D. (1887), no. 8068.



SECT. 2219. — See 25 St. 959.

SECT. 2387. — See 25 St. 668.

Page 564. — *Claffin v. Robertson*, 38 F. R. 92.

SECT. 2499. — At the end, add *Rubens v. Robertson*, 38 F. R. 86; *Hohenstein v. Hedden*, Id. 94.

SECT. 2502. — Schedule C. *Drucker v. Robertson*, 38 F. R. 97. — Schedule E. *Drucker v. Robertson*, *supra*. — Schedule I. *Claffin v. Robertson*, 38 F. R. 92; *Ullman v. Hedden*, Id. 95; *Drucker v. Robertson*, *supra*. — Schedule K. *Ullman v. Hedden*, *supra*; *Drucker v. Robertson*, *supra*. — Schedule N. *McCoy v. Hedden*, 38 F. R. 89; *Drucker v. Robertson*, *supra*.

SECT. 2630. — At the end add *Rubens v. Robertson*, 38 F. R. 86.

SECT. 2649. — Upon the act of 1876, see *Weeks v. United States*, 21 Ct. Cl. 124.

SECT. 2749. — See 25 St. 511, 719, 907.

SECT. 2837. — *United States v. 208 Bags*, 37 F. R. 326.

SECT. 2864. — *United States v. 2419 Sheepskins*, 2 Haskell, 394, 405.

SECTS. 2907, 2908. — *Badger v. Cusimano*, 130 U. S. 39.

SECT. 2976. — *Rubens v. Robertson*, *supra*.

SECT. 3088. — At the end of first paragraph add, See *The Paolina S.*, 18 Blatch. 315; 11 F. R. 171.

SECT. 3247. — The heading "CHAPTER IV. — DISTILLED SPIRITS" should be transferred from p. 664 to precede this section on p. 663.

SECT. 3571. — See 25 St. 945.

SECT. 3714. — As to purchasing horses, see 25 St. 830.

SECT. 3716. — See 25 St. 829.

SECT. 3733. — See 24 St. 512.

SECT. 3734. — St. March 2, 1889, ch. 411 (25 St. 941), provides —

"That hereafter no plan shall be approved by the Secretary of the Treasury for any public building authorized by Congress to be erected, until after the site therefor shall have been finally selected; and he shall not authorize or approve of any plan for any such building which shall involve a greater expenditure in the completion of such building, including heating apparatus, elevators, and approaches thereto, than the amount that shall remain of the sum specified in the law authorizing the erection of such building excluding cost of site. That hereafter commissions shall not be paid for disbursements on account of sites for public buildings; nor on account of construction of public buildings except for moneys actually handled and paid out by disbursing agents; and payments for sites for public buildings under the control of the Treasury Department shall be made by the Treasury Department, at Washington, District of Columbia, by drafts or checks payable to the grantors of such sites or their legal representatives. That hereafter all legal services connected with the procurement of titles to site for public buildings, other than for life-saving stations and pier-head lights, shall be rendered by United States district attorneys: *Provided further*, That hereafter, in the procurement of sites for such public buildings, it shall be the duty of the Attorney-General to require of the grantors in each case to furnish, free of all expenses to the Government, all requisite abstracts, official certifications, and evidences of title that the Attorney-General may deem necessary."



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